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Articles

***61 CONGRESSIONAL ADMINISTRATION**

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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. . . . In recent years, at least since *65 President Reagan's precedent-setting [Executive Order 12,291](#), 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. [FN19] 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. [FN20] This article is an attempt to initiate a *66 greater appreciation of Congress's role in the administration of the laws and to infuse that understanding into certain key features of administrative law.

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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. [FN29] 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. [FN30] 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 APA and the National Environmental Policy Act (NEPA), is more general and is designed to shape the *70 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 all legislation including the annual budget, the power of congressional committees to bottle up legislation, and the Senate's advice and consent power over appointments all 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. [\[FN31\]](#)

Sometimes, it seems that members of Congress do not care much 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. [\[FN32\]](#) Other times, Congress seems incredibly concerned, even obsessed, with how its laws are administered. Perhaps Congress should 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 by idly while the executive branch fails to carry out its terms. Even worse, Congress can interfere with the execution of the law to please a different group of constituents. 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. . . .

A. Formal Congressional Involvement in the Execution of the Laws

1. The Legislative Power

Congress's most important formal method of influencing the administration of the law is legislation, that is, by passing a bill through both Houses of Congress and presenting it to the President for signature or veto. . . . 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 ***72** 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. [\[FN38\]](#) 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.

The legislative power gives Congress an enormous ability to control the execution of the laws. [\[FN39\]](#) 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. [\[FN40\]](#) 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. . . .

Congress often legislates specifically to direct, override or prevent particular 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 ***83** 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 to legislatively reject particular administrative action without changing the underlying substantive law. [FN76] 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. [FN77] Under this statute, the Congressional Review Act (CRA), [FN78] 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 sixty days after Congress receives the report. Under this process, Congress may legislatively reject rules within a specified period of time. [FN79] 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 rules [FN80]), making it ***84** 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, primarily consisting of 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, [FN81] 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 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, [FN82] is through the appropriations process. [FN83] The power of the purse is among Congress's most potent weapons in its effort to control the execution of the laws. [FN84] The other branches of government are completely dependent on Congress for funding. [FN85] The Appropriations Clause provides: "No ***85** money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." [FN86] "Appropriations made by law" means appropriations made

through the legislative process--bills that pass both Houses of Congress and are presented to the President. [\[FN87\]](#)

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. [\[FN88\]](#) 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. [\[FN89\]](#) However, as a formal matter, Congress retains the power of the purse, and it has used that 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. 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, in the 1980s, when the Federal Communications Commission (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. [\[FN91\]](#)

Another striking example of the use of the rider to influence the execution of the law is a series of riders in the 1980s barring the executive branch from taking any action to change the per se rule in anti-trust law that prohibits resale price maintenance agreements. [\[FN92\]](#) 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. [\[FN93\]](#) . . . [T]his use of the rider dramatically illustrates how the power of the purse allows Congress to *87 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 hinder the listing of a species as endangered even if all of the statutory requirements for listing are met. [\[FN95\]](#) 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. [\[FN96\]](#) . . .

The use of appropriations riders is controversial for a number of reasons. 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." [\[FN102\]](#) For one, the placement of a rider in an appropriations bill makes it difficult for the President to veto it because he would have to veto an entire appropriations bill. [\[FN103\]](#) 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. [\[FN104\]](#) Riders are thus viewed in some circles as a method for *89 Congress to dodge responsibility for its legislative actions. [\[FN105\]](#) Nonetheless, despite these criticisms, the rider is an effective method for supervision by Congress of the execution of the laws. [\[FN106\]](#)

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. [\[FN107\]](#) At the same time that Congress funds large granting agencies like the National Science Foundation to enable the agency to distribute federal funds for scientific research under statutory and administrative standards, Congress appropriates funds for particular research projects that may or may not meet the usual, scientifically *90 accepted, standards. [\[FN108\]](#) 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. [\[FN109\]](#) 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. . . .

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 Procedures 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 are also 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.

*100 The most important general statute that regulates agency administration of the law is the APA, which was passed in 1946. [\[FN154\]](#) The APA contains two sets of provisions, one establishing the procedures that agencies must follow [\[FN155\]](#) and another establishing a system of judicial review of agency action. [\[FN156\]](#) 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. [\[FN157\]](#)

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. The APA 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. [FN158] If an agency does not follow the procedures Congress specifies, its action is invalid, unenforceable and subject to being set aside on judicial review. [FN159]

McNollgast explains the APA as establishing a set of mechanisms for Congress to maintain control over agencies. [FN160] According to McNollgast, the APA is intended to deal with two problems, agency drift and legislative drift. [FN161] Agency drift is the tendency of agencies to pursue their own goals, which may be different from the goals Congress intended. [FN162] 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. [FN163] The relatively loose procedural requirements for all agency 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 *101 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. [FN164] 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 limitations, or short of statutory right.” [FN165] . . .

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: (1) non-APA procedural requirements; (2) impact statement requirements; and (3) reporting requirements. The category of non-APA procedural requirements includes statutes such as the FOIA, [FN174] the Government in the Sunshine Act, [FN175] the Federal Advisory Committee Act (FACA), [FN176] the Negotiated Rulemaking Act [FN177] and the Alternative Dispute Resolution in Government Act. [FN178] Impact requirement *104 statutes include the NEPA, [FN179] the Endangered Species Act (ESA), [FN180] the Small Business Act [FN181] and the Migratory Bird Conservation Act. [FN182] Reporting requirements include scores of provisions that require agencies and other executive branch officials to make regular reports to Congress or congressional committees. . . .

The non-APA procedural requirements and the impact statement requirements have in common that Congress, with some exceptions, relies on courts to enforce their provisions. [FN184] Statutes such as FOIA 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. [\[FN185\]](#) FOIA opens all agency records to public inspection and copying except for those records that fall into a FOIA exception, [\[FN186\]](#) and FOIA is enforceable by an action in federal court to force an agency to turn over covered records. [\[FN187\]](#) 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. [\[FN188\]](#) If an agency improperly meets in private, any action taken at the private meeting may be void. FACA similarly requires any advisory committee with nongovernmental members “established or utilized” by the President or an agency to conform to open meetings requirements. [\[FN189\]](#) 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 *105 the President's ability to confer with nongovernmental 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. [\[FN190\]](#) With regard 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 by requiring 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. [\[FN191\]](#) 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. [\[FN192\]](#) 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. [\[FN193\]](#) 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. [\[FN194\]](#) . . .

6. Reporting Requirements

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. [\[FN195\]](#) 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. [\[FN196\]](#) It is impossible to overstate the volume of reporting requirements Congress includes in legislation directed at agencies and the President. [\[FN197\]](#) 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 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.

7. Executive Branch Organization and Agency Structure

Another way in which Congress exercises authority over the execution of the laws is its 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, [\[FN201\]](#) it is largely Congress that *108 decides what departments to create, how to organize those departments into various authorities and agencies and whether to create agencies outside of any department. [\[FN202\]](#) 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. [\[FN203\]](#) Congressional control over the organization of the executive branch can be a potent tool for supervising the execution of the law.

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 include any federal official with authority to execute the law, are made by the President with the advice and consent of the Senate. [\[FN215\]](#) 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. [\[FN216\]](#) 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 personnel and can refuse to approve appointments if it expects that the nominee will not execute the law in the manner favored by the *111 Senate. [\[FN217\]](#) 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. [\[FN218\]](#) 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.

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 Budget [\[FN219\]](#) and the United States Trade Representative [\[FN220\]](#) to senatorial advice and consent. This is also thought to allow the legislature to assert the power to summon these officials to oversight hearings. [\[FN221\]](#) . . .

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, that is, 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 take place with a threat in the background that if an agency does not align its actions with 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 ***122** 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 agencies to file periodic reports with Congress. [\[FN281\]](#) These reports are often used as the basis for committee hearings, the paradigmatic informal method of supervision. [\[FN282\]](#) 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 structures of agencies. At the end of the day, the multifaceted framework 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 involves the receipt of information and the 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. [\[FN283\]](#) 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. [\[FN284\]](#) Since then, oversight has mushroomed, although some may say it has mutated into a many-headed monster with some agencies scrutinized by dozens of committees and subcommittees. [\[FN285\]](#) It is apparently very easy for members of Congress with an interest in a particular agency to assume *123 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.” [\[FN286\]](#)

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. [\[FN287\]](#) . . .

The machinery of congressional oversight is enormous. [\[FN293\]](#) Each House of Congress has numerous committees and subcommittees, almost all of which engage in oversight activities. [\[FN294\]](#) The website of the House of Representatives lists twenty-one House committees and three joint committees, [\[FN295\]](#) while the Senate's website lists fifteen Senate committees and four joint committees. [\[FN296\]](#) The committees in each House are further divided into several subcommittees. [\[FN297\]](#) At the high end, the Appropriations Committee in each House has more than a dozen subcommittees. [\[FN298\]](#) More typically, committees such as Agriculture and International Relations have four to seven subcommittees. [\[FN299\]](#) Each of these committees and subcommittees has professional staff to perform oversight.

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 *125 questions concerning the agency's policies or performance. [\[FN300\]](#) 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 the fact that hearings provide an opportunity for members of Congress to express their views, often consisting of 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. [\[FN301\]](#) Hearings may include testimony from members of the public about how agency action has affected them and also from nongovernmental experts on the consequences of government policy. [\[FN302\]](#) 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. [\[FN303\]](#) 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 investigation.

[FN304] 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. 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.

***126** Hearings are often part of the many extensive congressional investigations conducted regarding the conduct of the executive branch. . . . 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 Investigations can result in the production of multivolume reports with hundreds and even thousands of pages. [FN312] 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 ***128** (GAO) (formerly the General Accounting Office). The GAO, with approximately 3,300 employees, [FN313] 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. [FN314] The research and investigations performed by the 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 fifteen-year term by the President, with the advice and consent of the Senate, from a list provided by the Speaker of the House and President pro tempore of the Senate. [FN315] The Comptroller is removable for cause and inability to perform the duties of the office by a joint resolution of Congress. [FN316] 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. [FN317]

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. [FN318] The GAO's nearly 3,300 employees and budget ***129** of over \$460 million constitute an enormous bureaucracy focused on the performance of the government. [FN319] The GAO is very active in investigating waste, fraud and other sorts of abuses by government agencies. [FN320] 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. [FN321] The GAO reports that it has made 2,700 recommendations for governmental reform and that eighty-three percent of its recommendations have been

accepted. [\[FN322\]](#) 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. . . .

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. . . .

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 ***135** base their decisions on the comments in the public record without worrying about the rules that bar reliance on nonrecord 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. . . .

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 ***140** administration of the laws is a healthy counterweight to two 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 twenty-five 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 com-

munity. 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 on key committees. [\[FN373\]](#) Oversight occurs largely through the actions of committees, subcommittees and individual members of Congress, and there is reason to fear that these subgroups do not represent the views of Congress as a whole. [\[FN374\]](#) *141 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. [\[FN375\]](#) 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-agent 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. [\[FN376\]](#) Slack exists in a principal-agent relationship when the agent (in our example, the subcommittee 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 agreements that make 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 *142 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. Under some circumstances, the views of members of Congress engaged in oversight may be closer to those of the President than the views of agency officials whose service began before the most recent presidential election. For example, after eight years of the Clinton Administration, oversight by members of the Republican-dominated Congress might have helped bring agency action taken by career officials who were hired or served during the Clinton Administration closer to the views of Republican President George W. Bush. While the President's 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. [\[FN377\]](#)

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. [\[FN378\]](#) 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 ***143** 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 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 bipartisan 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. [\[FN379\]](#)

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 as to avoid the principal-agent problem, the system would probably worsen because agencies would then 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 regulatory issues involved. Judicial review is episodic, limited to those controversies that present justiciable cases, and is subject to the will of judges who are even less connected to the popular will than members of Congress. [\[FN380\]](#) ***144** 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, there is good reason to doubt that judicial review presents the greatest promise for enforcing and enacting Congress's will. [\[FN381\]](#) Perhaps reforms to oversight would be desirable, but it appears that this is a case in which care must be exercised to avoid creating 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 potent 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, 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.

[\[FN1\]](#). Professor of Law and Harry Elwood Warren Scholar, Boston University School of Law. Thanks to Boston University School of Law for financial support including a sabbatical during which most of this work was completed. Thanks also to Wendy Gordon, Gary Lawson, Bill Marshall, Kevin Stack, and Jay Wexler for comments on earlier drafts and to Amy Olson, Amy Matlock, and Lydia French for excellent research assistance. © 2006 Jack M. Beermann, all rights reserved.

[\[FN18\]](#). There has been some very good legal scholarship on this point, including Jonathan R. Macey, *Organizational Design and the Political Control of Administrative Agencies*, 8 *J.L. Econ. & Org.* 93 (1992); Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 *Duke L.J.* 1059 (2001); and Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 *Harv. L. Rev.* 1511, 1525 (1992). However, the political science literature on congressional oversight of the administration of the law is much more developed. See, e.g., Arthur Lupia & Mathew D. McCubbins, *Designing Bureaucratic Accountability*, 57 *Law & Contemp. Probs.* 91 (1994); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *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); Seymour Scher, *Congressional Committee Members as Independent Agency Overseers: A Case Study*, 54 *Am. Pol. Sci. Rev.* 911 (1960); B. Dan Wood & Richard W. Waterman, *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.

[\[FN19\]](#). 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 Martin S. Flaherty, *The Most Dangerous Branch*, 105 *Yale L.J.* 1725 (1996) (discussing the dominance of executive power); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 *U. Chi. L. Rev.* 123 (1994); Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 *Am. J. Pol. Sci.* 197 (1982); Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 *Duke L.J.* 1180 (1994); Thomas O. Sargentich, *The Contemporary Assault on Checks and Balances*, 7 *Widener J. Pub. L.* 231, 241, 247-55 (1998); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 *Iowa L. Rev.* 1 (1994); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 *Admin. L. Rev.* 181 (1986).

[\[FN20\]](#). In the early days of review of regulations under President Reagan's [Executive Order 12,291](#), 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 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); Colin S. Diver, [Presidential Powers](#), 36 *Am. U. L. Rev.* 519 (1987); Thomas O. McGarity, [Presidential Control of Regulatory Agency Decisionmaking](#), 36 *Am. U. L. Rev.* 443 (1987); Alan B. Morrison, [OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation](#), 99 *Harv. L. Rev.* 1059 (1986); 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). Now that review under the successors to 12,291 is an entrenched and accepted element of the administrative process, scholarship has focused on its justifications, its effects, and its limits. See William D. Araiza, [Judicial and Legislative Checks on Ex Parte OMB Influence Over Rulemaking](#), 54 *Admin. L. Rev.* 611 (2002); Steven Croley, [White House Review of Agency Rulemaking: An Empirical Investigation](#), 70 *U. Chi. L. Rev.* 821 (2003); 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); Seidenfeld, *The Psychology of Accountability*, supra note 18, at 1068-75.

[FN29]. 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., 1981).

[FN30]. 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 Vasan Kesavan & J. Gregory Sidak, [The Legislator-In-Chief](#), 44 *Wm. & Mary L. Rev.* 1 (2002).

[FN31]. See generally Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 *J. Pol. Econ.* 765 (1983).

[FN32]. 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).

[FN38]. See Jonathan R. Macey, [Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies](#), 80 *Geo. L.J.* 671, 673 (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.

[FN39]. Unlike other legislatures that are constitutionally barred from legislating in certain areas of ex-

ecutive 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* 9, 23 (James A. Thurber ed., 1991).

[FN40]. [Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 \(1964\)](#); see also [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*, supra note 29, at 160-62. 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 Ivor Richard, *Foreign Perspective: With Whom Do You Deal? Whom Can You Trust?*, in *The Tethered Presidency*, supra note 29, at 21. The problem appears to arise from the lack of a connection between the Cabinet and Congress.

[FN76]. 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 142-153 and accompanying text.

[FN77]. See Congressional Review Act, [5 U.S.C. §§ 801-808 \(Supp. III 1994\)](#).

[FN78]. See *id.*

[FN79]. Under current law, if Congress does not act, the administrative rules go into effect after a specified period of time. [5 U.S.C. § 801\(a\)\(3\)](#). Conceivably, Congress could statutorily provide that rules do not go into effect unless Congress passes legislation approving them. [5 U.S.C. § 801](#). 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 Congress would be politically responsible for all rules adopted through the procedure.

[FN80]. See [5 U.S.C. § 802 \(Supp. III 1994\)](#). 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 opines 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 Powers, and the Rules of the 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).

[FN81]. See [Pub. L. No. 107-5, 115 Stat. 7 \(2001\)](#) (joint resolution disapproving Department of Labor's Ergonomics Rule).

[FN82]. Informal supervision through the appropriations process is discussed *infra* at p. 136.

[FN83]. See generally Harold J. Krent, *Presidential Powers* 77-83 (2005) (discussing strength of and limits on Congress's power over appropriations).

[FN84]. For an argument that Congress has not adequately supervised the budget process, see Fisher, *Congressional Abdication on War and Spending*, *supra* note 28. 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. Pub. 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).

[FN85]. 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.

[FN86]. [U.S. Const. art. I, § 9, cl. 7.](#)

[FN87]. Congress has statutorily prohibited agencies from getting around limits on their appropriations by raising and spending their own funds. See [31 U.S.C. § 3302 \(2000\)](#). Agencies are also statutorily prohibited from spending more than what has been appropriated. See [31 U.S.C. § 1341 \(2000\)](#).

[FN88]. *Budget and Accounting Act, 1921, ch. 18, 42 Stat. 20 (1921)* (codified as amended in scattered sections of 31 U.S.C.).

[FN89]. See Kiewiet & McCubbins, *supra* note 84, at 166 (quoting James Pfiffner, *The President, the Budget, and Congress: Impoundment and the 1974 Budget Act* 15 (1979) (“[T]he creation of the Budget Bureau marks the ‘beginning of the domination of the budgetary process by the institutionalized presidency.’”)); Alan L. Feld, [Separation of Political Powers: Boundaries or Balance?](#), *21 Ga. L. Rev.* 171, 188 (1986).

[FN90]. *Omnibus Consolidated Rescissions and Appropriations Act of 1996*, [Pub. L. No. 104-34, § 102, 110 Stat. 1321 \(1996\)](#).

[FN91]. See Daniel A. Farber & Philip P. Frickey, [Is *Carolene Products* Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation](#), 79 Cal. L. Rev. 685, 715 n.164 (1991) (citing [Pub. L. No. 100-202](#), 101 Stat. 1329-1, 1329-31 (1987)).

[FN92]. 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 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); Act of Oct. 18, 1986, [Pub. L. No. 99-500](#), § 605, 100 Stat. 1783, 1783-73; § 510, 97 Stat. at 1102-03.

[FN93]. See Sidak, *supra* note 92, at 2080.

[FN94]. [U.S. Const. art. II, § 3](#).

[FN95]. See Jason M. Patlis, [Riders on the Storm, or Navigating the Crosswinds of Appropriations and Administration of the Endangered Species Act: A Play in Five Acts](#), 16 Tul. Envtl. L.J. 257 (2003).

[FN96]. See [Lincoln v. Vigil](#), 508 U.S. 182 (1993) (agency decision to reallocate 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* text accompanying notes 369370.

[FN102]. Steven G. Calabresi, [Some Normative Arguments for the Unitary Executive](#), 48 Ark. L. Rev. 23, 53 (1995).

[FN103]. 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 & Frickey, *supra* note 91, at 714-15.

[FN104]. 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. USDA](#), 960 F.2d 105 (9th Cir. 1992), cited in Schoenbrod, *supra* note 32, at 218 n.54; see also [City of Chicago v. U.S. Dep't of Treasury](#), 384 F.3d 429 (7th Cir. 2004) (rider prohibiting the expenditure of funds to release certain firearms data does not prohibit Treasury Department from releasing firearms data in response to FOIA request). However, when the rider

was augmented with language stating that the information in question is “immune from legal process and shall not be subject to subpoena or other discovery in any civil action in a State or Federal court,” see [Pub. L. No. 108-447, 118 Stat. 2809](#), 2859-60 (2004), (to be codified at [18 U.S.C. § 923](#)), the Seventh Circuit reversed itself and held, en banc, that the Treasury Department may not release the data pursuant to a FOIA request. See [City of Chicago v. Bureau of Alcohol, Tobacco & Firearms](#), 423 F.3d 777 (7th Cir. 2005).

[FN105]. See 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); Neal E. Devins, [Regulation of Government Agencies Through Limitation Riders](#), 1987 *Duke L.J.* 456; see also Neal E. Devins, [Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution](#), 1988 *Duke L.J.* 389 (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.

[FN106]. 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 Broad., Inc. v. FCC](#), 497 U.S. 547, 572 (1990).

[FN107]. See J.R. DeShazo & Jody Freeman, [The Congressional Competition to Control Delegated Power](#), 81 *Tex. L. Rev.* 1443, 1477 & n.124 (2003) (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).

[FN108]. See Donald N. Langenberg, [Earmarked Appropriations: The Debate Over the Method of Federal Funding](#), 20 *U. Mich. J.L. Reform* 1029 (1987). A 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 & Juliet Eilperin, [Hastert Steps Up to Leading Role](#), *Wash. Post*, Jan. 5, 1999, at A1.

[FN109]. An infamous recent example is the \$450 million earmarked to build two bridges in Alaska that went nowhere. See Matt Volz, [Alaska Wants to Fix Image; Governor Fears State Is Perceived as a Greedy Place](#), *Columbian (Wash.)*, Feb. 14, 2006, at D9, available at 2006 WLNR 2810225 (discussing two “bridges to nowhere”). The use, and expense, of earmarks has grown dramatically in the past ten years. See Susan Milligan, [Congressional Pet Projects Boom in Secret: Lobbyist with Hill Ties Key to Record Funding](#), *Boston Globe*, Jan. 29, 2006, at A1. Because of the effect they have on the federal budget deficit, earmarks have become a hot issue and various reforms have been proposed to make it more difficult to insert earmarks into legislation. See Peter Cohn, [Panel Closing Ranks on Earmarks Plan](#), *Congress Daily*, Feb. 10, 2006, 2006 WLNR 2376809. Some members of Congress defend earmarking as something they do only because their constituents would suffer if they stopped doing it when everyone else does, or as

necessary to help constituents ignored by federal agencies. See Milligan, *supra* (quoting Representative John Tierney); FDCH Capital Transcripts, Jan. 18, 2006, 2006 WLNR 975075 (quoting Senator Trent Lott at a news conference):

I've been involved in earmarking for my state. My state has been one of the poorest states in the nation We don't have adequate roads, we don't have adequate schools, we don't have adequate housing.

....

I've been trying to get the Department of Housing and Urban Development to help the poor little town of Tchula, Mississippi for four years.

....

Everything that they've gotten Senator Cochran and I did with line items.

Id.; 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. 1405, 1451-60 (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 Newt Gingrich).

[FN154]. Administrative Procedure Act, [5 U.S.C. §§ 551-559](#), 700-706 (2000).

[FN155]. Administrative Procedure Act [§§ 551-559](#).

[FN156]. Administrative Procedure Act §§ 700-706.

[FN157]. See McNollgast, The [Political Origins of the Administrative Procedure Act](#), 15 J.L. Econ. & Org. 180, 182 (1999); George B. Shepherd, [Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics](#), 90 Nw. U. L. Rev. 1557 (1996).

[FN158]. Administrative Procedure Act §§ 553-554, 706.

[FN159]. 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).

[FN160]. See McNollgast, *supra* note 157, at 184-85; McCubbins et al., Structure and Process, *supra* note 18, at 440-42, 472-73.

[FN161]. McNollgast, *supra* note 157, at 184.

[FN162]. *Id.*

[FN163]. See DeShazo & Freeman, *supra* note 107, at 1496 n.177.

[FN164]. 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 50, at 219-26.

[FN165]. [5 U.S.C. §§ 702, 706\(2\)\(A\) \(2000\)](#).

[FN174]. [5 U.S.C. § 552 \(2000\)](#).

[FN175]. [5 U.S.C. § 552b \(2000\)](#).

[FN176]. Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972).

[FN177]. [5 U.S.C. §§ 561-570 \(2000\)](#).

[FN178]. Alternative Dispute Resolution Act of 1998, [Pub. L. No. 105-315, 112 Stat. 2993 \(1998\)](#).

[FN179]. [42 U.S.C. §§ 4321, 4331-4335, 4341-4347 \(2000\)](#).

[FN180]. [16 U.S.C. §§ 1531-1544 \(2000\)](#).

[FN181]. [15 U.S.C. §§ 631-657f \(2000\)](#).

[FN182]. [16 U.S.C. §§ 715-715r \(2000\)](#).

[FN183]. [5 U.S.C. §§ 801-808 \(2000\)](#).

[FN184]. 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 \(2000\)](#). The Negotiated Rulemaking Act provides that “agency action relating to establishing, assisting, or terminating a negotiated 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.”

[FN185]. See [5 U.S.C. §§ 552, 552b \(2000\)](#).

[FN186]. [5 U.S.C. § 552](#).

[FN187]. *Id.*

[FN188]. [5 U.S.C. § 552b\(b\)-\(c\)](#).

[FN189]. Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972).

[FN190]. See [Pub. Citizen v. U.S. Dep't of Justice](#), 491 U.S. 440 (1989); [Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton](#), 997 F.2d 898 (D.C. Cir. 1993).

[FN191]. [42 U.S.C. §§ 4321, 4331-4335, 4341-4347](#) (2000); [5 U.S.C. §§ 601-612](#) (2000).

[FN192]. [42 U.S.C. §§ 4321, 4331-4335, 4341-4347](#).

[FN193]. [42 U.S.C. § 4332](#).

[FN194]. See McCubbins, *Abdication or Delegation*, supra note 22, 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 C. Karkkainen, [Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance](#), 102 *Colum. L. Rev.* 903 (2002).

[FN195]. See Jonathan G. Pray, *Comment, Congressional Reporting Requirements: Testing the Limits of the Oversight Power*, 76 *U. Col. L. Rev.* 297, 298-317 (2005) (discussing volume and burden of reporting requirements).

[FN196]. See Louis Fisher, *The Politics of Executive Privilege* (2004); Raoul Berger, *Executive Privilege: A Presidential Pillar Without Constitutional Support*, 26 *Vill. L. Rev.* 405 (1980).

[FN197]. A Wall Street Journal report estimated the number of reports required in 1991 at approximately 3000, at an annual cost of \$350 million. See Jim Payne, *Congress's Uncontrollable 'In' Basket*, *Wall St. J.*, May 15, 1991, at A14, cited in Pray, supra note 195, at 300 n.10.

[FN201]. See David E. Lewis, *Presidents and the Politics of Agency Design* 77-136 (2003) (discussing agencies created by the executive branch and Congress's responses).

[FN202]. Congress also has granted the President power to reorganize without specific statutory approval of the new organizational structure. See generally Reorganization Act of 1977, [Pub. L. No. 95-17, 91 Stat. 29](#), 32 (1977). These reorganizations were subject to legislative vetoes. See *id.* § 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. No. 98-614, § 3\(a\), 98 Stat. 3192](#) (1984) (codified at [5 U.S.C. § 906](#) (2000)).

[FN203]. Brooke Donald, 2002: The Year in Review: GOP Showed National Gains, Controlling Congress, *Milwaukee J. Sentinel*, Dec. 29, 2002, § J, at 2, available at 2002 WLNR 3692699 (“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.”).

[FN204]. [29 U.S.C. §§ 651-675, 677-678 \(2000\)](#); [42 U.S.C. § 3141-1 \(2000\)](#).

[FN205]. See Ronald A. Cass et al., *Administrative Law: Cases and Materials* 11-16 (4th ed. 2002).

[FN206]. McCubbins et al., *Administrative Procedures*, supra note 18; see also 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); Macey, supra note 18 (discussing efforts in Congress to “hard wire” agencies to produce favored results).

[FN207]. McCubbins et al., *Structure and Process*, supra note 18.

[FN208]. For a general description of the independent agency phenomenon, see Fisher, supra note 29, at 146-76.

[FN209]. 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.

[FN210]. See, e.g., [29 U.S.C. § 661\(b\)](#) (2000) (specifying six-year terms for members of the Occupational Safety and Health Review Commission).

[FN211]. [U.S. Const. art II, § 2, cl. 2](#).

[FN212]. See, e.g., [29 U.S.C. § 661\(b\)](#) (“A member of the [Occupational Safety and Health Review] Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.”).

[FN213]. See, e.g., [19 U.S.C. § 1330\(c\)](#) (2000) (imposing severe restrictions on President's choices of chairman of International Trade Commission).

[FN214]. See Fisher, supra note 29, at 162-64.

[FN215]. [U.S. Const. art. II, § 2, cl. 2](#).

[FN216]. “Advice and consent” is understood as a majority vote in the Senate except when the Constitution specifies otherwise, as in the requirement in Article II, Section 2, Clause 2 of the Constitution that treaties be ratified by a two-thirds majority of the Senate. See Lawrence H. Tribe, [Taking Text and Structure Seriously: Reflections of Free-Form Method in Constitutional Interpretation](#), 108 *Harv. L. Rev.* 1221, 1272 (1995) (“The Appointments Clause requires Senate majority approval of principal and inferior officers[.]”). Advice and consent for judicial appointments similarly requires a majority vote in the Senate.

Recently, a controversy has arisen over whether it is constitutional for the Senators to use procedural devices such as the filibuster, under which a minority of Senators can vote to continue debate indefinitely, to prevent the full Senate from voting on a nomination. See Orrin Hatch, [Judicial Nomination Filibuster Cause and Cure](#), 2005 *Utah L. Rev.* 803, 822 (tradition is that advice and consent means majority vote of Senators present and voting; use of filibuster against judicial nominees is “unprecedented”); Adam J. White, [Toward the Framers' Understanding of “Advice and Consent”: A Historical and Textual Inquiry](#), 29 *Harv. J.L. & Pub. Pol’y* 103, 104-06 (2005) (describing methods of defeating judicial nominees including failure to hold committee hearings and filibustering).

[FN217]. 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.

[FN218]. Cf. Barry Friedman, [The Politics of Judicial Review](#), 84 *Tex. L. Rev.* 257, 278 n.104 (asserting that, while the “Senate has an ameliorating influence on presidential appointments... the exact extent of that influence has been difficult to capture with certainty....”).

[FN219]. See Act of Mar. 2, 1974, [Pub. L. No. 93-250, § 207](#), 88 Stat. 11 (1974) (codified at [31 U.S.C. § 502](#) (2000)).

[FN220]. See Act of Jan. 3, 1975, [Pub. L. No. 93-618, § 141\(a\), \(b\)\(1\)-\(2\), \(c\)-\(h\)](#), 88 Stat. 1999 (1975) (codified at [19 U.S.C. § 2171](#) (2000)).

[FN221]. This point was suggested by John F. Cooney.

[FN281]. See Pray, *supra* note 195.

[FN282]. *Id.* at 301.

[FN283]. See Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 (codified at [2 U.S.C. § 31](#)).

[FN284]. For a theoretical examination of legislative committee structure, see generally Keith Krehbiel, *Information and Legislative Organization* (1991).

[FN285]. For example, a recent editorial in the *Boston Globe* states that seventy-nine committees and subcommittees engage in oversight regarding the Department of Homeland Security. See Editorial, *Security at Risk*, *Boston Globe*, Feb. 7, 2005, at A18.

[FN286]. See Calabresi, *supra* note 102, 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.

[FN287]. For an examination of congressional oversight, see, for example, *Who Makes Public Policy? The Struggle for Control Between Congress and the Executive* (Robert S. Gilmour & Alexis A. Halley eds., 1994).

[FN293]. 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).

[FN294]. See Kathleen Bawn, [Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System](#), 13 *J.L. Econ. & Org.* 101, 103-05 (1997).

[FN295]. United States House of Representatives, [http:// www.house.gov/house/CommitteeWWW.shtml](http://www.house.gov/house/CommitteeWWW.shtml).

[FN296]. U.S. Senate: Committees Home, [http:// www.senate.gov/pagelayout/committees/d_three_sections_with_tasers/committees_ home.htm](http://www.senate.gov/pagelayout/committees/d_three_sections_with_tasers/committees_home.htm) (last visited Nov. 20, 2005). The Senate lists a Joint Committee on the Library which the House does not list.

[FN297]. See United States House of Representatives, *supra* note 295 (providing links to subcommittees); U.S. Senate: Committees Home, *supra* note 296 (noting presence of subcommittees).

[FN298]. See Committee on Appropriations, <http://appropriations.house.gov> (last visited Mar. 15, 2006) (listing 10); U.S. Senate Committee on Appropriations, [http:// appropria- tions.senate.gov/subcommittees/subcommittees.htm](http://appropriations.senate.gov/subcommittees/subcommittees.htm) (last visited Mar. 15, 2006) (listing 12).

[FN299]. See House Committee on Agriculture: Subcommittees, [http:// agricul- ture.house.gov/inside/subcomms.html](http://agriculture.house.gov/inside/subcomms.html) (last visited Nov. 20, 2005) (House Committee on Agriculture lists five subcommittees); United States House of Representatives Committee on International Relations: Subcommittees, [http:// wwwc.house.gov/international_ relations/subcommittees.htm](http://wwwc.house.gov/international_relations/subcommittees.htm) (last visited Nov. 20, 2005) (House Committee on International Relations lists seven subcommittees); United States Senate Agriculture, Nutrition, and Forestry Committee, [http:// agricul- ture.senate.gov/sub.htm](http://agriculture.senate.gov/sub.htm) (last visited Nov. 20, 2005) (Senate Committee on Agriculture, Nutrition and Forestry lists four subcommittees); United States Senate Committee on Foreign Relations, [http:// foreign.senate.gov/subcommittee.html](http://foreign.senate.gov/subcommittee.html) (last visited Nov. 20, 2005) (Senate Committee on Foreign Relations lists seven subcommittees).

[FN300]. See Pray, *supra* note 195, at 307 (describing usual oversight practices).

[FN301]. See, e.g., Brian D. Shannon, [Debarment and Suspension Revisited](#), 44 *Cath. U. L. Rev.* 363, 366 n.10 (1995) (observing committee criticism of agency action).

[FN302]. See, e.g., Alan N. Resnick, [The Bankruptcy Rulemaking Process](#), 70 *Am. Bankr. L.J.* 245, 256-57 (discussing role of public comments before Advisory Committee).

[FN303]. [INS v. Chadha, 462 U.S. 919, 946 \(1983\)](#).

[FN304]. See A. Michael Froomkin, [The Metaphor Is the Key: Cryptography, the Clipper Ship, and the Constitution, 143 U. Pa. L. Rev. 709, 780 n.290 \(1995\)](#) (observing that “[a]gencies are allowed to defer to other opinions, so long as they make the final decision” and listing supporting cases).

[FN305]. See William Marshall, [The Limits on Congress's Authority to Investigate the President, 4 U. Ill. L. Rev. 781, 781-84 \(2004\)](#); Randall K. Miller, [Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege, 81 Minn. L. Rev. 631, 635-37, 683-87 \(1996\)](#).

[FN306]. See [Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503-07 \(1975\)](#) (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, Clause 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 Tex. 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 Tex. 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, 612 \(1991\)](#); 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).

[FN307]. See [Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 453 \(1977\)](#); [Eastland, 421 U.S. at 504-05](#).

[FN308]. 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).

[FN309]. 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. [Id. at 1378](#).

[FN310]. See, e.g., Robert V. Percival, [Separation of Powers, the Presidency, and the Environment, 21 J. Land Resources & Envtl L. 25, 36-37](#) (describing congressional response to protests that the Office of Management and Budget was unduly interfering with the EPA: “Congress responded by holding nu-

merous oversight hearings at which administration officials were asked to appear as witnesses to defend their actions.”).

[FN311]. Congress's power to investigate the President is not unlimited. See Marshall, *supra* note 305. Marshall explains that Congress has strong political incentives to investigate the President and little in the way of political disincentives. *Id.* at 820. 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. *Id.*

[FN312]. For example, the staff of the Joint Committee on Taxation produced a 2700 page, three volume report on the federal taxation issues related to the Enron scandal. See Christopher H. Hanna, [From Gregory to Enron: The Too Perfect Theory and Tax Law](#), 24 *Va. Tax. Rev.* 737, 788 n.238 (2005) (discussing Staff of Joint Comm. on Taxation, 108th Cong., Report of Investigation of Enron Corp. and Related Entities Regarding Federal Tax and Compensation Issues, and Policy Recommendations (Joint Comm. Print 2003)).

[FN313]. See U.S. Government Accountability Office, GAO: The Human Capital Strategic Plan, Fiscal Years 2004-2006 5, available at <http://www.gao.gov/new.items/d041063.pdf>.

[FN314]. What is GAO?, *supra* note 255.

[FN315]. [31 U.S.C. § 703 \(2000\)](#). 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. Metro. Wash. Airports Auth.](#), 36 F.3d 97 (D.C. Cir. 1994).

[FN316]. [31 U.S.C. § 703](#).

[FN317]. 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).

[FN318]. See U.S. Department of Defense, Defense Logistics: More Efficient Use of Active RFID Tags Could Potentially Avoid Millions in Unnecessary Purchases, GAO-06-366R, (Mar. 8, 2006), available at <http://www.gao.gov/docsearch/abstract.php?rptno =GAO-06-366R> (last visited Mar. 16, 2006) (indicating that the Department of Defense, an executive branch agency, has failed to maintain visibility over inventory and that “[t]he lack of visibility over inventory and equipment shipments increases vulnerability to undetected loss or theft and substantially heightens the risk that millions of dollars will be spent unnecessarily. Additionally, needed supplies may not reach the warfighter when needed, which may impair readiness”).

[FN319]. GAO at a Glance, <http://www.gao.gov/about/gg glance.html> (last visited Mar. 16, 2006) (indicating a staffing level of 3,200 employees and a budget of \$463.6 million).

[FN320]. See, e.g., Peter S. Arno & Michael H. Davis, [Why Don't We Enforce Existing Drug Price Controls?](#), *75 Tul. L. Rev.* 631, 678-79 (2001) (discussing GAO investigation of medical patent fraud).

[FN321]. See Key Related GAO Products Issued Since 2003 Performance and Accountability Series, <http://www.gao.gov/pas/2005/> (last visited Mar. 16, 2006).

[FN322]. GAO at a Glance, *supra* note 319.

[FN323]. Stephen Young, CRS Reports (July 26, 2004), <http://www.llrx.com/features/crsreports.htm> (guide to the Congressional Research Service). CRS's 2004 annual report states that in fiscal year 2004 it “delivered 889,284 research responses.” Congressional Research Service, Annual Report: Fiscal Year 2004, available at http://www.loc.gov/crsinfo/CRS04_AnnRpt.pdf.

[FN324]. *Id.*

[FN325]. *Id.*

[FN326]. See What is the Congressional Research Service, <http://www.loc.gov/crsinfo/whatscrs.html#about> (last visited Nov. 20, 2005). Interestingly, the Librarian himself is appointed by the President with the advice and consent of the Senate. Librarians tend to serve through multiple presidencies--there have been only thirteen Librarians of Congress since the founding of the library in 1800. The current Librarian, James H. Billington, has been serving since 1987.

[FN327]. See [Buckley v. Valeo](#), 424 U.S. 1 (1976).

[FN328]. See Steven P. Croley, [Public Interested Regulation](#), *28 Fla. St. U. L. Rev.* 7, 12 (2000) (“Congress can and does monitor agencies through... informal staff contacts....”).

[FN329]. See [5 U.S.C. § 557\(a\), \(d\)\(1\)\(a\)](#) (2000):

[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

[FN330]. Compare [Sierra Club v. Costle](#), 657 F.2d 298 (D.C. Cir. 1981) with [HBO v. FCC](#), 567 F.2d 9 (D.C. Cir. 1977).

[FN331]. See *infra* text accompanying note 341.

[FN332]. See [D.C. Fed'n Civic Ass'ns v. Volpe, 459 F.2d 1231 \(D.C. Cir. 1972\)](#). For a discussion of this and other cases in which members of Congress have exerted political pressure on agencies, see Richard J. Pierce, Jr., [Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta, 57 U. Chi. L. Rev. 481 \(1990\)](#).

[FN362]. 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. Laurin Henry, *Presidential Transitions* 80-82 (1961).

[FN363]. 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 Rich Klein, *NTSB Slot Has Kennedy, Kerry at Odds*, *Boston Globe*, Mar. 31, 2005, at A4. It apparently goes without saying that Democrats in Congress have the power to make the choice.

[FN373]. See Seidenfeld, *The Psychology of Accountability*, *supra* note 18.

[FN374]. See Seidenfeld, *Civic Republican Justification*, *supra* note 18, 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 DeShazo & Freeman, *supra* note 107. See also Lupia & McCubbins, *supra* note 18; McCubbins et al., *Administrative Procedures*, *supra* note 18.

[FN375]. 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 *W. Pol. Q.* 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.

[FN376]. See DeShazo & Freeman, *supra* note 107; see also Jonathan Bender & Terry M. Moe, *Agenda Control, Committee Capture and the Dynamics of Institutional Politics*, 80 *Am. Pol. Sci. Rev.* 1187

(1986); Sean Gailmard, [Expertise, Subversion, and Bureaucratic Discretion](#), 18 J.L. Econ. & Org. 536 (2002) (discussing incentives for individual legislators to subvert overall legislative intent).

[FN377]. Thanks to Michael Harper for suggesting this point.

[FN378]. 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 Seidenfeld, Civic Republican Justification, supra note 18, at 1525, and text accompanying note 374. 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 18, at 1515.

[FN379]. Because most oversight is informal, that is, no subgroup 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 subgroup within Congress to affect legal rights and duties.

[FN380]. See Beermann, supra note 173; Einer R. Elhauge, [Does Interest Group Theory Justify More Intrusive Judicial Review?](#), 101 Yale L.J. 31, 66-86 (1991). 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).