

Outside Advisers Inside Agencies

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Advisory committees are a ubiquitous, yet understudied feature of the administrative state. More than seventy-five thousand experts from outside the federal government serve on over one thousand committees across the Executive Branch, providing agencies with informed “second opinions” to complement their in-house experts in the civil service. By law, these committees must be “fairly balanced in terms of the points of view represented.” Yet little is known about whether advisory committees live up to this standard, under what circumstances agencies utilize these panels, and how advisory committees influence agency decisionmaking.

This Article sheds light on the composition and operation of advisory committees. We begin by gathering data on the campaign contribution histories of more than one thousand randomly selected advisory committee members over twenty-one years and across four administrations. We find—notwithstanding the statutory fair-balance requirement—that these committees lean left during Democratic administrations and right during Republican ones.

We then examine agency engagement with advisory committees over the same timeframe. Combining these data with information on the political preferences of career civil servants, we find that agencies are more likely to create and convene committees when the preferences of civil servants and the presidential administration diverge. In other words, Democratic administrations appear to rely more on advisory committees at agencies with relatively conservative career staffs (such as the Pentagon), whereas Republicans rely more on these outside panels at agencies with liberal-leaning careerists (such as the Environmental Protection Agency).

We supplement our quantitative analysis with case studies of four advisory committees across four different agencies and presidential administrations. Our case studies show how the political appointees at the helms of agencies use advisory committees as substitute sources of information and expertise when career civil servants at their agencies resist the administration’s agenda.

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These results point to a new view of advisory committees as important instruments of presidential administration. In contrast to the so-called “deep state” of career civil servants who persist at agencies across presidencies, we suggest that advisory committees constitute a “shallow state” whose composition ebbs and flows with the political tides. This “shallow state” presents both a contrast with and a counterweight to the “deep state” of agency careerists. At the same time, advisory committees serve a legitimating function for the administrative state, increasing agency responsiveness to electoral politics. We conclude by considering the implications of this account for judicial review of agency action and for long-running separation-of-powers debates.

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INTRODUCTION

Each year, federal agencies consult with over one thousand advisory committees on a wide range of programs and policies.¹ These advisory committees include more than seventy-five thousand members drawn from the public, private, and nonprofit sectors²—more than ten times the total number of political appointees across the Executive Branch.³ If all advisory committee members “reclined end-to-end on a line due east of the Capitol,” an Associated Press reporter once noted, they could “build a human sidewalk to the Naval Academy” in Annapolis, Maryland.⁴ Commentators have described these committees as a

1. See *Reporting Fiscal Year 2017 Government Totals*, FACA DATABASE, <https://www.facadatabase.gov/FACA/apex/FACAPublicTotals?fy=2017> [<https://perma.cc/LD8G-SQ3R>] (last visited Mar. 3, 2020).

2. *Id.*

3. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-249, *FEDERAL ETHICS PROGRAMS: GOVERNMENT-WIDE POLITICAL APPOINTEE DATA AND SOME ETHICS OVERSIGHT PROCEDURES AT INTERIOR AND SBA COULD BE IMPROVED* 8, 10 (2019). Somewhat surprisingly, “[n]o single source of data on political appointees exists that is comprehensive, timely, and publicly available.” *Id.* at 10. The most recent “Plum Book,” published in December 2016, lists four thousand political appointee positions, but it does not reveal how many of these positions are vacant. See *id.* at 8, 10.

4. Lee Byrd, *1,020 Executive Panels Offer Lots of Advice—and It’s Not Free*, ASSOCIATED PRESS, Dec. 10, 1989, at A45.

“fifth branch” of the federal government⁵ and as a “mini-republic of ideas” within the administrative state.⁶

Advisory committees wield influence over numerous aspects of American life, from the food we eat and the water we drink to the air we breathe and the wars we fight. A federal advisory committee drafts the dietary guidelines for federal school breakfast and school lunch programs, “which feed more than 30 million children each school day.”⁷ Advisory committees help to determine the acceptable levels of arsenic in our drinking water⁸ and ozone in our air.⁹ According to several accounts, the Defense Policy Board Advisory Committee led by Richard Perle played an important role in President George W. Bush’s decision to invade Iraq in 2003.¹⁰ And, while U.S. troops were fighting in the Middle East for a second time, a federal advisory committee played a central part in persuading Congress to spend millions of dollars on treatment and research related to illnesses afflicting veterans of the 1990–1991 Gulf War.¹¹

Although the “enormous influence” of advisory committees is widely recognized,¹² the interactions between advisory committees and the other parts of the federal government are not well understood. A number of scholars have offered positive or normative accounts that address the relationship between advisory committees and the Legislature, Executive, and Judiciary, but these accounts point in divergent directions. Some scholars cast advisory committees as agents of the Legislature.¹³ Others argue that they are tools that the

5. See, e.g., SHEILA JASANOFF, *THE FIFTH BRANCH: SCIENCE ADVISERS AS POLICYMAKERS* (1990); Kevin D. Karty, *Closure and Capture in Federal Advisory Committees*, 4 BUS. & POL. 213, 214 (2002).

6. Sheila Jasanoff, (*No?*) *Accounting for Expertise*, 30 SCI. & PUB. POL’Y 157, 161 (2003).

7. U.S. DEP’T OF HEALTH AND HUM. SERV. & U.S. DEP’T OF AGRIC., 2015–2020 DIETARY GUIDELINES FOR AMERICANS, at vii, 5 (8th ed. 2015). On advisory committee influence over dietary guidelines, see MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 378–81 (10th Anniversary ed. 2013).

8. See Brent Israelsen, *EPA Upholds Stricter Guidelines on Arsenic Levels*, SALT LAKE TRIB., Nov. 1, 2001, at A1 (discussing National Drinking Water Advisory Council’s role in EPA’s 2001 decision to lower arsenic standard from fifty parts per billion to ten parts per billion).

9. See Brad Knickerbocker, *Smog Check: EPA Proposes Tougher Regs for Ground-Level Ozone Pollution*, CHRISTIAN SCI. MONITOR (Nov. 26, 2014), <https://www.csmonitor.com/Environment/2014/1126/Smog-check-EPA-proposes-tougher-regs-for-ground-level-ozone-pollution> (discussing the Clean Air Scientific Advisory Committee’s role in setting ground-level ozone standards).

10. See ALEX MINTZ & KARL DEROUEN, *UNDERSTANDING FOREIGN POLICY DECISION MAKING* 31 (2010); Ari Berman, *Payments for Perle*, NATION (July 31, 2003), <https://www.thenation.com/article/payments-perle>; Seymour M. Hersh, *Lunch with the Chairman*, NEW YORKER (Mar. 9, 2003), <https://www.newyorker.com/magazine/2003/03/17/lunch-with-the-chairman> [<https://perma.cc/F7WW-FJ3M>].

11. See *Gulf War Illness*, CONGRESSIONALLY DIRECTED MED. RES. PROGRAMS (2015), <https://cdmrp.army.mil/gwirp/default> [<https://perma.cc/UT6E-DL7H>] (last updated Feb. 26, 2020); Scott Shane, *Chemicals Sickened ‘91 Gulf War Veterans, Latest Study Finds*, N.Y. TIMES (Oct. 15, 2014), <https://www.nytimes.com/2004/10/15/politics/chemicals-sickened-91-gulf-war-veterans-latest-study-finds.html>.

12. See Byrd, *supra* note 4.

13. See, e.g., Steven J. Balla & John R. Wright, *Can Advisory Committees Facilitate Congressional Oversight of the Bureaucracy?*, in CONGRESS ON DISPLAY, CONGRESS AT WORK 167, 171–74 (William T. Bianco ed., 2000) [hereinafter Balla & Wright, *Can Advisory Committees*]; Steven J. Balla & John R. Wright, *Interest Groups, Advisory Committees, and Congressional Control of the Bureaucracy*, 45 AM. J. POL. SCI. 799, 799–800 (2001) [hereinafter Balla & Wright, *Interest Groups*].

President¹⁴ and Executive Branch agencies¹⁵ use to gather information, build support for their agendas, and manage reputational risk. A book-length study of science-related advisory committees concludes that these bodies can serve as lodestars for “technically illiterate” courts.¹⁶

These existing accounts tend to emphasize the role of advisory committees in interactions among the branches. Existing accounts ask, for example, how Congress can use advisory committees to control and monitor the Executive Branch, how executive branch actors can use advisory committees to circumvent congressionally imposed resource constraints, or how courts can use advisory committees when engaged in judicial review of executive action. This focus on external relations among the branches is consistent with the bulk of separation-of-powers scholarship, though in tension with the lived experience of former executive branch officials who emphasize the importance of intra-agency and intrabranch interactions in the day-to-day doings of the administrative state.¹⁷

Our Article articulates a new model of advisory committees that situates these panels as actors within an intra-agency framework. The idea that civil servants can act as checks on the presidential administration has gained currency in recent years as President Trump and his supporters have complained about a “deep state” of career officials,¹⁸ whom they see as “out to get” the commander-in-chief.¹⁹ Meanwhile, a number of scholars and commentators have sought to repurpose the term “deep state” to refer—with approbation rather than antipathy—to the civil servants who check and balance the executive from within.²⁰ They argue that intra-agency dynamics between political appointees and civil servants plays “an

14. See Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51 (1994); Chad Levinson, *Gilt by Associations: Appointments to Federal Advisory Committees in U.S. National Security Politics*, 49 PRESIDENTIAL STUD. Q. 97 (2019).

15. See Stéphane Lavertu & David L. Weimer, *Federal Advisory Committees, Policy Expertise, and the Approval of Drugs and Medical Devices at the FDA*, 21 J. PUB. ADMIN. RES. & THEORY 211, 231 (2010); Susan L. Moffitt, *Promoting Agency Reputation Through Public Advice: Advisory Committee Use in the FDA*, 72 J. POL. 880, 880–81 (2010).

16. JASANOFF, *supra* note 5, at 249.

17. See, e.g., Paul D. Clement, *The Intra-Executive Separation of Powers*, 59 EMORY L.J. 311 (2009) (discussing his experience as Solicitor General); Peter L. Strauss, *The Internal Relations of Government: Cautionary Tales from Inside the Black Box*, 61 L. & CONTEMP. PROBS. 155 (1998) (discussing his own experience as general counsel to the Nuclear Regulatory Commission); see also Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1758–59 (2013) (stating that the “lopsided attention to judicial review in the literature” is “puzzling” in light of the primacy of intra-executive checks on agency action).

18. See, e.g., JASON CHAFFETZ, *THE DEEP STATE: HOW AN ARMY OF BUREAUCRATS PROTECTED BARACK OBAMA AND IS WORKING TO DESTROY THE TRUMP AGENDA* (2018); Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 6, 2018, 7:19 AM), <https://twitter.com/realDonaldTrump/status/1037661562897682432> [<https://perma.cc/LJ34-MAYW>].

19. Julian E. Barnes, Adam Goldman & Charlie Savage, *Blaming the Deep State: Officials Accused of Wrongdoing Adopt Trump’s Response*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/deep-state-trump-classified-information.html>.

20. See, e.g., Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 143–44 (2018); Heidi Kitrosser, *Accountability in the Deep State*, 65 UCLA L. REV. 1532, 1534 (2018); Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1657 (2018).

important, salutary, and quite possibly necessary role in safeguarding our constitutional commitments.”²¹

If the federal government’s two-million-plus civil servants constitute a “deep state,” then its tens of thousands of advisory committee members might be seen as a sort of “shallow state” existing alongside. The “shallow state” sobriquet captures at least two significant aspects of this phenomenon. First, whereas civil servants are protected by the federal merit system and often hold their jobs for decades, the memberships of federal advisory committees ebb and flow with the political tides. Members—or even entire committees—can be fired at the whim of an agency head, and, as this Article demonstrates empirically, new administrations often seize the opportunity to stock these advisory panels with ideologically sympathetic individuals. Second, the shallow state offers a counterbalance to the deep. Federal advisory committees provide political appointees with an alternative source of knowledge and manpower when career civil servants might otherwise thwart the appointee’s agenda. Indeed, we demonstrate that political appointees rely more on advisory committees when they are ideologically at odds with the career bureaucrats in their agencies than when they are in sync with the civil servants beneath them. Phrased in “deep state” and “shallow state” terms, it is precisely when relations between political appointees and the deep state are most tempestuous that the shallow state is most likely to be utilized.

Before developing and testing this shallow-state model, we provide an overview of the legal framework governing federal advisory committees and the existing theoretical frameworks within which scholars have analyzed these panels so far. We begin in Part I with the law—and, specifically, the Federal Advisory Committee Act (FACA).²² Depending on whom one asks, FACA either succeeded in “enhancing the political legitimacy of the administrative state”²³ or “aggrandize[d] Congress’ relative powers over the President” to an unconstitutional degree.²⁴ All agree, though, that the 1972 statute is central to the everyday existence of advisory committees. If the Administrative Procedure Act is the administrative state’s “Magna Charta,”²⁵ then FACA is the shallow state’s own version of the great charter.

After laying out the legal framework, Part II situates advisory committees vis-à-vis the three branches of government. We review studies suggesting that advisory committees act or ought to act as instruments of congressional control, as auxiliaries to the Executive Branch, and as guides to courts. We then present our own shallow state model, which posits that Presidents and their political

21. Michaels, *supra* note 20, at 1655.

22. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. 2 §§ 1–16 (2012)).

23. Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 527 (1997).

24. Bybee, *supra* note 14, at 128.

25. Michael Asimow, *The Administrative Judiciary: ALJ's in Historical Perspective*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 157, 163 (2000).

appointees populate advisory committees with ideologically sympathetic experts and then use those panels as counterweights to the career bureaucracy.

In Part III, we evaluate various theories of advisory committees through a series of empirical tests. We first leverage data on campaign contributions made by more than one thousand randomly selected individuals serving on advisory committees in order to estimate the ideological preferences of advisory committee members. We find that committee members' views tend to track those of the party that controls the White House, not the views of current lawmakers or of the Congress that created the committee. We go on to examine the formation, funding, and activities of advisory committees across sixteen cabinet-level agencies over two decades. We find strong evidence that political appointees across administrations utilize advisory committees as counterweights to the career bureaucracy. Agency heads in Republican administrations are more likely to convene policy-focused advisory committees when the civil servants at their agencies trend more liberal. Agency heads in Democratic administrations are more likely to convene policy-focused advisory committees when the civil servants at their agencies lean to the right. These results suggest that agency heads use advisory committees to pull in outside expertise when career civil servants within their agencies are less sympathetic to the administration's agenda. In other words, political appointees turn to the shallow state when the deep state is inhospitable to their aims.

We supplement our quantitative analysis in Part III with qualitative case studies in Part IV. We examine four advisory committees advising four separate agencies under four different Presidents. In all four cases, political appointees turned to advisory committees to counterbalance career staff. In two of those cases (the Pentagon's Defense Advisory Committee on Women in the Services under President Clinton and the Centers for Disease Control and Prevention's Advisory Committee on Childhood Lead Poisoning Prevention under President George W. Bush), the counterweight proved successful, allowing political appointees to implement their agenda over the opposition of careerists. In a third case (the Immigration and Customs Enforcement Advisory Committee on Family Residential Centers under President Obama), the deep state struck back, thwarting the advisory committee's efforts at reform. In the fourth case (the Environmental Protection Agency's Clean Air Scientific Advisory Committee under President Trump), the final chapter in the struggle between the deep state and the shallow state has yet to be written.²⁶

We end in Part V by considering the implications of our empirical findings for separation-of-powers accounts of advisory committees. Our results cast doubt on the notion that advisory committees—whose composition tends to track the partisan preferences of the President rather than of Congress—enhance legislative control over agencies. We suggest that more specific membership criteria—such

26. See Jean Chemnick, *Trump's Changes to Science Might Not Last*, E&E NEWS (July 22, 2019), <https://www.eenews.net/stories/1060771339> [<https://perma.cc/D6VN-XE4N>].

as partisan balance requirements—may increase the likelihood that advisory committees will assist Congress in its exercise of oversight functions. Our results also (at least partially) allay concerns about congressional aggrandizement through control over advisory committees. FACA does not appear to have prevented Presidents and their appointees from surrounding themselves with advisers who share their views.

The implications for judicial review of agency action are more nuanced. On the one hand, our findings might be seen to counsel in favor of judicial deference to agencies on science-related matters when the agency's scientific conclusions are affirmed by an expert advisory committee. Advisory committees, we find, are often used as counterweights to career civil servants; when advisory committees and civil servants agree, that may be a strong sign of reasonableness. On the other hand, predictable partisan changes in advisory committee composition may call into question whether these panels should be viewed as neutral arbiters of scientific fact.

Finally, and most significantly, our findings speak to a long-running debate about intra-executive branch checks on administrative power—sometimes referred to as the “internal” or “new” separation of powers²⁷—and what it means for the legitimacy of the administrative state. Some celebrate the power of the civil service as an important check on executive overreach;²⁸ others lament the ability of unelected careerists to stymie the agenda of a democratically accountable administration.²⁹ Our results should cause both sides of this debate to update their positions. On one hand, the check exerted by career civil servants may not be as robust as celebrants of “internal separation” suggest. Our findings indicate that agency heads have access to a broad network of advisory committees that can provide them with alternative viewpoints and expert knowledge, thereby balancing the influence of career civil servants. On the other hand, and for the same reason, those who worry about the outsized influence of career civil servants may

27. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 229 (2016). These terms stand in contradistinction to the “external” separation of powers—all extra-executive checks on that branch, including not only Congress and the courts, but also, *inter alia*, media and civil society organizations and “old” separation of powers, that is, legislative-executive-judicial interactions. See Gillian E. Metzger, *The Interdependent Relationship between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 425 (2009) (defining the external separation of powers); Michaels, *supra*, at 229 (defining the old separation of powers).

28. See, e.g., JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC* 16 (2017) (stating that “mid-twentieth-century administrative lawyers redeemed [the framers'] constitutional commitment to separating and checking State powers—and did so by triangulating administrative power among . . . politically insulated civil servants” and two other groups within administration); Katyal, *supra* note 27.

29. See, e.g., DONALD J. DEVINE, *REFORMING THE FEDERAL BUREAUCRACY: CHALLENGE AND OPPORTUNITY* 10 (2018), https://www.heritage.org/sites/default/files/2018-12/BG3357_0.pdf [<https://perma.cc/PK6K-Q9SQ>]; Jason Richwine, *When Bureaucrats Veto the President*, NAT'L REV. (Feb. 19, 2019, 6:30 AM), <https://www.nationalreview.com/2019/02/bureaucrats-civil-service-veto-presidential-policies> [<https://perma.cc/G82P-SLH2>].

find that their concerns are allayed—at least somewhat—by the check that advisory committees offer. The shallow state, by serving as a counterweight to the deep state, may also help to legitimize it.

I. THE LAW OF FEDERAL ADVISORY COMMITTEES

Presidents and their Cabinet members have convened committees of outside experts to assist in the formulation and implementation of policy since the early days of the Republic. George Washington's appointment of a three-person, ad hoc commission to negotiate an end to the Whiskey Rebellion in 1794 is sometimes cited as the first such instance.³⁰ Since then, panels of outside experts—or panels composed of a mix of government officials and private citizens—have played important roles at critical historical junctures, including the Roberts Commission that investigated the Pearl Harbor attacks, the Warren Commission that probed the assassination of President Kennedy, and the Kerner Commission that investigated the race riots of the 1960s.³¹

Congress has sought to assert control over the formation, composition, and operations of advisory committees at various points. When President John Tyler convened a three-member commission to investigate claims of corruption in the New York customs house, Congress quickly responded with a statute prohibiting the payment of any account or charge “growing out of, or in any way connected with, any commission or inquiry” in the absence of a special appropriation.³² After President Theodore Roosevelt created an expert panel to provide artistic and architectural advice on future federal building plans, Congress in 1909 passed another statute barring public funds from being used for any “commission, council, board, or other similar body” unless “authorized by law.”³³

Notwithstanding these funding restrictions, advisory committees flourished across the Executive Branch throughout the early and middle parts of the twentieth century. By 1970, the House Committee on Government Oversight estimated that more than 1,800 advisory bodies reported to the President, his executive departments, and other federal agencies, with more than 20,000 members and operating costs of approximately \$75 million (or roughly \$500 million adjusted for inflation).³⁴ Members of Congress sounded alarm that these committees had

30. Bybee, *supra* note 14, at 60 n.35; *see also* WENDY R. GINSBERG, CONG. RES. SERV., R40520, FEDERAL ADVISORY COMMITTEES: AN OVERVIEW 2 (2009).

31. *See* Bybee, *supra* note 14, at 56.

32. Act of Aug. 26, 1842, ch. 202, § 25, 5 Stat. 523, 533 (exempting military courts martial and courts of inquiry from the ban); *see also* Bybee, *supra* note 14, at 61–63.

33. Act of March 4, 1909, ch. 299, § 9, 5 Stat. 1027 (codified as amended at 31 U.S.C. § 1346 (2012)). The 1909 statute also blocked the use of federal dollars to pay the salaries of executive branch officers or employees detailed to unauthorized commissions, councils, and boards. *See id.*; *see also* Bybee, *supra* note 14, at 63–65.

34. FEDERAL ADVISORY COMMITTEE ACT (PUBLIC LAW 92-463): SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 214, 227–28 (Comm. Print 1978) (Virginia A. McMurtry ed., Cong. Research Serv.) [hereinafter FACA Sourcebook] (quoting H.R. Rep. No. 91-1731 (1970), *in* S. COMM. ON ENERGY, NUCLEAR PROLIFERATION, AND FEDERAL SERVICES, 95TH CONG.).

come to constitute a “fifth branch of [g]overnment,” alongside the Legislature, Executive, Judiciary, and independent regulatory commissions.³⁵

Congress responded to these concerns in 1972 with the Federal Advisory Committee Act (FACA), a sweeping statute that functions as the legal framework for the “fifth branch.” FACA applies to the operations of virtually every body within the Executive Branch that includes at least one member from outside of the federal government—whether the body was constituted by Congress or by an executive branch actor.³⁶ FACA’s stated purpose is to bring order to what its drafters saw as a vast collection of committees with duplicative or irrelevant missions and with insufficient public disclosure.³⁷

Much of FACA is focused on making the activities of advisory committees more transparent to Congress and to the public. When an agency forms an advisory committee, it must publish a notice in the Federal Register and file a detailed charter with the Library of Congress and with Senate and House standing committees that have jurisdiction over the agency.³⁸ Advisory committee meetings must be open to the public,³⁹ with advance notice of meetings published in the Federal Register,⁴⁰ and “[i]nterested persons” must have an opportunity to appear before or file statements with the committee.⁴¹ Committees must keep “[d]etailed minutes” of all of their meetings and must make those minutes—along with other committee documents—available for public inspection (subject to certain exemptions set forth in the Freedom of Information Act).⁴² Agencies must maintain financial records of committee-related expenditures, which the Comptroller General—an official answerable to Congress—can audit.⁴³

FACA also regulates the appointment of advisory committee members and the duration of committees’ existence. Section 5(b)(2) provides that the membership of advisory committees must be “fairly balanced in terms of the points of view represented and the functions” they perform.⁴⁴ For some committees, Congress

35. *See id.* at 259 (quoting 117 CONG. REC. 2750 (daily ed. Feb. 17, 1971) (statement of Rep. John Monagan)); *see also id.* at 299 (quoting 118 CONG. REC. H4282 (daily ed. May 9, 1972) (statement of Rep. Bud Brown)).

36. FACA, 5 U.S.C. app. § 3(2) (1972). Two specific committees are exempted by name from FACA’s requirements: The Advisory Commission on Intergovernmental Relations and the Commission on Government Procurement. *Id.*

37. *Id.* § 2(b).

38. *Id.* § 9. The Federal Register requirement does not apply to committees formed by the president. Presidential advisory committees must file their charters with the General Services Administration and the Library of Congress but not any House or Senate committee. *See id.*

39. *Id.* § 10(a)(1).

40. *Id.* § 10(a)(2) (stating exception when “President determines otherwise for reasons of national security”).

41. *Id.* § 10(a)(3).

42. *Id.* § 10(b)–(d). For exemptions to the Freedom of Information Act, see 5 U.S.C. § 552(b).

43. 5 U.S.C. app. § 12. On the Comptroller General’s status as an officer of the Legislative Branch, see *Bowsher v. Synar*, 478 U.S. 714, 730–32 (1986).

44. 5 U.S.C. app. § 5(b)(2). For an overview of legislative, judicial, and administrative interpretations of the fair balance requirement, see generally Mark B. Brown, *Fairly Balanced: The Politics of Representation on Government Advisory Committees*, 61 POL. RES. Q. 547 (2008). Mark Petracca provides an early empirical examination of the interest-group composition—but not the ideological

has added further representation requirements in separate statutes. For example, the Occupational Safety and Health Act of 1970 requires Occupational Safety and Health Administration advisory committees to include equal representation of employer and worker interests.⁴⁵ Other statutory membership criteria are more specific. For example, five of the ten members on the advisory committee counseling the Interior Secretary regarding the 200,000-acre Dominguez–Escalante National Conservation Area in western Colorado must “reside in, or within reasonable proximity to, Mesa County, Delta County, or Montrose County.”⁴⁶ All committees must be reestablished or renewed every two years—which effectively sets members’ terms at that same length—unless a statute provides otherwise.⁴⁷

The statute casts a wide net, defining “advisory committee” as essentially any group created by statute or “established or utilized” by the President or any agency or officer so long as the group meets two additional conditions: (1) it was established or utilized “in the interest of obtaining advice or recommendations” for the President or federal agencies or officers; and (2) it has at least one member who is not a full-time or permanent part-time federal officer or employee.⁴⁸ Subsequent court decisions have restricted that definition somewhat. In the 1989 case *Public Citizen v. United States Department of Justice*, the Supreme Court held that the American Bar Association’s Standing Committee on the Federal Judiciary fell outside FACA’s scope, notwithstanding the Court’s acknowledgment that the Executive Branch “no doubt . . . ‘utilizes’ [the ABA committee] in one common sense of the term” when selecting judicial nominees.⁴⁹ Based primarily on the statute’s legislative history, the Court in *Public Citizen* concluded that FACA applies only to advisory committees that are “formed”—and not merely “utilized”—by the federal government or by “quasi-public organizations such as the National Academy of Sciences ‘for’ public agencies.”⁵⁰ Then, in the 2005 case *In re Cheney*, which involved an energy policy task force headed by the then-Vice President, the D.C. Circuit held that a panel advising the President may include nonfederal employees in its meetings without becoming subject to

composition—of advisory committee members in FACA’s first five years. Mark P. Petracca, *Federal Advisory Committees, Interest Groups, and the Administrative State*, 13 CONG. & THE PRESIDENCY 83, 96–98 (1986) (examining select executive departments). Kevin Karty examines interest group representation—but again, not ideology—on advisory committees for one year (1998). Karty, *supra* note 5, at 217 fig.2. In a thoughtful and thought-provoking student note, Daniel Walters suggests that courts should interpret FACA’s fair balance requirement not as “representational” balancing of members from various interest groups, but instead as “look[ing] to the robustness of the process of deliberation in advisory committees.” Daniel E. Walters, Note, *The Justiciability of Fair Balance Under the Federal Advisory Committee Act: Toward a Deliberative Process Approach*, 110 MICH. L. REV. 677, 681–82 (2012).

45. Occupational Safety & Health Act of 1970, Pub. L. No. 91-596, § 7(b), 84 Stat. 1590, 1598 (1970).

46. 16 U.S.C. § 460zzz-6(d)(5) (2006).

47. 5 U.S.C. app. § 14(a).

48. *Id.* § 3(2). Advisory committees established by certain intelligence agencies or the Federal Reserve System, as well as several specifically named committees, are exempted. *Id.* §§ 3(2)(C), 4(b).

49. 491 U.S. 440, 452 (1989).

50. *Id.* at 461–62.

FACA so long as the nonfederal employees never exercise a “right to vote or veto” during deliberations.⁵¹

Some scholars and judges (and at least one scholar-turned-judge) have expressed unease with the statutory framework for advisory committees, especially as applied to panels that advise the President directly. Justice Kennedy, concurring in the *Public Citizen* case, wrote that the application of FACA to a committee advising the President on judicial appointees “encroaches upon a power that the text of the Constitution commits in explicit terms to the President.”⁵² (One wonders whether he might have reached a similar conclusion regarding FACA’s application to committees advising the President on nonappointments matters as well.) Then-law professor and now-Ninth Circuit Judge Jay Bybee expanded on Justice Kennedy’s concerns in a *Yale Law Journal* article five years after the *Public Citizen* decision. According to Bybee, “FACA violates the separation of powers to the extent that it regulates the President’s use of outside advisory committees funded at their own expense.”⁵³ Judge A. Raymond Randolph of the D.C. Circuit echoed Bybee’s analysis in the first round of the *Cheney* litigation. “As applied to committees the President establishes to give him advice, FACA has for many years teetered on the edge of constitutionality.”⁵⁴ We return to the concerns voiced by Justice Kennedy, Judge Bybee, and Judge Randolph in Part V. The key point for now is that FACA has survived, and the narrowing interpretations in *Public Citizen* and *Cheney* have circumscribed its scope only slightly.

Advisory committees are thriving under FACA’s legal framework. At last count, fifty-three executive agencies and independent regulatory commissions maintained active advisory committees.⁵⁵ The total number of active committees numbered 1,019 in fiscal year 2017, with 77,614 members in all.⁵⁶ Of these, about three-fifths were statutorily mandated,⁵⁷ and the remaining were created by agencies themselves,⁵⁸ with the exception of forty-four panels formed by presidential directive.⁵⁹ In that fiscal year, these committees held 7,885 meetings and issued 630 reports.⁶⁰ All in all, the federal government expended about \$380 million on advisory committee activities.⁶¹ A majority of those funds (fifty-seven percent)

51. 406 F.3d 723, 728 (D.C. Cir. 2005) (en banc).

52. *Pub. Citizen*, 491 U.S. at 482 (Kennedy, J., concurring in the judgment).

53. Bybee, *supra* note 14, at 128.

54. *In re Cheney*, 334 F.3d 1096, 1113 (D.C. Cir. 2003) (Randolph, J., dissenting).

55. See *All Agency Accounts*, FACA DATABASE, <https://www.facadatabase.gov/FACA/FACA-PublicAgencyNavigation> [<https://perma.cc/Y67J-MZBE>] (last visited Mar. 3, 2020).

56. FACA DATABASE, *supra* note 1.

57. *Id.*; see, e.g., 20 U.S.C. § 1011c(a) (2012) (establishing “in the Department [of Education] a National Advisory Committee on Institutional Quality and Integrity . . . to assess the process of accreditation and the institutional eligibility and certification of institutions of higher education”).

58. See, e.g., U.S. DEPT. OF AGRIC., DEPARTMENTAL REG. NO. 1043-37 (2005) (establishing an advisory committee regarding a forest management plan within the spotted owl’s habitat).

59. See FACA DATABASE, *supra* note 1.

60. *Id.*

61. *Id.*

went to compensate federal members and staff for their time, but the federal government also spent nearly \$54 million on member travel and per diem expenses and approximately \$37 million in honoraria to committee members.⁶²

These committees tend to comprise a mix of members from the for-profit and nonprofit sectors, with many committees—particularly those addressing resource management issues or programs that require intergovernmental coordination—also including state and local governmental employees. The Office of Financial Research Advisory Committee, which supplies economic analysis to that office, which in turn advises the Financial Stability Oversight Council,⁶³ is illustrative. Approximately half of that committee’s members hail from financial firms or related entities, with the other half consisting of academics, think-tank researchers, and former government officials.⁶⁴

The number of committees that fall within FACA’s ambit has remained relatively stable year to year, with a small overall upward trend over the past two decades. Committee membership size and activities also have exhibited similar trends over time.⁶⁵ All the while, a small but active literature on advisory committees and the separation of powers has emerged. We summarize that literature in the next Part.

II. THEORETICAL FRAMEWORKS

A. EXISTING FRAMEWORKS

A number of scholars have sought to characterize the relationship between advisory committees and other elements of the federal government. Attempts to situate advisory committees vis-à-vis the three constitutional branches of government can be categorized—coarsely—by the branch to which they relate. In this section, we consider accounts that emphasize the relationships between advisory committees and the Legislative Branch (Article I), the Executive Branch (Article II), the Judiciary (Article III), and the web of administrative agencies sometimes dubbed the “fourth branch.”⁶⁶

1. Advisory Committees and Congress

A number of accounts highlight the role of advisory committees as tools of congressional control over administrative agencies. These congressional-control accounts build on the foundational work of political scientist Matthew McCubbins and his collaborators. In a much-cited 1984 article, McCubbins and

62. *Id.*

63. See 12 U.S.C. § 5342 (2012).

64. For biographies of committee members, see *Committee Members*, OFFICE OF FIN. RESEARCH ADVISORY COMM. (2019), <https://www.financialresearch.gov/frac/frac-member-biographies/> [<https://perma.cc/7J53-H3R9>].

65. For data on the number, size, and activities of federal advisory committees, see *FACA Database Downloadable Datasets*, FACA DATABASE, <https://www.facadatabase.gov/FACA/apex/FACADatasets> (last visited Oct. 13, 2019).

66. See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984).

Thomas Schwartz observed that lawmakers have two techniques of oversight available to them: “police patrols” and “fire alarms.” Police-patrol oversight is “comparatively centralized, active, and direct”: members of Congress review materials, commission studies, conduct field observations, and hold oversight hearings “with the aim of detecting and remedying any violations of legislative goals.”⁶⁷ Fire-alarm oversight is “less centralized” and “less active and direct”: Congress establishes institutions that enable citizens and interest groups to monitor agencies, challenge them in court, and alert lawmakers when they have strayed from their charges. “Instead of sniffing for fires,” McCubbins and Schwartz write, “Congress places fire-alarm boxes on street corners, builds neighborhood fire houses, and sometimes dispatches its own hook-and-ladder in response to an alarm.”⁶⁸ Whereas police patrols are costly and time-consuming, fire alarms allow lawmakers to outsource oversight costs to individual citizens, organized interest groups, and courts.

In later work, McCubbins and collaborators Roger Noll and Barry Weingast add to the “police patrol” and “fire alarm” models a third approach to congressional control over agencies: “deck-stacking.”⁶⁹ They suggest that lawmakers design agencies to “stack the deck in favor of constituents who are the intended beneficiaries of the bargain struck by the coalition which created the agency.”⁷⁰ When it succeeds, deck-stacking can be even more cost-effective than fire-alarm oversight, because it does not require lawmakers “to monitor, or even be aware of, the nature of the agency’s actions.”⁷¹ Instead, lawmakers who engage in “deck-stacking” seek to “create a decisionmaking environment” inside the agency that “mirrors the political circumstances” that gave rise to the agency’s creation of the relevant program’s adoption.⁷²

Advisory committees can potentially serve “fire-alarm” and “deck-stacking” purposes.⁷³ Political scientists Steven Balla and John Wright have explored the extent to which advisory committees fulfill both functions. In a 2000 book chapter, they proposed that “advisory committees can facilitate oversight by reducing the information asymmetry between Congress and bureaucratic agencies.”⁷⁴ More specifically, advisory committees “provide competing interest groups with

67. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

68. *Id.*

69. See Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L., ECON., & ORG. 243, 261 (1987).

70. *Id.*

71. Matthew 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, 432 (1989).

72. *Id.* at 444.

73. Advisory committees are thus an alternative to “police patrols,” which entail centralized oversight by congressmembers and their staffs. See McCubbins & Schwartz, *supra* note 67, at 166 (defining “police patrols”).

74. Balla & Wright, *Can Advisory Committees*, *supra* note 13, at 184.

institutionalized access to agency policy making.”⁷⁵ In the terminology of McCubbins and Schwartz, advisory committees place interest group members in positions where they can sound the fire alarm when agencies deviate from their statutory mandates. Balla and Wright note, though, that advisory committees can only serve this facilitative function when two conditions are met: (1) “committees must be heterogeneous in their composition,” and (2) “committee members must have access to agency information.”⁷⁶ Because agency heads can choose advisory committee members and agency officials can regulate access to information, agencies play an important role in determining whether advisory committees operate as useful instruments of oversight.⁷⁷

Balla and Wright modify and expand upon this account in an influential 2001 article.⁷⁸ There, they place less weight on the role of advisory committees as fire alarms and more emphasis on advisory committees as tools for deck-stacking. According to the latter view, lawmakers establish committees that reflect the preferences of the legislative coalition that created the relevant agency or program.⁷⁹ That symmetry between interest groups involved in the debate over an agency or program’s genesis and the membership of an associated advisory committee helps ensure that members of the enacting coalition continue to have a seat at the table throughout the implementation process.⁸⁰

Importantly, the deck-stacking model characterizes committees not as instruments of the current members of Congress, but rather as a means for a *past* Congress to project its influence into the future.⁸¹ One way that an enacting coalition can accomplish this projection goal, according to Balla and Wright, is to require the representation of specific outside interests on certain committees.⁸² Balla and Wright use as their principal example the fifteen-member National Drinking Water Advisory Council, created by the Safe Drinking Water Act of 1974 to advise the EPA. The 1974 law mandates that five members of the committee be members of “the general public”; that five members come from state and local water-safety agencies; and that five members represent private organizations with “an active interest in the field of water hygiene and public water supply.”⁸³ Analyzing appointments to the panel from 1995 to 1997, Balla and Wright conclude that the committee’s composition “is broadly representative of the range of interests that were active in the legislative debate over the Safe Drinking Water Act.”⁸⁴

75. *Id.* at 172–73.

76. *Id.* at 173.

77. *See id.* at 184.

78. Balla & Wright, *Interest Groups*, *supra* note 13.

79. *Id.* at 800.

80. *Id.* at 799–800.

81. *See id.* at 801.

82. *See id.* at 803–04.

83. 42 U.S.C. § 300j-5(a) (2018). Two members of the third group must be “associated with small, rural public water systems.” *Id.*

84. Balla & Wright, *Interest Groups*, *supra* note 13, at 810–11.

Although the “fire-alarm” and “deck-stacking” accounts no doubt contain elements of truth, these accounts are—as their primary exponents acknowledge—incomplete. Balla and Wright state that their account applies only to committees created by Congress’s own hand, not to those established by Presidents and agencies.⁸⁵ In fiscal year 2017, that would leave more than 400 committees that are not statutorily mandated—or more than two-fifths of all advisory committees in that year—expressly outside of the scope of the “fire-alarm” and “deck-stacking” accounts.⁸⁶

Further, the “controls” that the Legislative Branch places on congressionally created advisory committees often are elastic. Recall that FACA itself requires only that membership rosters be “fairly balanced in terms of the points of view represented and the functions to be performed”⁸⁷—a standard that leaves agency heads with ample wiggle room to choose individuals of their liking. And even when Congress imposes more specific stipulations on advisory committee composition, agencies still enjoy wide latitude to choose panel members. Consider again the fifteen-member drinking water committee that Balla and Wright use as an example of congressional control. Members must be drawn from “the general public”; state and local water-safety agencies; and private organizations with “an active interest in the field of water hygiene and public water supply.”⁸⁸ We suspect that a savvy agency head could locate members of the general public, public water commissioners, and members of water-related organizations—including conservation groups; associations representing industry and agriculture; and everything in between—that hold virtually any conceivable view on water safety.⁸⁹ Restrictions of this magnitude serve as devices of congressional control only in a loose sense. Accordingly, accounts that place Congress in the driver’s seat tell only part of the story.

2. Advisory Committees and the Executive

A second perspective on advisory committees emphasizes the relationship between these panels and the Executive Branch. As then-Professor Bybee noted, presidents and their administrations historically have relied on advisory committees for a number of purposes. The “obvious and publicly invoked justification” is

85. Balla & Wright, *Can Advisory Committees*, *supra* note 13, at 168–69; Balla & Wright, *Interest Groups*, *supra* note 13, at 802. The authors add that committees established via mechanisms other than statutory enactment “undoubtedly serve a variety of different purposes.” Balla & Wright, *Interest Groups*, *supra* note 13, at 802.

86. See FACA DATABASE, *supra* note 1. These committees were created by executive branch organs, either pursuant to congressional authorization or *sua sponte*. See *id.*

87. 5 U.S.C. app. 2 § 5(b)(2) (2018).

88. 42 U.S.C. § 300j-5(a). Two members of the third group must be “associated with small, rural public water systems.” *Id.*

89. For example, one of the most recent appointees to the National Drinking Water Advisory Council—evidently as a representative of the “general public”—is a senior vice president and general counsel at a cast iron manufacturing company that has been the subject of several criminal prosecutions for environmental offenses in recent years. See Sarah Okeson, *Polluter’s Friend Stalls on Protecting Public Water Supply*, DCREPORT.ORG (Mar. 14, 2019), <https://www.dcreport.org/2019/03/14/polluters-friend-stalls-on-protecting-public-water-supplies/> [https://perma.cc/RLD2-SM9H].

“for information or advice, which the committees can provide at relatively little cost to the government.”⁹⁰ A second function of advisory committees is to “legitimize” executive branch policies. Incorporating interest groups into the decisionmaking process by placing their representatives on advisory committees may neutralize potential opposition to administration policies, and the endorsement of a broadly representative advisory committee may “show the support of the key parties that will be affected.”⁹¹ Advisory committees also may serve “purely political ends” such as “masking the government’s unwillingness to act.”⁹² Other scholars echo Bybee’s account of the ways in which Presidents and their administrations utilize these panels.⁹³

Bybee believes that advisory committees have served all of these functions in the past, but he worries that FACA now undermines the ability of the Executive Branch—and in particular, the President—to make use of advisory committees. “FACA’s requirements that advisory committees have a balanced viewpoint, open their records to public inspection, and open their meetings to public participation increase the cost of using advisory committees, and suggest that presidents will rely less frequently on advisory committees,” Bybee writes.⁹⁴ He concedes that “[t]he empirical evidence for this proposition is admittedly anecdotal,” though he notes that the American Bar Association committee at issue in *Public Citizen* said that it would no longer provide advice on judicial nominations if required to abide by FACA.⁹⁵ He also worries that FACA’s open-meeting and public-inspection requirements will discourage advisory committee members from providing the Executive Branch with their “full and frank views.”⁹⁶

Although Bybee argues that FACA’s constraints on presidential advice-seeking amount to unconstitutional “aggrandizement” of congressional power at the Executive’s expense, he is careful to limit the scope of his constitutional argument: “Any claim the President can make probably does not include the hundreds of advisory committees that are agency-established.”⁹⁷ He adds that application

90. Bybee, *supra* note 14, at 58.

91. *Id.* at 58–59.

92. *Id.* at 59. Bybee notes that establishing a committee may

help the government give the public the impression that something is being done, while it avoids having to take action. Thus, the appointment of a committee buys the decisionmaker time and defuses a politically troublesome matter by deferring it until it fades from the public’s memory or more immediate concerns subsume it.

Id.

93. See, e.g., Levinson, *supra* note 14, at 120 (suggesting that Presidents use advisory committees in the national security domain “to gain leverage over the legislature by mobilizing public support”); Amy B. Zegart, *Blue Ribbons, Black Boxes: Toward a Better Understanding of Presidential Commissions*, 34 PRESIDENTIAL STUD. Q. 366, 374–76 (2004) (focusing on advisory committees convened by the President and positing that their primary functions are to “generate mass public attention and support for the president’s policies”; to “provid[e] new ideas, new facts, and new analysis” to executive branch officials; and to “alter the constellation of political opposition”).

94. Bybee, *supra* note 14, at 125.

95. *Id.*

96. *Id.*

97. *Id.* at 124.

of FACA to “the bulk of congressionally created advisory committees” is also constitutionally unproblematic,⁹⁸ though the concern that open-meeting mandates might dissuade members from offering their unvarnished views would seem to apply to those panels as well. We return to these issues in Part V, where—armed with evidence from our quantitative and qualitative analyses—we will be better positioned to assess FACA’s effects on Executive Branch control over advisory committees.

3. Advisory Committees and the Judiciary

In addition to their functions as congressional agents and Executive Branch auxiliaries, advisory committees play a potentially important—though “undertheorized”⁹⁹—role in judicial review of agency action. This issue most often arises in cases involving section 706 of the Administrative Procedure Act, which (among other things) instructs courts to set aside agency action that is “arbitrary” or “capricious.”¹⁰⁰ In some cases, courts explicitly rely on an advisory committee’s conclusions in deciding whether agency action satisfies the Act’s reasonableness requirements.¹⁰¹ In other cases, courts will cite an agency’s decision to disregard an advisory committee recommendation as evidence that the agency action is “arbitrary and capricious.”¹⁰² But judicial treatment of advisory-committee conclusions is not uniform, and in other cases courts give little weight to an advisory committee’s view.¹⁰³

Two prominent scholars have separately argued that advisory committees’ views *should* figure more prominently in judicial review of agency actions. Sheila Jasanoff, in the conclusion to her thorough examination of scientific advisory committees at the EPA and FDA, argues that courts should “adopt a highly deferential posture” to agency actions when an advisory committee composed of scientists supports the agency’s findings.¹⁰⁴ “It is not very likely, after all, that a

98. *Id.*

99. Adrian Vermeule, *The Parliament of the Experts*, 58 DUKE L.J. 2231, 2236 (2009).

100. 5 U.S.C. § 706(2) (2018).

101. *See, e.g.,* *Am. Trucking Ass’n v. EPA*, 283 F.3d 355, 378–79 (D.C. Cir. 2002) (citing Clean Air Scientific Advisory Committee’s recommendation in upholding EPA’s primary national ambient air quality standard for ozone); *British Am. Commodity Options Corp. v. Bagley*, 552 F.2d 482, 490 (2d Cir. 1977) (citing recommendation of the Advisory Committee on the Definition and Regulation of Market Instruments in upholding Commodity Futures Trading Commission rule). Note that in *American Trucking*, the relevant judicial review provision came from the Clean Air Act, not the Administrative Procedure Act, though the court emphasized that the same standard applies in both contexts. *See Am. Trucking Ass’n*, 283 F.3d at 362.

102. *See, e.g.,* *New York v. Dep’t of Commerce*, 315 F. Supp. 3d 766, 808 (S.D.N.Y. 2018) (finding the Department of Commerce “ignor[ed] the recommendation of the . . . advisory committee”); *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 233–34 (E.D.N.Y. 2006) (finding the FDA’s decisionmaking processes unusual when they do not follow advisory committee’s recommendation).

103. *See, e.g.,* *Am. Great Lakes Ports Ass’n v. Zukunft*, 296 F. Supp. 3d 27, 48 (D.D.C. 2017) (finding that the Coast Guard’s adoption of a ten percent adjustment to rates that international shippers must pay to American maritime pilots on the Great Lakes was not a product of reasoned decisionmaking because “there is no evidence that the Coast Guard or its sources at the [Great Lakes Pilotage Advisory Committee] ever relied on any relevant or creditable methodological evidence whatsoever in arriving at this figure”).

104. JASANOFF, *supra* note 5, at 249.

technically illiterate judiciary will detect flaws in scientific reasoning that has already been examined by a competent expert body,” Professor Jasanoff observes.¹⁰⁵ She adds that “close judicial scrutiny” of the science underlying agency action may be warranted when the agency and its scientific advisers disagree or when “there is evidence of procedural impropriety in the review process.”¹⁰⁶

Adrian Vermeule has proposed an even more influential role for scientific advisory committees and other expert panels in judicial review of agency action. In Professor Vermeule’s view, “[a]gencies should not be permitted to depart from the findings of expert panels unless they can give a valid second-order reason to think that the consensus or majority view of experts as to matters of fact is not epistemically reliable.”¹⁰⁷ A valid second-order reason might be, for example, “that the panel’s composition made it inadequately diverse.”¹⁰⁸ Simply disagreeing with the experts’ substantive conclusions would not suffice.

Both Jasanoff and Vermeule propose roles for expert advisory committees that would relieve the epistemic burden on judges in cases involving challenges to agencies’ scientific conclusions. Under her proposal, Jasanoff writes, “the spectacle of courts immersing themselves in technical data may gradually become as much an artifact as aggressive judicial overruling of congressional enactments became in the aftermath of the New Deal.”¹⁰⁹ In this respect, advisory committees would become aides and guides to the judicial branch. Importantly, Jasanoff’s and Vermeule’s arguments apply to a subset of advisory committees—those that provide “scientific advice”¹¹⁰ or “expertise”¹¹¹—though the boundaries around those categories are likely to be blurred and contested. Their theories are, moreover, explicitly normative accounts of the role that advisory committees *should* play in judicial review, rather than descriptive claims about the roles that advisory committees currently occupy.

4. Advisory Committees and the Bureaucracy

A fourth perspective on advisory committees suggests that agencies use these panels to serve particular bureaucratic interests. Like the executive-focused account, the bureaucratic account emphasizes that advisory committees can be used to gather information from experts and stakeholders and to facilitate buy-in from outside groups involved in policy implementation.¹¹² The posited goal, however, is not to advance the administration’s agenda but to further the agency’s own objectives.¹¹³

105. *Id.*

106. *Id.*

107. Vermeule, *supra* note 99, at 2235.

108. *Id.* at 2275.

109. JASANOFF, *supra* note 5, at 249.

110. *Id.* at 248–49.

111. Vermeule, *supra* note 99, at 2234.

112. Moffitt, *supra* note 15, at 880.

113. See Lavertu & Weimer, *supra* note 15, at 215 (building on a model in which the agency’s “driving motivation is to protect its reputation”); Moffitt, *supra* note 15, at 881 (arguing that “agencies can use transparency procedures, such as federal advisory committees, to enhance and protect agency reputation”).

Two simultaneously published studies—both focused on the FDA’s use of advisory committees when deciding whether to approve pharmaceuticals and medical devices—offer agency-centered theories of advisory committee activity. Both suggest that the FDA utilizes advisory committees to reduce the risk of—and fall-out from—costly regulatory errors. Susan Moffitt posits that advisory committees serve to insure the FDA against risks generated by “implementers outside the agency”—the pharmaceutical companies that market a drug, the doctors who prescribe it, and the patients who use it as (or not as) prescribed. According to Professor Moffitt, advisory committees can publicize the risk and uncertainty associated with a new drug and to “diffus[e] blame for policy failures away from the agency.”¹¹⁴ Moffitt’s empirical analysis reveals that the FDA’s use of advisory committees is “systematically associated with a chief concern among reputation-minded bureaucrats: avoiding a Congressional oversight hearing at which the bureaucrats must publicly defend and explain ostensible agency failures.”¹¹⁵

Stéphane Lavertu and David Weimer likewise argue that advisory committees supply the FDA with “political cover” when the “stakes of its decisions are high.”¹¹⁶ They also emphasize the role of advisory committees in helping the FDA overcome resource constraints.¹¹⁷ Advisory committees, they note, provide the FDA with extra “information-processing capacity” when the agency lacks the budget and expertise to synthesize data itself.¹¹⁸

These bureaucracy-focused accounts overlap with the executive-focused accounts discussed above.¹¹⁹ All agencies—including the so-called “independent regulatory commissions”—are formally part of the Executive Branch and thus to some degree under the aegis of the President.¹²⁰ We treat these accounts separately because, as we seek to show, the interests of the President and those of bureaucrats do not necessarily align. Indeed, as we will argue, preference divergence between the presidential administration and the federal bureaucracy potentially plays an important role in the formation and function of advisory committees.

B. A NEW THEORY OF THE FIFTH BRANCH

Existing theoretical frameworks no doubt capture important aspects of advisory-committee activity and the interactions between these panels and the branches. Yet, as we note above, we think these accounts omit much as well. Accounts that position advisory committees as instruments of Congress—either as “fire-alarm” monitors or as “deck-stacking” tools—explicitly leave out nearly half of all committees, and they fail to make sense of the loose restrictions that Congress imposes on the advisory committees that it creates by statute. Accounts focused on executive-branch

114. Moffitt, *supra* note 15, at 888, 891.

115. *Id.* at 889.

116. Lavertu & Weimer, *supra* note 15, at 227, 231.

117. *Id.* at 215, 231.

118. *Id.* at 233.

119. See *supra* Section II.A.2.

120. The FDA, moreover, is not an independent regulatory commission but an agency within the U.S. Department of Health and Human Services.

uses of advisory committees tend to view the Executive Branch as unitary, overlooking the substantial diversity of preferences and incentives among Executive Branch actors. A similar criticism applies to bureaucracy-focused accounts, which (correctly) highlight the ways in which committees can serve particular bureaucratic interests, but fail to open up the “black box of the agency”¹²¹ to reveal the divergence of interests within it. Accounts focused on the role of advisory committees in judicial review of agency action—persuasive or not—operate primarily on a different plane: as normative arguments about how government actors ought to use advisory committees rather than as descriptive models of how they actually do.

Our search for a new model is motivated by the recognition that the Executive Branch as a whole and its component agencies—like Congress in Kenneth Shepsle’s famous formulation—constitute a “they” rather than an “it.”¹²² At the helm of each agency are one or more political appointees who are chosen, in part, to translate the President’s ideological preferences and political objectives into concrete policies.¹²³ But, though regulations often are highly technical, agency heads typically are generalists.¹²⁴ As a consequence, they must rely on others for specialized information and advice.¹²⁵

An obvious source for this information—indeed, an intended source—is the civil service.¹²⁶ According to Jennifer Nou, “in many ways, high-quality information is the bureaucracy’s *raison d’être*.”¹²⁷ As Christopher Lu, who served as Deputy Secretary of Labor during the Obama Administration, characterized the arrangement: “The politicals set the direction of the agency, but they can only do it effectively if they tap into the expertise of the federal civil service.”¹²⁸

121. Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 488 (2002); Strauss, *supra* note 17, at 155.

122. See generally Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 254 (1992) (arguing against legislative intent as a useful tool of statutory interpretation because “[i]ndividuals have intentions and purpose and motives; collections of individuals do not”).

123. Although the extent of presidential direction of agency heads is in dispute, administrative law scholars at least agree that the President provides political oversight. See, e.g., Peter L. Strauss, *Overseer, or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 697, 703 (2007).

124. See Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 484 (2017).

125. *Id.*

126. We use the term “civil service” to refer to career federal employees—other than uniformed servicemembers—who are not political appointees. Political appointees fall into three general categories. The first and most familiar category covers positions filled by presidential appointment with Senate confirmation (PAS). The second category is “Schedule C” positions. The third category comprises political appointees in the Senior Executive Service (capped at ten percent of all Senior Executive Service posts). See Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 925–27 (2008). See generally JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RESEARCH SERV., R45635, CATEGORIES OF FEDERAL CIVIL SERVICE EMPLOYMENT: A SNAPSHOT (Mar. 26, 2019) (reviewing the categories of federal service employment).

127. See Nou, *supra* note 124, at 487.

128. Charles S. Clark, *Deconstructing the Deep State*, GOV’T EXEC., <http://www.govexec.com/feature/gov-exec-deconstructing-deep-state/?oref=special-reports> [<https://perma.cc/LU88-VPNU>] (last visited Mar. 5, 2020).

That arrangement may have worked well for Deputy Secretary Lu, a Democratic appointee to a cabinet department whose employees lean left.¹²⁹ But what about for an appointee at loggerheads with her department's workforce—or even one with designs to demolish that department?¹³⁰ Here, it is far from clear that civil servants will implement the agency head's agenda.¹³¹ Instead, the prospect of shirking—that is, that an agent will undertake action (or inaction) that is contrary to the principal's objective or desired effort level—looms large.¹³² This concern is particularly acute in the federal government, where civil service protections limit appointees' ability to fire unfaithful agents.¹³³

The conventional wisdom holds that the federal civil service leans left,¹³⁴ and so bureaucratic resistance will be more of a problem for conservative Republican administrations than for liberal Democratic ones. Although that may be true in gross,

129. See Joshua D. Clinton et al., *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341, 348 fig.3 (2012) (reporting preference estimates for executive departments and independent agencies).

130. See, e.g., Evan Halper, *Rick Perry Wanted to Eliminate the Department of Energy; Now He Is Said to Be Trump's Pick to Run It*, L.A. TIMES (Dec. 13, 2016, 12:45 PM), <https://www.latimes.com/politics/la-na-pol-trump-perry-20161213-story.html>; David Lazarus, *For Trump's Man at Consumer Agency, Emphasis Is on Ditching Rules, Not Enforcing Them*, L.A. TIMES (Dec. 22, 2017, 11:25 AM), <http://www.latimes.com/business/lazarus/la-fi-lazarus-cfpb-mulvaney-changes-20171222-story.html> (reporting that Consumer Financial Protection Bureau Acting Director Mick Mulvaney once referred to his agency as a “sick, sad joke”).

131. See, e.g., Strauss, *supra* note 66, at 586 (noting that “the bureaucracy constitutes an independent force . . . and its cooperation must be won to achieve any desired outcome”); see also Jennifer Nou, *Bureaucratic Resistance from Below*, YALE J. ON REG. NOTICE & COMMENT (Nov. 16, 2016), <http://yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou> [<https://perma.cc/K5GK-MKZA>] (presenting typology of bureaucratic resistance mechanisms).

132. See Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535, 546 (2011) (defining shirking). Some authors distinguish between two forms of shirking: agents that pursue their own policy goals instead of their principal's objectives (“zealots”) and agents that engage in effort levels that maximize their own welfare rather than their principal's (“slackers”). See generally Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873 (2007) (discussing “zealots” and “slackers” at length). Although most of this Article addresses how principals use advisory committees to mitigate against what Gailmard and Patty term “zealots,” we note that these committees also may temper civil servants' slacking, by, in a sense, providing a quality-assurance team to double-check the civil servants' work and perhaps ferret out slacking-induced errors.

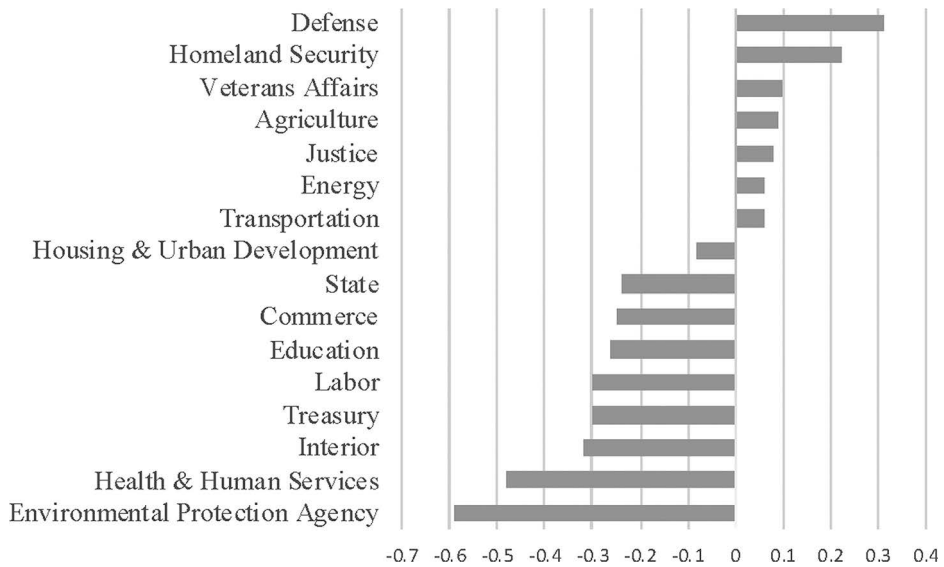
133. See, e.g., 5 U.S.C. § 2301(b)(8)(A) (2012) (“Employees should be protected against arbitrary action, personal favoritism, or coercion for partisan political purposes . . .”). Complicating matters, an outgoing presidential administration may exploit these civil service personnel protections by “burrowing” political appointees into the civil service, thereby entrenching their ideological allies in the administrative state and increasing the ideological gap between the incoming administration and the federal workforce. See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 606–16 (2003).

134. See, e.g., Ralph R. Smith, *Which Party Receives the Most in Political Contributions from Federal Employees?*, FEDSMITH.COM (May 19, 2016), <https://www.fedsmith.com/2016/05/19/which-party-receives-the-most-in-political-contributions-from-federal-employees> [<https://perma.cc/SN94-JWW5>] (“The general view of government employees is that they prefer Democrats over Republicans as they benefit economically by having more money allocated for government spending.”); Hans A. von Spakovsky, *Liberal Civil Servants Treat Political Opponents as Enemies*, HERITAGE FOUND. (Feb. 7, 2011), <https://www.heritage.org/commentary/liberal-civil-servants-treat-political-opponents-enemies> [<https://perma.cc/5WP6-AQ8K>] (stating that the “civil service is dominated by liberals and radicals”).

it is certainly not true in every case. Based on a survey of individuals in senior positions across the Executive Branch, Joshua Clinton and several colleagues estimated ideological ideal points for high-ranking career civil servants across fifteen major Cabinet departments.¹³⁵ Although their study is based on a survey conducted in 2007 and 2008, their estimates are likely to be stable over time, because turnover in the career civil service is low.¹³⁶ (Indeed, a follow-on study in 2014 yields closely matching results.¹³⁷)

Figure 1 reports the findings of Clinton and his collaborators. Positive values signify a more conservative orientation for the mean civil servant respondent in each department, whereas negative values connote a more liberal orientation.

Figure 1: Civil Servants’ Political Preferences



135. See generally Clinton et al., *supra* note 129; see also Joshua D. Clinton et al., *Replication Data for “2012 ‘Separated Powers.’”* <https://my.vanderbilt.edu/joshclinton/data> (last visited July 29, 2019) (data on file with the authors). Clinton and colleagues administered surveys to both political appointees and civil servants, and they report the results separately for each of these two categories of respondent. We adopt their civil servant-only estimates here.

136. See David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 44 (2018) (noting “exceedingly low rate of exit” for federal employees).

137. See Mark D. Richardson, Joshua D. Clinton & David E. Lewis, *Elite Perceptions of Agency Ideology and Workforce Skill*, 89 J. POL. 303, 306 (2018) (noting correlation of 0.80). The 2014 survey asked senior federal officials to say whether specific agencies slant liberal, conservative, or neither. *Id.* at 304. It did not—surprisingly—ask respondents to distinguish between political appointees and careerists at agencies. We say this is surprising because one of the key findings of the 2008 survey by Clinton, Bertelli, Grose, Lewis, and Nixon was that the preferences of political appointees and careerists are *not* always aligned. See Clinton et al., *supra* note 129, at 345 fig.1.

Figure 1 shows significant variation in the ideological preferences of civil servants across agencies. The Department of Defense is the agency with the most conservative careerists, and the Environmental Protection Agency (EPA) is the agency with the most liberal civil servants. This suggests that a liberal Defense Secretary in a Democratic administration is likely to face resistance from agency staff, as is a conservative EPA Administrator in a Republican administration. Indeed, accounts of the Defense Department under Democratic Presidents and the EPA under Republican administrations anecdotally confirm this expectation.¹³⁸

Preference divergence between career civil servants and the presidential administration presents a dilemma for agency heads. Given the scope and complexity of many regulatory areas and the relatively small cadre of mostly short-term political appointees,¹³⁹ an agency head is faced with what initially seems like a stark choice: rely on civil servants who are subject-matter experts but do not share the agency head's worldview, or seek out likeminded but potentially less-informed individuals for guidance.

Advisory committees provide an escape hatch. By forming new advisory committees stacked with ideological allies or by reshaping the composition of advisory committees that already exist, agency heads can advance their own agendas notwithstanding the divergent preferences of career staff. Sympathetic advisory committees can provide an agency head with information unfiltered through civil servants, or, in some cases, even supply a ready-made policy that the agency head can then adopt.¹⁴⁰ Even when an agency head already knows what policy she wishes to adopt, an advisory committee can help the agency head justify the policy—potentially increasing the likelihood that the policy will pass judicial muster.¹⁴¹ And still in other cases, an advisory committee will serve an important function simply by verifying that the agency's civil servants—notwithstanding their divergent preferences—have provided sound advice.¹⁴²

138. Compare Rebecca Ingber, *supra* note 20, at 214 (noting that “bureaucratic resistance” contributed to President Obama’s failure to close Guantanamo), with B. Dan Wood, *Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements*, 82 AM. POL. SCI. REV. 213, 228 (1988) (observing that career civil servants at EPA thwarted Reagan administration’s deregulatory agenda).

139. See O’Connell, *supra* note 126, at 935 (“[I]n sheer numbers, the layer of political personnel in the federal workforce is thin.”); *id.* at 919 n.23 (reporting median appointee tenure of approximately two to three years).

140. See, e.g., Press Release, Transp. Sec. Admin., TSA Update on ASAC Recommendations (July 14, 2015), <https://www.tsa.gov/news/releases/2015/07/14/tsa-update-asac-recommendations> [<https://perma.cc/DC49-QJJA>] (adopting twenty-six of twenty-eight recommendations from the Department of Homeland Security’s Aviation Security Advisory Committee).

141. Cf. *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating that an agency—to survive judicial review—must “articulate a satisfactory explanation for its action”).

142. See, e.g., Katharine Q. Seelye, *E.P.A. to Adopt Clinton Arsenic Standard*, N.Y. TIMES (Nov. 1, 2001), <https://www.nytimes.com/2001/11/01/us/epa-to-adopt-clinton-arsenic-standard.html> (noting decision by President George W. Bush’s first EPA Administrator, Christine Todd Whitman, to adopt a more stringent standard for arsenic in drinking water after an advisory committee tasked by Whitman affirmed the findings of EPA career staff).

The advisory committee structure supports agency heads who seek outside advice in several ways. For one, government employees organize meetings, procure needed information, and otherwise facilitate advisory committees' operations. In fiscal year 2017, for instance, the equivalent of over 1,500 full-time government employees provided these support services.¹⁴³ Agencies fund members' travel for committee meetings, pay fees to outside consultants to assist committees, and—for a subset of committees—pay honoraria.¹⁴⁴ Further, the prestige that comes with selection to a federal panel may encourage members to devote their energies to their committees' subject matter.

Certainly, advisory committees are not the only escape route for agency heads seeking to loosen the cognitive grip of career staff. They also can solicit outside opinions through procedures such as notice-and-comment rulemaking, though this procedure involves substantial resource costs.¹⁴⁵ They can seek input from White House bodies such as the Council of Economic Advisers (CEA) or the Office of Science and Technology Policy (OSTP), though the two dozen or so CEA employees and even fewer OSTP employees are no substitute for more than 75,000 advisory committee members.¹⁴⁶ And they can consult with lobbyists, though the number of active registered federal lobbyists (11,650 in 2018¹⁴⁷) is still only a fraction of the number of advisory committee members, and these lobbyists often lack the subject-matter expertise that many advisory committee members possess.

Advisory committees, importantly, are not a costless solution for agency heads facing resistance from career bureaucrats. Identifying nominees, complying with FACA, funding committee activities, and assigning staff to assist committees all involve resource costs. Naturally, resources expended on advisory committees cannot be used productively elsewhere. Similarly, involving another entity in policymaking could stretch out the policymaking process, creating red tape and contributing to regulatory ossification. And the use of advisory committees carries potential risks as well as potential rewards: members may, for example, ally with civil servants instead of the agency heads.¹⁴⁸ Thus, although there are strong theoretical reasons to expect that agency heads will use advisory committees as counterweights to career civil servants with differing preferences, the proof lies in the (quantitative and qualitative) pudding. The next Part assesses our shallow state

143. FACA DATABASE, *supra* note 1.

144. *See id.*

145. *See* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 896 (2008).

146. For statistics on CEA and OSTP staff sizes, see *Council of Economic Advisers Salaries of 2017*, FEDERALPAY.ORG, <https://www.federalpay.org/employees/council-of-economic-advisers/2017> [<https://perma.cc/2CP4-W3PL>] (last visited July 24, 2019); *Office of Science and Technology Policy Salaries of 2017*, FEDERALPAY.ORG, <https://www.federalpay.org/employees/office-of-science-and-technology-policy> [<https://perma.cc/P3MB-5Y25>] (last visited July 24, 2019).

147. *See Lobbying Database*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby> [<https://perma.cc/2SDN-62FM>] (last updated June 17, 2019) (noting 11,654 active registered federal lobbyists for 2018).

148. *See infra* Section IV.E.

model and alternative models of advisory committee interactions using quantitative methods. Part IV presents four focused case studies and evaluates the extent to which those committees' activities conform to our model's predictions.

III. QUANTITATIVE ANALYSIS

This Part applies quantitative analysis to evaluate various theoretical accounts of advisory committees. We first examine the political composition of a randomly selected sample of 2,500 advisory committee members who served at some point from fiscal years 1997 through 2017.¹⁴⁹ Then, we probe the circumstances under which agencies decide to engage advisory committees, and we consider the effects of advisory committee engagement on agency reputation and resources.

A. COMMITTEE COMPOSITION

We begin by assessing whether the ideological composition of advisory committees reflects the preferences of the President, the current Congress, or (for committees established by statute) the Congress that created the committee. We combine several sources of information to conduct this assessment. To identify advisory committee members, we rely on datasets maintained by the General Services Administration, which include the names, occupations, and committee assignments of all advisory committee members serving at any point from fiscal year 1997 through fiscal year 2017.¹⁵⁰ (That date range reflects the full coverage of the General Service Administration's FACA Database as of this writing.) We select a random sample of 2,500 of the 334,248 unique individuals who served on one of the 2,536 committees in existence during this period.¹⁵¹

To estimate each committee member's ideological preferences, we utilize Adam Bonica's Database on Ideology, Money in Politics, and Elections (DIME).¹⁵² DIME leverages over 16.4 million political contributions from individuals and organizations to candidates and political action committees between 1979 and 2014 to assign an ideological score, known as a Campaign Finance Score (CF Score), to both donors and recipients.¹⁵³ To generate preference

149. Grant review panels and National Institutes of Health "special emphasis panels," which are ad hoc groups on which members serve for only one meeting, are excluded from the sample. *See, e.g., Special Emphasis Panels*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, NAT'L INSTS. OF HEALTH, <https://www.niaaa.nih.gov/grant-funding/application-process/special-emphasis-panels> [<https://perma.cc/C5JB-BCA4>] (last visited July 27, 2019).

150. *See* FACA DATABASE, *supra* note 65.

151. This sample—2,500 individuals out of 334,248—is constrained by the labor-intensive nature of matching individuals in the FACA and DIME databases. Even uncommon names typically appear multiple times in DIME, which impedes fuzzy matching and necessitates time-consuming hand-coding to identify the correct individuals based on other indicia, for example, location, occupation, and employer. A team of six research assistants logged several hundred hours of work as part of this process.

152. Adam Bonica, *Codebook for the Database on Ideology, Money in Politics, and Elections (DIME) (Version 2.0)* (Aug. 16, 2016), <https://dataverse.harvard.edu/api/access/datafile/2865308> [<https://perma.cc/FY4K-J7BU>].

153. *Id.* at 3–5. DIME obtains these data from the Federal Election Commission, various state agencies, the Center for Responsive Politics, and the Sunlight Foundation. *See* Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. POL. SCI. 367, 370 (2014). To be assigned a CF Score, a donor

estimates, DIME employs an algorithm to place donors along a left–right scale such that the distance between donors with similar patterns of political donations is minimized.¹⁵⁴ The method assumes, essentially, that these donations constitute a form of revealed preferences.¹⁵⁵ CF scores range from –2 for the most liberal donors and recipients, to 2 for the most conservative.¹⁵⁶ The population of donors included in DIME is normally distributed, with a mean CF score for donors of zero and a standard deviation of one.¹⁵⁷

The use of CF scores as a measure of political preferences is now widely accepted in both law and political science.¹⁵⁸ Aside from the measure’s widespread acceptance, there are a number of reasons to believe that it is a valid estimate of individual ideology. First, CF scores closely correlate with measures of ideology based on lawmakers’ voting behavior.¹⁵⁹ Second, and consistent with the view that individual ideology is a mostly unchanging characteristic, CF scores remain quite stable for individuals across time.¹⁶⁰ Third, CF scores are strong predictors of individual-level survey responses to questions regarding ideologically salient issues such as abortion, affirmative action, the environment, fiscal policy, immigration, and same-sex marriage.¹⁶¹ All these considerations give us confidence that CF scores are reasonable proxies for the ideological preferences of advisory committee appointees.

Of the 2,500 appointees in our random sample, 1,081 had corresponding CF scores,¹⁶² meaning that 43.2% of the committee members in our sample made at least two recorded campaign contributions.¹⁶³ This donation rate is significantly

must give to at least two recipients in DIME, and a recipient must receive funds from at least two donors in DIME. *Id.*

154. *Id.* at 369–70.

155. *See id.* at 373 (contending that CF Scores tend to reflect donors’ sincere views, rather than their strategic behavior).

156. *See id.* at 371.

157. *Id.* at 369.

158. *See, e.g.,* Gregory J. Martin & Zachary Peskowitz, *Agency Problems in Political Campaigns: Media Buying and Consulting*, 112 AM. POL. SCI. REV. 231, 235 (2018) (using CF scores to estimate the ideological preferences of political consultants); *see also* Jamie L. Carson & Ryan D. Williamson, *Candidate Ideology and Electoral Success in Congressional Elections*, 176 PUB. CHOICE 175, 183 (2018) (congressional candidates); Adam S. Chilton & Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 J. LEGAL STUD. 277, 282 (2015) (law professors); Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 19 (2018) (independent commissioners).

159. Bonica, *supra* note 152, at 5–6.

160. *See* Bonica, *supra* note 153, at 373.

161. *See* Adam Bonica, *Are Donation-Based Measures of Ideology Valid Predictors of Individual-Level Policy Preferences?*, 81 J. POL. 327, 329–31 (2019).

162. A team of five undergraduate and law student research assistants helped us match appointees to CF scores. The matching process involves collection of biographical information from publicly available sources to confirm, for example, that the “Howard Berman” appointed to the ICE Advisory Committee on Family Residential Centers is the same “Howard Berman” who appears in DIME as a senior advisor to Covington & Burling (and not, for example, the “Howard Berman” who is a rabbi in Boston).

163. These 2,500 randomly selected committee members served on committees in 43 different executive departments and independent agencies. Donation rates differ by agency. Among the agencies

higher than the portion of the general population that appears in DIME (five percent),¹⁶⁴ though the high rate is unsurprising for a group that is actively involved in advising the federal government.¹⁶⁵ Notably, advisory committee member donation rates by agency are unconnected to the partisan leanings of that agency's leadership or civil servants.¹⁶⁶

What should one make of the 56.8% of committee members that do not appear in DIME (and thus are excluded from the analysis in this section)? One possibility is that their lack of big-dollar donations indicates that they are less ideologically motivated, and thus more likely to serve on advisory committees as politically neutral technocrats. (To be included in DIME, one has to make multiple donations of at least \$200 each.) We suspect, however, that the universe of politically motivated individuals is larger than the set of donors.¹⁶⁷ Regardless, we emphasize that the conclusions we derive from quantitative analysis are constrained by the availability of data. (This is one more reason to supplement our quantitative analysis with qualitative case studies, as we do in Part IV.)

After matching advisory committee members to CF scores, we examine how the ideological composition of committees has changed over a twenty-one-year span. Figure 2 displays the results of this analysis. For each fiscal year during the study period, the figure includes a density plot of the CF scores for the randomly selected individuals who served in that twelve-month time frame. For fiscal years that fell mostly or entirely during Republican administrations, the corresponding plot is demarked with a solid line, and with a dashed line for Democratic

from which five or more advisory committee members were randomly chosen, donation rates ranged from 22.1% for the Department of Transportation to 71.4% for the Securities and Exchange Commission, with a mean of 40.1% and a standard deviation of 11.1%.

164. See Adam Bonica, Adam S. Chilton & Maya Sen, *The Political Ideologies of American Lawyers*, 8 J. LEGAL ANALYSIS 277, 286 (2016).

165. This rate of appearance in DIME is not as high, however, as the rates for members of elite groups like corporate CEOs and board members, members of federal commissions like the SEC, and former Supreme Court law clerks. See Adam Bonica, *Avenues of Influence: On the Political Expenditures of Corporations and their Directors and Executives*, 18 BUS. POL. 367, 375 (2016) (83% for CEOs and corporate board members); Adam Bonica et al., *The Political Ideologies of Law Clerks*, 19 AM. L. & ECON. REV. 96, 105 (2016) (66% for former Supreme Court clerks); Feinstein & Hemel, *supra* note 158, at 38 (reporting that 80% of members of multi-member agencies are included in DIME).

166. This finding was obtained by running a variation on the regression models in Table 3, *infra*, with agencies' donation rates as the dependent variable.

There is, however, suggestive evidence that agencies that regulate or interact with more lucrative professions have higher donation rates for their advisers, as the SEC and CFTC enjoy, respectively, the highest and third-highest rates. On other end, advisers to the National Endowment for the Arts have the second-lowest rate. NEA advisers may not be starving artists, but neither do they spend like securities industry professionals.

167. Cf. Michael J. Barber, Brandice Canes-Wrone & Sharece Thrower, *Ideologically Sophisticated Donors: Which Candidates Do Individual Contributors Finance?*, 61 AM. J. POL. SCI. 271, 274 n.7 (2017) (finding no material difference in motivations for donors who give \$200 versus those who give substantially more).

administrations.¹⁶⁸ Because the federal government’s fiscal year runs from October 1 to September 30¹⁶⁹ and new Presidents are inaugurated on January 20,¹⁷⁰ the correspondence between fiscal years and presidential administrations is imprecise in the year of a presidential transition (fiscal years 2001, 2009, and 2017).

Figure 2: Ideological Position of Randomly Selected Sample of Advisory Committee Members, FY 1997–2017

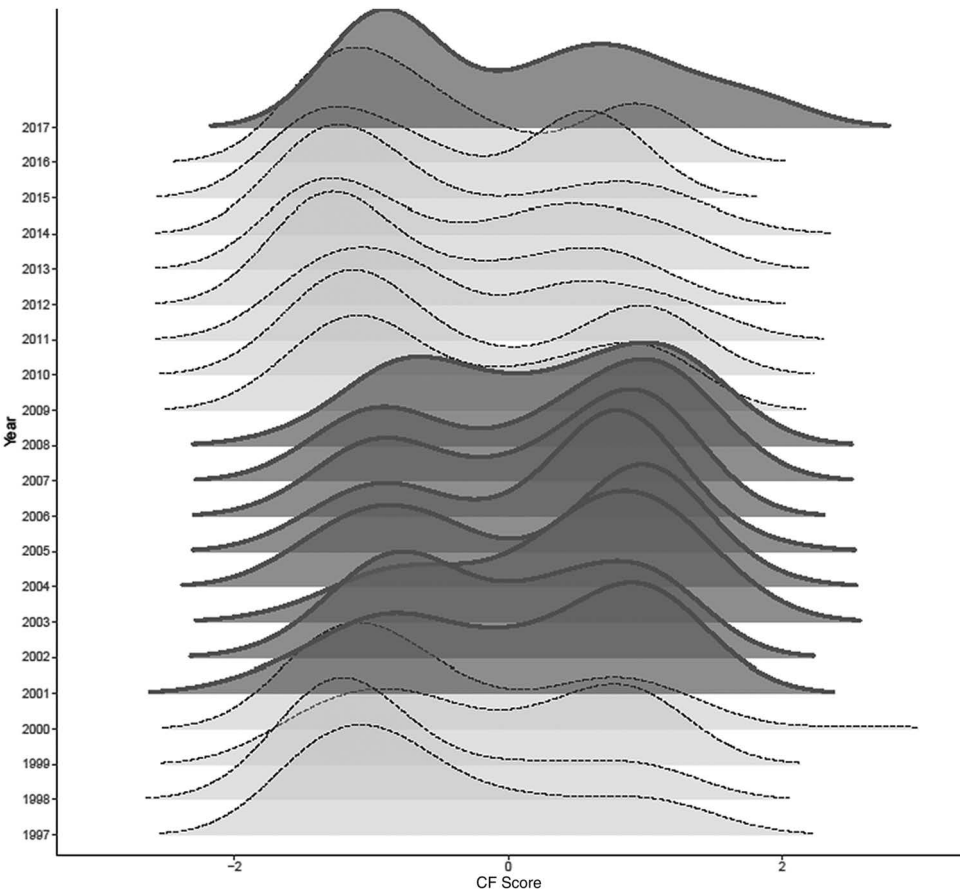


Figure 2 shows that the ideological posture of advisory committee members tends to move in the direction of the President. The distributions skew left during Democratic administrations and shift to the right during most periods of

168. For readers following along on a black-and-white printout, years under a Democratic administration will appear light gray, and years under a Republican administration will appear in dark gray.

169. See *Glossary Term: Fiscal Year*, U.S. SENATE, https://www.senate.gov/reference/glossary_term/fiscal_year.htm [<https://perma.cc/U34R-CJ7G>] (last visited July 30, 2019).

170. U.S. CONST. amend. XX, § 1.

Republican control.¹⁷¹ (The lingering left-of-center skew in fiscal year 2017—the first partial fiscal year of the Trump Administration—may be attributable to the fact that Barack Obama remained President for the first sixteen weeks of fiscal year 2017.)

Already, these initial results shed some light on several of the positive and normative claims that we canvass in Part II. Despite Professor Bybee's concern that FACA's "fairly balanced" requirement would prevent the President and his administration from staffing advisory committees with individuals of their choosing,¹⁷² we find that committee composition is highly responsive to the President's preferences. Even though political movement among the general public is glacially slow,¹⁷³ the ideology of the modal advisory committee member quickly flips from liberal to conservative with the Clinton-to-Bush transition and back from conservative to liberal with the Bush-to-Obama transition. Although this responsiveness will be viewed as desirable by those who envision advisory committees as instruments of presidential administration, it may be more concerning to those who see advisory committees as guides for judicial review. The shift in composition from administration to administration may suggest that advisory committees are not neutral arbiters, but instead are very much part of the President's political coalition.

Diving deeper, we use regression analysis to examine the relationship between the ideological preferences of advisory committee members and those of the President and Congress. To do so, we make use of DW-NOMINATE scores, another commonly used estimate of ideology.¹⁷⁴ Applying a similar algorithm as DIME, DW-NOMINATE arranges legislators on a liberal-to-conservative scale,

171. As a robustness check to ensure that our randomly selected sample accurately reflected overall advisory committee composition, we conducted a parallel analysis of the members of nine specific committees that address environmental policy, financial regulation, and tax policy. Within these policy areas, we selected committees with a diverse set of characteristics, namely: (i) location in an executive department or independent agency; (ii) establishment via statute or agency initiative; and (iii) functional classification in the GSA FACA Database. The results of this alternative analysis are consistent with the random sample.

The nine committees used in this alternative analysis are: the Bureau of Land Management Alaska Resource Advisory Council, the CFTC Global Markets Advisory Committee, the EPA Clean Air Act Advisory Committee, the EPA National Drinking Water Advisory Council, the FDIC Advisory Committee on Community Banking, the IRS Advisory Committee on Tax Exempt and Government Entities, the Nuclear Regulatory Commission Reactor Safeguards Advisory Committee, and Office of Financial Research (Treasury) Financial Research Advisory Committee.

172. See Bybee, *supra* note 14, at 125.

173. See ROBERT S. ERIKSON, MICHAEL B. MACKUEN & JAMES A. STIMSON, *THE MACRO POLITY* 119 (2002).

174. See, e.g., Cynthia Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1693 (2015); Nolan McCarty, *Pivotal Politics, Partisan Polarization, and Policy Predictability*, 80 J. POL. 1076, 1077 (2018); Nicholas Stephanopoulos, *Spatial Diversity*, 125 HARV. L. REV. 1903, 1944 (2012).

going from -1 to $+1$, based on their roll call voting patterns.¹⁷⁵ DW-NOMINATE also places Presidents on the same scale based on the subset of roll call votes for which the President offers a position.¹⁷⁶

Table 1 presents these results. In Column 1, we regress each committee member’s CF score on the DW-NOMINATE score for the President in the year of the member’s appointment. In Column 2, we regress each committee member’s CF score on the DW-NOMINATE score for the median representative in the House in the year of the member’s appointment. (The results are substantively similar when we use the DW-NOMINATE score of the median senator instead.) In Column 3, we limit our sample to advisory committee members who served on the subset of panels established by statute, and we regress each committee member’s CF score on the DW-NOMINATE score for the median House member in the Congress that established the committee. In Column 4, we include all three explanatory variables—the President’s preferences, the current Congress’s preferences, and the enacting Congress’s preferences—in the regression analysis.

TABLE 1: RELATIONSHIP BETWEEN PREFERENCES OF COMMITTEE MEMBERS AND PREFERENCES OF PRESIDENT AND CONGRESS

	(1)	(2)	(3)	(4)
President’s Preferences	0.491*** (0.075)	—	—	0.611** (0.198)
Current Congress’s Preferences	—	-0.405* (0.178)	—	-0.321 (0.407)
Enacting Congress’s Preferences	—	—	-4.746 (14.597)	0.903 (14.348)
<u>Unit of Analysis:</u> Randomly-selected advisory committee members, FY 1997–2016. <u>Dependent variable:</u> Appointee’s CF Score. <u>Model:</u> OLS regression. All models include committee-level fixed effects. <u>R²:</u> 0.12 (Column 1), 0.09 (Column 2), 0.12 (Column 3), 0.10 (Column 4). <u>Observations:</u> 1081 (Columns 1 & 2); 308 (Columns 3 & 4). *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$. Parentheses report standard errors clustered at the committee level.				

Table 1 shows that Republican presidential administrations are associated with more conservative appointees to advisory committees, and Democratic administrations are associated with more liberal appointees, confirming through

175. See KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING 23–24 (2000).

176. *Id.* at 23. Because DW-NOMINATE only calculates presidential ideal point estimates through President Obama, our analyses using this measure end in 2016. Although DW-NOMINATE does not include ideal point estimates for agency heads that have not served in Congress, we expect that their preferences would roughly track the President’s because appointees are selected based largely on their loyalty to the President’s program. See Michael A. Livermore, *Political Parties and Presidential Oversight*, 67 ALA. L. REV. 45, 52 (2015); Donald Moynihan & Alasdair S. Roberts, *The Triumph of Loyalty Over Competence: The Bush Administration and the Exhaustion of the Politicized Presidency*, 70 PUB. ADMIN. REV. 572, 573 (2010).

regression analysis what Figure 2 displays visually. Specifically, a one-point increase in the President's DW-NOMINATE score—essentially, moving from President Obama to President George W. Bush—is associated with a 0.611-point expected increase in the CF Score of a new appointee to an advisory committee. (Recall that DW-NOMINATE uses a -1 to $+1$ scale; most CF scores range from -2 to $+2$; and both scales are liberal-to-conservative.) To put this 0.611-point difference in perspective, consider that 0.626 points separate Senator Susan Collins, a moderate Maine Republican, from Representative Debbie Wasserman Schultz of Florida, the former chair of the Democratic National Committee.¹⁷⁷

By contrast, the preferences of new advisory committee members do not appear to reflect the preferences of the current Congress or the Congress that created the committee. Indeed, the association between the current Congress's preferences and those of new advisory committee members is negative, though the estimate is imprecise, and based on Column 4 we cannot reject the null hypothesis that the effect is zero. These findings cast doubt on the notion that advisory committees act as fire-alarm monitors for the current Congress.¹⁷⁸ It would be surprising if Congress relied on individuals who do not share its ideological preferences to serve a fire-alarm function. The findings also cast doubt on the deck-stacking theory of advisory committees.¹⁷⁹ If Congress designs advisory committees to reflect the preferences of the coalition that created the committee, then these panels do not appear to be doing the job that Congress had in mind for them.¹⁸⁰

B. COMMITTEE ENGAGEMENT

Our finding that advisory committee composition reflects the ideological preferences of the sitting President provides a first piece of evidence in favor of the shallow state account. The fact that presidential administrations populate advisory committees with ideologically sympathetic individuals does not prove, though, that administrations *use* advisory committees as counterweights to career staff.

In this section, we consider whether preference divergence between presidential administrations and civil servants is associated with the creation, funding, and convening of committees. This section focuses specifically on advisory committees with a policy function—what the General Services Administration classifies as a

177. See Adam Bonica, *DIME Scores for Congressional Candidates for 1980–2018 Elections Cycles*, STAN. UNIV., https://www.dropbox.com/s/zg3x8ugbjcv4jb0/dime_cong_elections_current.csv?dl=1 [<https://perma.cc/UBW4-B9CU>] (last updated Oct. 31, 2018).

178. See *supra* notes 67–68 and accompanying text.

179. See *supra* notes 69–72 and accompanying text.

180. The fact that the GSA reports data on committee rosters by fiscal year—and some fiscal years span multiple Congresses and presidential administrations—potentially biases these estimates. Accordingly, as a robustness check, we re-ran all models, first, excluding the fiscal year that includes the start of each new presidential administration (for example, fiscal year 2017 for the Trump Administration) and, second, excluding all fiscal years in which a new Congress is seated (that is, odd-numbered fiscal years). The coefficient estimates maintained the same sign, approximate size, and significance (or lack thereof) at least at the $p < 0.10$ level.

We performed the same exclusions in every subsequent analysis reported in this Article. The results for all models were substantially similar.

“National Policy Issue Advisory Board.”¹⁸¹ To preview our results, we find correlations between White House-civil servant preference divergence and advisory committee activity. We then develop and test hypotheses to evaluate the four extant theories regarding committee engagement. These tests yield mostly null results.

1. President–Civil Servant Preference Divergence and Committee Engagement

If, as our shallow state account claims, political appointees use advisory committees as counterweights to civil servants with differing positions, then one should expect greater engagement as preference divergence between appointees and civil servants increases. To measure the preferences of civil servants in each department, we return to the survey-based ideal point estimates generated by Joshua Clinton and colleagues.¹⁸² The advantage of this measure is that—unlike other measures of federal employees’ ideologies—it distinguishes between the preferences of political appointees and civil servants, thus allowing us to use only ideal points for the latter group.¹⁸³ The drawback of this measure is that it is not dynamic. Clinton and colleagues administered their survey in 2007 and 2008, but we adopt their estimate for civil servants over fiscal years 1997–2017. Although more regularly updated estimates would be preferable, we take comfort in the fact that Clinton et al.’s estimates come from the middle of our study period, the turnover rate among federal employees is low,¹⁸⁴ and point-in-time estimates of agency ideology from different periods are strongly correlated (for example, the Defense Department remains conservative and the EPA remains liberal).¹⁸⁵

We first employ as our dependent variable the number of new policy boards created in each of sixteen cabinet departments during fiscal years 1997 through 2017.¹⁸⁶ We then estimate the following Poisson regression model:¹⁸⁷

181. The General Services Administration’s FACA Database applies the “national policy issue advisory board” label to “committees devoted to advising agencies on the implementation of National Policy Issues.” *Common Questions About Federal Advisory Committees*, GEN. SERV. ADMIN., <https://d2d.gsa.gov/report/ogp-federal-advisory-committee-act-faca-data> [<https://perma.cc/GA2C-DX4E>] (last visited Aug. 4, 2019); accord WENDY GINSBERG, CONG. RESEARCH SERV., R44232, CREATING A FEDERAL ADVISORY COMMITTEE IN THE EXECUTIVE BRANCH 5 n.28 (2016), <https://fas.org/sgp/crs/misc/R44232.pdf> (“Committees in this category advise agencies on a specific policy issue.”). Political scientist Kathleen Doherty offers a less tautological definition: these boards “propose policy solutions to an issue,” in contrast to non-scientific and “scientific technical” program advisory boards, which provide advice regarding the implementation of an existing program. Kathleen M. Doherty, *Seeking Experts or Agents of Control: The Use of Advisory Committees in Bureaucratic Policymaking* 45–46 (Sept. 3, 2013) (unpublished manuscript), https://www.vanderbilt.edu/csdi/KMD-AdComs_V.pdf [<https://perma.cc/3759-7VSZ>].

182. Clinton et al., *supra* note 135.

183. This is in contrast to other estimates that aggregate political appointees and civil servants. *See, e.g.,* Jowei Chen & Tim Johnson, *Federal Employee Unionization and Presidential Control of the Bureaucracy: Estimating and Explaining Ideological Change in Executive Agencies*, 27 J. THEORETICAL POL. 151, 162–63 (2015); Joshua D. Clinton & David E. Lewis, *Expert Opinion, Agency Characteristics, and Agency Preferences*, 16 POL. ANALYSIS 3, 6 fig.1 (2008); Richardson et al., *supra* note 137, at 304.

184. *See* Fontana & Huq, *supra* note 136, at 44.

185. *See* Richardson et al., *supra* note 137, at 307 (noting “much agreement on the relative ideology of many agencies”).

186. We collect these data from information available on the General Service Administration’s FACA Database. *See* FACA DATABASE, *supra* note 65.

$$\ln(\text{NewCommittees}_{it}) = \alpha + \beta_1 * \text{CareeristPreferences}_i \\ + \beta_2 * \text{DemPresident}_t \\ + \beta_3 * \text{CareeristPreferences}_i * \text{DemPresident}_t + \varepsilon_{it}$$

where:

- *NewCommittees_{it}* is the number of new national policy boards created in department *i* in year *t*;
- *CareeristPreferences_i* is an estimate of the ideological preferences of department *i*;
- *DemPresident_t* is a dummy variable taking the value 1 if the President in year *t* is a Democrat;
- *CareeristPreferences_i * DemPresident_t* is an interaction term; and
- *ε_{it}* is an error term for *it*, clustered at the department level.

We then repeat this analysis for two more measures of committee engagement: the inflation-adjusted amount that each cabinet department spent on advisory committees annually and the number of meetings convened by committees at each department.¹⁸⁸ Because agency heads mostly have discretion to shift funds between advisory committees and other uses, committee funding levels serve as an effective proxy for the extent to which agency heads empower committees.¹⁸⁹

Table 2 reports the results.¹⁹⁰ Our use of the interaction term *DemPresident_t* means that the estimate on *CareeristPreferences_i* reflects the relationship between careerist preferences and the dependent variable when *DemPresident_t* = 0 (that is, when the President is a Republican).¹⁹¹ The interaction term

187. Poisson regression is appropriate where, as here, the dependent variable is an event count without an upper limit and overdispersion is not present. See ANDREW GELMAN & JENNIFER HILL, DATA ANALYSIS USING REGRESSION AND MULTILEVEL/HIERARCHICAL MODELS 112 (2007). As a robustness check, we repeat all analyses using ordinary least squares regression, and the signs and significance levels of our estimates remain the same.

188. All three measures were calculated from the yearly FACA Data files available at FACA DATABASE, *supra* note 65. The number of new committees is derived from the *New Committee This FY* column; expenditures is derived from *Total Actual Committee Cost*; and the number of meetings is derived from *Committee Meeting Total*. Expenditures are converted to millions of 2016 dollars using the Bureau of Labor Statistic's Inflation Calculator. See *Databases, Tables & Calculators by Subject: CPI Inflation Calculator*, DEP'T OF LABOR, https://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/XA4P-7D4S>] (last visited Dec. 19, 2019).

Because the distribution of advisory committee meetings by department is overdispersed, we estimate a negative binomial model for all models with this dependent variable. See GELMAN & HILL, *supra* note 187, at 115. Again, we repeat all analyses using an ordinary least squares regression model and find no change to signs or significance levels.

189. See Consolidated Appropriations Act of 2017, Pub. L. No. 115-31, 131 Stat. 135 (2017) (including specific line items for only three advisory committees across the entire federal government).

190. Based on the possibility that agency budgeting may exhibit a status-quo bias, we also estimated an alternative version of Model 2 with a time-series cross-sectional model. The results were substantially similar. Cf. Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 506–07 (1998) (status-quo bias in federal budgeting).

191. See Bear F. Braumoeller, *Hypothesis Testing and Multiplicative Interaction Terms*, 58 INT'L ORG. 807, 809 (2004).

$CareeristPreferences_i * DemPresident_t$, reflects the relationship between careerist preferences and the dependent variable when $DemPresident_t = 1$. The estimate on $DemPresident_t$, though included for completeness, is not meaningful for our purposes.¹⁹² Our discussion focuses on the estimates that appear in bold.

TABLE 2: PRESIDENT–CIVIL SERVANT PREFERENCE DIVERGENCE AND COMMITTEE ENGAGEMENT

Dependent Variable	(1) <i>New Committees</i>	(2) <i>Funding</i>	(3) <i>Meetings</i>
<i>Careerist Preferences</i> (higher values=more conservative)	-1.065*** (0.277)	-2.162* (1.041)	-3.093*** (0.491)
<i>Democratic President</i>	-0.011 (0.105)	0.453 (0.364)	0.251 (0.172)
<i>Careerist Preferences * Democratic President</i>	0.737* (0.374)	1.316 (1.380)	2.470*** (0.650)

Unit of Analysis: Cabinet departments in each year. FY 1997–2017. Model: Poisson regression (Column 1), OLS (Column 2), negative binomial regression (Column 3). Pseudo R²: 0.06 (Column 1), 0.16 (Column 3); R²: 0.02 (Column 2). Observations: 357, *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$. Parentheses report standard errors clustered at the department level.

The basic conclusions from Table 2 are as follows.

- The negatively signed, statistically significant coefficient estimates for *Careerist Preferences* indicate that, during Republican administrations, more conservative civil servants in a given department are associated with the creation of fewer policy-related committees in that department, less funding allocated to policy-related advisory committees at the department, and fewer meetings of policy-related advisory committees at the department.
- The positively signed, statistically significant coefficient estimates for the interaction term in Column 1 (new committees) and Column 3 (meetings) indicate that, during Democratic administrations, more conservative civil servants in a given department are associated with *more* policy-related advisory committees being created and more meetings of those committees.
- The positively signed coefficient estimate for the interaction term in Column 2 (funding) is suggestive of higher funding levels under Democratic administrations for advisory committees at departments with more conservative careerists, but the estimate falls below conventional thresholds for statistical significance.

Because the substantive interpretation of coefficients in models with logarithmically transformed dependent variables is not intuitive, we generate simulated first differences, or differences in the expected number of new committees at set levels of each independent variable.¹⁹³

192. To be precise, the estimate on $DemPresident_t$ is the effect of a Democratic President on committee engagement when $CareeristPreferences_i = 0$.

193. We estimate quantities of interest by running one thousand simulations in Zelig using a Poisson regression model. For more information about the Zelig software, see generally Christine Choirat et al.,

We find that agencies with liberal workforces—defined in these simulations as agencies at the twenty-fifth percentile for *Careerist Preferences*—create 0.33 more policy-related advisory committees per year under a Republican President than under a Democratic President.¹⁹⁴ Given that a mean of 1.4 new policy-related committees are created per agency each year, these first differences are substantial. Consistent with the shallow state model, we also observe that agencies with conservative workforces form policy-related committees at a lower rate when a Republican occupies the White House. However, in this case the simulated first-differences estimate falls short of conventional levels of statistical significance.¹⁹⁵

Simulated first differences for Column 2 tell a similar story. Our estimates indicate that conservative agencies spend \$590,002 more on policy-related advisory committees per year in expectation when a Democrat is President than when a Republican occupies the Oval Office.¹⁹⁶ Again, the difference between Democratic and Republican administrations is substantial—approximately one-third of annual-mean spending per agency on national policy issue advisory boards.¹⁹⁷ We cannot, however, reject the null hypothesis that spending levels do not differ for liberal agencies across Democratic and Republican administrations.¹⁹⁸

The results in Column 3 provide the clearest illustration of the shallow state account in action. Simulated first differences reveal that, with a Republican President, agencies with a liberal workforce hold 14.4 more meetings, and those with a conservative workforce hold 6.8 fewer meetings, in expectation.¹⁹⁹ Note that the mean agency convenes 24.1 meetings of policy-related advisory committees per year. These estimates indicate a sharp uptick in advisory committee activity when agency careerists and the White House are ideologically at odds.

All in all, the results in Table 2 provide robust support for the claim that wider preference divergence between the President and civil servants at a given agency is associated with greater engagement of advisory committees at that agency. These results are consistent with the shallow state account, which posits that Presidents and political appointees use advisory committees as an alternative source of expertise—bypassing career civil servants—when the President’s preferences and those of civil servants are misaligned.

We next consider whether the four existing accounts of advisory committees can also help to explain committee engagement across agencies. The analyses to follow yield mostly null results, suggesting that these accounts may have limited explanatory power.

Zelig: *Everyone’s Statistical Software*, ZELIG PROJECT (2017 ed., version 5.0-15), <http://www.zeligproject.org> [<https://perma.cc/Z422-4JFF>].

194. 95% confidence interval: 0.01, 0.68.

195. For agencies at the seventy-fifth percentile for *Careerist Preferences*, we estimate 0.09 fewer committees per year under Republican Presidents versus Democratic Presidents, but we note that the 95% confidence interval spans zero (−0.38, 0.22).

196. 95% confidence interval: \$589,677, \$590,332. Figures are expressed in 2016 dollars.

197. Annual mean spending per agency is \$1,782,218. Note that this figure includes only spending on national policy issue advisory boards, not expenditures on other types of advisory committees. See *supra* note 65.

198. 95% confidence interval: −\$828,356, \$874,454.

199. 95% confidence interval for liberal agencies: 2.8, 27.5; for conservative agencies: −13.0, −1.1.

2. President–Congress Preference Divergence and Committee Engagement

In Table 3, we examine whether committee engagement is associated with preference divergence between the presidential administration and Congress. When that divergence is wide, we might expect agencies to be more likely to stray from legislators’ preferences, and we might expect lawmakers to be more watchful of administration activities. If advisory committees serve as fire-alarm monitors for Congress, we might therefore expect their activities to be intensified when the President and Congress are at odds. We measure divergence two ways: whether the White House and at least one chamber of Congress are controlled by different parties and the difference in DW-NOMINATE ideal points between the President and the median House member. (A third specification, not included in the table, measures divergence as the difference in ideal points between the President and the median senator. This model also yields null findings.)

TABLE 3: PRESIDENT–CONGRESS PREFERENCE DIVERGENCE AND COMMITTEE ENGAGEMENT

	(1)	(2)
<i>Dependent Variable: New Committees</i>		
Divided Government	0.007 (0.136)	
Ideological Distance Between President and House Median		0.419 (0.322)
<i>Dependent Variable: Committee Funding</i>		
Divided Government	0.140 (0.234)	
Ideological Distance Between President and House Median		-0.393 (0.508)
<i>Dependent Variable: Committee Meetings</i>		
Divided Government	-8.688 (11.290)	
Ideological Distance Between President and House Median		1.319 (3.691)
<u>Unit of Analysis:</u> Cabinet departments in each year during 1997–2017. <u>Notes on Independent Variables:</u> All models include department-level fixed effects. <i>Divided Government</i> is coded as a 1 when different parties control the presidency and at least one chamber of Congress. <u>Model:</u> Poisson regression (<i>DV: New Comms.</i>); OLS regression (<i>DV: Comm. Funding</i>); negative binomial regression (<i>DV: Comm. Meetings</i>). <u>Observations:</u> 357. *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$. Parentheses report standard errors clustered at the department level.		

Again, we find little support for the claim that advisory committees act as fire-alarm monitors for Congress. Coefficient estimates are inconsistently signed and all fall well below conventional thresholds for statistical significance. This finding may be unsurprising in light of our results in Table 1, which cast doubt on the reliability of advisory committee members as faithful congressional agents.

3. Agency Reputation and Committee Engagement

We next consider the claim that agencies use advisory committees for reputational purposes. In Table 4, we examine whether agencies that are publicly criticized by a respected entity in one year tend to engage more with advisory committees in the next year. If agencies create, fund, and convene advisory committees in order to boost their reputations, we might expect them to do so more after suffering a reputational hit. To operationalize public criticism, we draw on a dataset of agency critiques by agencies inspectors general, the Government Accountability Office, or the *New York Times* or *Wall Street Journal* editorial pages.²⁰⁰ This dataset includes 14,431 unique subjects—termed “agency infractions”—encompassing a wide range of regulatory implementation, enforcement, and personnel-management issues across the Executive Branch during the 1991–2012 period.²⁰¹ (We restrict our analysis to the years in which the infractions dataset and the advisory committee data overlap.)

TABLE 4: AGENCY REPUTATION AND COMMITTEE ENGAGEMENT

<i>Dependent Variable: New Committees</i>	
Infractions in Previous Year	0.007† (0.003)
<i>Dependent Variable: Committee Budget</i>	
Infractions in Previous Year	-0.002 (0.007)
<i>Dependent Variable: Committee Meetings</i>	
Infractions in Previous Year	0.063 (0.046)
Unit of Analysis: Cabinet departments in each fiscal year, 1997–2012. All models include department-level fixed effects. Model: Poisson regression (DV: <i>New Comms.</i>); OLS regression (DV: <i>Comm. Funding</i>); negative binomial regression (DV: <i>Comm. Meetings</i>). Observations: 357. *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$. Parentheses report standard errors clustered at the department level.	

200. See Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1187, 1191, 1208 (2018).

201. *Id.* at 1191. These infractions data include the subjects for over 90% of congressional oversight hearings during the 1991–2012 period, which shows that the dataset captures salient issues that some segment of the policy community deems important. See *id.* at 1210.

Only one of these coefficient estimates (for the effect of previous-year infractions on new-committee formation) approaches conventional thresholds of statistical significance, and in substantive terms, the effect is miniscule.²⁰²

Table 4 suggests that agencies do not increase their engagement with advisory committees in response to a reputational hit in the immediate *past*. But perhaps they engage with advisory committees to boost their reputation in the *future*. We tested this hypothesis in three ways. First, we assessed whether agencies' greater engagement with advisory committees is associated with fewer reported infractions in the next year. Second, we asked whether greater engagement in one year is associated with fewer congressional oversight hearings in the next year. Third, we examined whether committees that engage more with advisory committees receive budget increases in the next year. These analyses, which are reported in the Appendix, all yield null results. Engagement with advisory committees does not appear to be connected to agencies improving their reputations in the near future.

4. Agency Resources and Committee Engagement

Finally, we consider the claim that agencies turn toward advisory committees in response to resource constraints.²⁰³ Agencies may demand extra "information-processing capacity"²⁰⁴ either because their resources have decreased or because their informational requirements have increased. We use the agency's budget in the previous year as a proxy for agency resources. (Because these models include department fixed effects that provide a time-invariant intercept for each agency, the agency budget covariate effectively captures relative changes in a given agency's budget over time.) To measure the agency's information-processing requirements, we look to the agency's regulatory output: the number of regulatory restrictions on private-sector actors issued by the agency in the previous year and the total word length of these regulations.²⁰⁵ As in previous analyses, committee engagement is measured by the number of new committees created, the level of committee funding, and the number of committee meetings. Table 5 presents our results.

202. Simulated first differences using Zelig reveal that moving from an agency in which 16 infractions occurred in the previous year (that is, the 25th percentile value for this variable) to one in which forty-five infractions occurred (that is, the 75th percentile value) is expected to be associated with 0.09 new committees created in that agency during the next year. See Choirat et al., *supra* note 193 (data on file with the author).

203. See Lavertu & Weimer, *supra* note 15, at 231, 233.

204. See *id.* at 215.

205. Data on the number and length of these regulations were obtained from the Mercatus Center's QuantGov project. Patrick A. McLaughlin & Oliver Sherouse, *RegData U.S. 3.1 Full Dataset*, QUANTGOV, MERCATUS CTR. AT GEORGE MASON UNIV., https://s3.amazonaws.com/quantgov-datasets/regdata/RegData3.1/regdata_20180226-1639.zip [https://perma.cc/QUK3-G8DB] (last visited Dec. 19, 2019).

For regulations that are coded as being issued by multiple agencies, we include only the first named agency. Budget data is derived from Office of Management and Budget figures. See OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, HISTORICAL TABLES: TABLE 5.4 – DISCRETIONARY BUDGET AUTHORITY BY AGENCY: 1976–2022 (2017), <https://www.govinfo.gov/content/pkg/BUDGET-2018-TAB/xls/BUDGET-2018-TAB-6-4.xls> [https://perma.cc/WGM4-VUZC].

TABLE 5: AGENCY RESOURCES AND COMMITTEE ACTIVITY

	(1)	(2)	(3)	(4)
<i>Dependent Variable: New Committees in Current Year</i>				
Agency Budget in Previous Year	-0.00002 (0.00002)			-0.00002 (0.00002)
Number of Regulations		-0.048 (0.055)		0.366† (0.212)
Length of Regulations			-0.102 (0.066)	-0.550* (0.241)
<i>Dependent Variable: Committee Budget in Current Year</i>				
Agency Budget in Previous Year	-0.00003 (0.00004)			-0.00003 (0.00004)
Number of Regulations		-0.023 (0.105)		-0.078 (0.346)
Length of Regulations			-0.022 (0.121)	0.029 (0.392)
<i>DV: Committee Meetings in Current Year</i>				
Agency Budget in Previous Year	-0.0006 (0.002)			-0.0006 (0.002)
Number of Regulations		5.501 (5.093)		0.989 (16.993)
Length of Regulations			6.457 (5.842)	6.253 (19.303)
<u>Unit of Analysis:</u> Cabinet departments in each year, 1997–2017. <u>Notes on Independent Variables:</u> All models include department-level fixed effects. <i>Agency Budget in Previous Year</i> refers to discretionary budget authority and is measured in millions of real (2016) dollars. <i>Number of Regulations</i> is measured in tens of thousands of regulatory restrictions on private actors. <i>Length of Regulations</i> is measured in millions of words. <u>Model:</u> Poisson regression (<i>DV: New Committees</i>); OLS regression (<i>DV: Committee Funding</i>); negative binomial regression (<i>DV: Committee Meetings</i>). <u>Observations:</u> 357. *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$. Parentheses report standard errors clustered at the department level.				

Of the eighteen coefficient estimates in Table 5, only two achieve statistical significance at the $p < 0.10$ level, and those estimates—the effect of the number and length of regulations on new committees in Column 4—are inconsistently signed. Resource constraints arising from inputs (agency budget) or outputs (the number and length of regulations) have no consistent association with committee engagement. These results cast doubt on the hypothesis that agencies look to advisory committees for extra-information-processing capacity when faced with resource constraints.

All in all, our results in Tables 3–5 offer tepid support for the notion that advisory committees serve as fire-alarm monitors for Congress, that agencies turn toward advisory committees either in response to past reputational damage or to enhance their reputations in the future, or that they use advisory committees to

overcome resource constraints. The only factor consistently associated with committee engagement in our analyses is preference divergence between the President and an agency's civil servants. The clearest conclusion to emerge from our quantitative analysis, then, is that Presidents and their administrations appear to use advisory committees as counterweights to agency careerists. In the next Part, we will examine whether qualitative approaches bear out these quantitative findings.

IV. QUALITATIVE ANALYSIS

The quantitative analysis in Part III strongly supports two predictions of the shallow-state account, that: (1) the ideological composition of advisory committees will ebb and flow with the presidential administration; and (2) the President and his political appointees will utilize advisory committees most when the gap between the administration's preferences and the civil service's preferences is widest. Our quantitative findings cannot, however, tell us whether and why the shallow state operates as an *effective* check on the deep state. The key finding in Part III—that political appointees across multiple administrations have turned toward advisory committees when the administration's preferences diverged from those of agency careerists—may serve as *prima facie* evidence that advisory committees actually function as effective counterweights to the civil service. Why else, after all, would political appointees go to the trouble of empaneling and convening advisory committees if these panels did not advance their purposes? Still, a qualitative approach will assist us in uncovering the causal pathways through which advisory committees shape policy as well as the conditions under which the influence of advisory committees is likely to be most profound.²⁰⁶

We present four case studies, each involving a different agency and administration. The case studies are chosen to achieve a diversity of subjects as well as a variety of outcomes. They show how political appointees have used advisory committees as alternative sources of information when the appointees' preferences diverge from agency careerists. But, as the case studies also illustrate, the triumph of the shallow state is far from inevitable. Advisory committees sometimes find their access to information curtailed or their recommendations ignored.

A. DEFENSE ADVISORY COMMITTEE ON WOMEN IN THE SERVICES

Since its establishment by Secretary of Defense George C. Marshall in 1951, the Defense Advisory Committee on Women in the Services (DACOWITS) has played a sometimes peripheral and sometimes central role in shaping U.S. military policy toward gender integration.²⁰⁷ The committee achieved particular

206. Our approach of combining quantitative and qualitative methods follows political scientist Sidney Tarrow's call for "triangulation"—the application of quantitative and qualitative methods to the same problem. As Tarrow notes, triangulation allows researchers to add nuance to quantitative results and demonstrate the generalizability of qualitative findings. See Sidney Tarrow, *Bridging the Quantitative-Qualitative Divide in Political Science*, 89 AM. POL. SCI. REV. 471, 473–74 (1995).

207. On DACOWITS's formation and early history, see M. C. DEVILBISS, *WOMEN AND MILITARY SERVICE: A HISTORY, ANALYSIS, AND OVERVIEW OF KEY ISSUES* 10 (1990). See also *id.* at 41 (noting

prominence in the 1990s as the Clinton Administration faced the question of whether to place female servicemembers in combat positions. This section examines DACOWITS's interactions with political appointees and career officers during that episode and in the years that followed.

The controversy arose against the backdrop of a longstanding ban on women in combat positions. Prior to 1991, a statute barred women in the Air Force, Navy, and Marines from being assigned to aircraft engaged in combat missions, and women in the Navy could not be assigned to duty on vessels other than hospital ships and transports.²⁰⁸ (Women were in practice prohibited from serving in most other combat positions as well, but the broader ban was not codified.²⁰⁹) In 1991, Congress repealed the ban on women in combat aviation positions—leaving in place the prohibition that applied to vessels²¹⁰—but then-Secretary of Defense Dick Cheney left it up to the individual services to decide whether to deploy female aviators.²¹¹

Interest among Pentagon political appointees in gender integration increased after President Clinton took office and named Les Aspin, a longtime Democratic congressman from Wisconsin, to be his Defense Secretary. As a member of Congress, Aspin had been a supporter of the Equal Rights Amendment and a critic of gender-based combat exclusions.²¹² At the Pentagon, he found himself at the helm of a department where views about women in combat were mixed, with the Navy more eager to integrate women into combat roles and the Air Force and Marines more reluctant. In his first few months on the job, Aspin delayed a Navy plan to place women in combat aviation positions while he hammered out a service-wide policy.²¹³

In April 1993, DACOWITS met in Washington to consider the issue.²¹⁴ Air Force Chief of Staff General Merrill McPeak told the group that he thought it was “a mistake to open up bombers and fighters to women.”²¹⁵ The committee rejected McPeak's position. It recommended to Aspin that he direct all branches to open combat aviation positions to women immediately, that he approve the Navy's proposal to place more women on ships and patrol aircraft, and that he support legislation to repeal the remaining statutory restriction on women serving

that DACOWITS “often has been very influential,” even though “it has little *direct* power to effect change in the situation of women in the military”).

208. Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, §§ 210, 212, 307(a), 62 Stat. 356, 368-369, 373; *see also* Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 106 n.38 (2008).

209. U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-88-222, WOMEN IN THE MILITARY: MORE MILITARY JOBS CAN BE OPENED UNDER CURRENT STATUTES 2, 8 (1998).

210. National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, §§ 531(a)(1), (b)(1), 105 Stat. 1290, 1365 (1991).

211. LANA OBRADOVIC, GENDER INTEGRATION IN NATO MILITARY FORCES: CROSS-NATIONAL ANALYSIS 96 (2014).

212. *See* Hasday, *supra* note 208, at 139-40.

213. *See* Eric Schmitt, *Women Ready to Fly for Navy, or Flee It*, N.Y. TIMES, Apr. 23, 1993, at A14.

214. *See* Melissa Healy, *Aspin to Allow Women to Fly Combat Positions*, L.A. TIMES, Apr. 28, 1993, at A1 (recounting meeting); Judy Pasternak, *Sky's the Limit for Squadron*, L.A. TIMES, May 11, 1993, at A1 (same).

215. Schmitt, *supra* note 213, at A14.

on vessels.²¹⁶ Aspin adopted the substance of DACOWITS's recommendations days later.²¹⁷

Aspin resigned as Defense Secretary in December 1993,²¹⁸ but his successors in the Clinton Administration would continue to rely on DACOWITS for counsel. As William Perry (Defense Secretary from 1994 to 1997) told reporters, DACOWITS served as his "eyes and ears"—traveling to bases, speaking to military personnel and their families, "and bring[ing] back that feedback to me."²¹⁹ DACOWITS would serve a similar role under Defense Secretary William Cohen, who held the Pentagon's top post from 1997 to 2001. When a panel led by former Republican Senator Nancy Kassebaum Baker proposed that men and women be separated during basic training, DACOWITS produced its own report finding "that most members of the armed services actually want more integration of the sexes during their early months in uniform."²²⁰ Cohen, who ultimately rejected most of Kassebaum Baker's proposals and maintained gender integration in basic training, cited DACOWITS's report when announcing his decision and added that the advisory committee had "provided invaluable advice."²²¹

DACOWITS's influence was not limited to high-profile decisions, such as whether to allow women to serve in combat aviation roles or whether to segregate the sexes during basic training. As retired General James Cartwright recalls, DACOWITS "had the authority to go out and visit the commands, come up with an independent assessment of the environment for an integrated gender force, and anything that they said was not contributing to that environment the military had to fix."²²² In Cartwright's view, this "changed the incentive structure inside the military in welcoming the gender integration activity."²²³ But it also generated criticism from conservatives who felt that the committee was pushing a "feminist agenda"²²⁴ and was being used as a "tool for social engineering."²²⁵

216. DEFENSE ADVISORY COMM. ON WOMEN IN THE SERVS., DACOWITS HISTORY OF RECOMMENDATIONS - SPRING CONFERENCE 1993 (1993), <https://dacowits.defense.gov/Reports-Meetings/1993-Spring> [<https://perma.cc/LEL8-QK22>].

217. See Hasday, *supra* note 208, at 140.

218. See Eric Schmitt, *Change at the Pentagon; Aspin Resigns from Cabinet; President Lost Confidence in Defense Chief, Aides Say*, N.Y. TIMES, Dec. 16, 1993, at A1.

219. See Briefing by Secretary of Defense William Perry and Assistant Secretary for Economic Security Joshua Gotbaum Concerning the Military Housing Initiative, FED. NEWS SERV. (May 8, 1995).

220. Philip Shenon, *New Finding on Mixing Sexes in Military*, N.Y. TIMES, Jan. 21, 1998, at A12.

221. Remarks by Sec'y of Def. William S. Cohen & Gen. Henry H. Shelton, USA, Chairman, Joint Chiefs of Staff, Washington, D.C. (Mar. 15, 1998).

222. Avika Dua, *Interview: Gen. James Cartwright on the Relationship Between Presidents and Generals*, HARV. POL. REV. (Oct. 21, 2013), <https://harvardpolitics.com/interviews/interview-gen-james-cartwright-on-the-relationship-between-presidents-and-generals/> [<https://perma.cc/6M9X-8LXS>].

223. *Id.*

224. Jack Spencer, *Time to Review the Defense Advisory Committee on Women in the Services*, HERITAGE FOUND. EXEC. MEMORANDUM, no. 739, Apr. 17, 2001, at 1.

225. Ann McFeatters, *Advances by Women in Military May Have Slowed Since Gulf War*, PITTSBURGH POST-GAZETTE (Sept. 29, 2002), <http://old.post-gazette.com/nation/20020929militarywomen3.asp> [<https://perma.cc/KX6E-WFVK>].

DACOWITS receded into the background during the administration of George W. Bush. According to a critical report by the office of Congresswoman Carolyn Maloney, a New York Democrat, the new administration “effectively silenced” DACOWITS in President Bush’s first year by “canceling all meetings, conferences, and installation visits and failing to appoint a new chair.”²²⁶ Under FACA, an advisory committee’s charter can last only two years unless renewed, and in February 2002, the Defense Department allowed DACOWITS’s charter to expire for the first time in more than a half-century.²²⁷ The department reconstituted DACOWITS the following month,²²⁸ but the new charter substantially limited the committee’s resources and potential influence. The number of committee members was cut from around thirty-five during DACOWITS’s first half-century to a maximum of fifteen.²²⁹ The committee’s support staff was reduced from thirty to six.²³⁰ The new charter also narrowed the committee’s scope significantly: before, it had advised the Defense Secretary “on the full range of matters relating to women in the services,” now it was limited to advising on matters “specified” by Defense Department officials.²³¹ Meetings and base visits were scaled back as well.²³² By the end of Bush’s second term, according to one scholar, the committee “had been allowed to almost disappear,” and only five of its positions were occupied.²³³

The partisan cycle continues. The Obama Administration announced during its first term that it would expand DACOWITS,²³⁴ and by President Obama’s last full year in office, the committee’s charter authorized twenty positions, nineteen of which were filled.²³⁵ Since President Trump took office, the committee’s estimated budget has decreased by nearly ten percent,²³⁶ and the number of positions filled has decreased by three.²³⁷ To be sure, the scaling back of DACOWITS under the Trump Administration has been less dramatic than under President George W. Bush. Still, DACOWITS’s activities reflect an ebb-and-flow pattern,

226. OFFICE OF CONGRESSWOMAN CAROLYN B. MALONEY, *THE DOWNGRADING OF DACOWITS: HOW PRESIDENT BUSH HAS FAILED AMERICA’S WOMEN IN UNIFORM* 5 (2004).

227. See Obradovic, *supra* note 211, at 100. Conservative groups initially celebrated the charter expiration. See, e.g., *Demise of DACOWITS*, CTR. FOR MILITARY READINESS (Apr. 15, 2002), <https://www.cmrlink.org/issues/full/demise-of-the-dacowits> [<https://perma.cc/32PT-R6NJ>].

228. See *Demise of DACOWITS*, *supra* note 227.

229. OFFICE OF CONGRESSWOMAN CAROLYN B. MALONEY, *supra* note 226.

230. *Id.* at 6.

231. *Id.* at 6.

232. *Id.* at 5, 7.

233. Obradovic, *supra* note 211, at 100.

234. Michele S. Jones, *Advisory Committee Expanded to Meet the Needs of Women in the Armed Forces*, WHITE HOUSE BLOG (June 11, 2010, 12:31 PM), <https://obamawhitehouse.archives.gov/blog/2010/06/11/advisory-committee-expanded-meet-needs-women-armed-forces> [<https://perma.cc/U58H-SZYA>].

235. U.S. DEP’T OF DEF., *DEFENSE ADVISORY COMMITTEE ON WOMEN IN THE SERVICES (DACOWITS)*, 2016 ANNUAL REPORT app. at A-2, C-1–C-13 (2016).

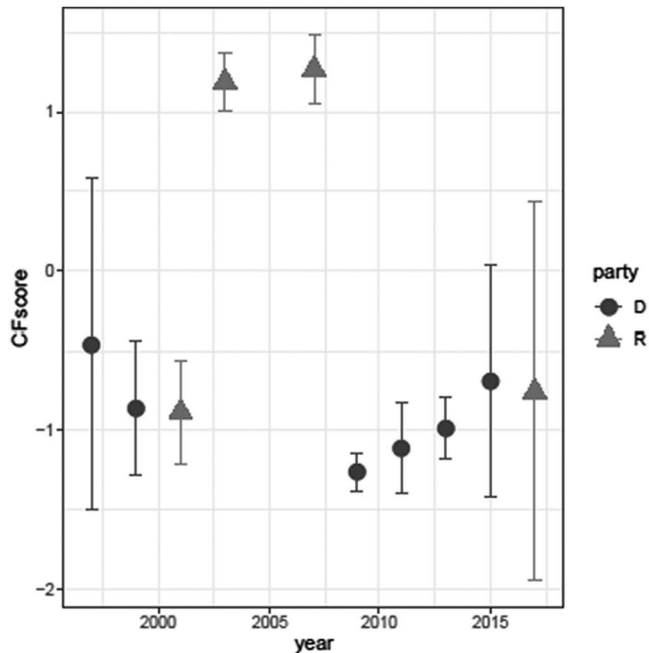
236. Compare *id.* at A-2 (\$975,000), with U.S. DEP’T OF DEF., *DEFENSE ADVISORY COMMITTEE ON WOMEN IN THE SERVICES (DACOWITS)*, 2018 ANNUAL REPORT app. at A-1 (2018) (\$900,000).

237. See U.S. DEP’T OF DEF., *DEFENSE ADVISORY COMMITTEE ON WOMEN IN THE SERVICES (DACOWITS)*, *supra* note 236, app. at C-1–C-14.

with a larger role for the committee under recent Democratic administrations than under recent Republican administrations.

The ideological orientation of the committee’s members also tracks that of the party in power. Figure 3 displays the median CF Scores for newly appointed DACOWITS members during fiscal years 1997 through 2017. (Recall that CF Scores are ideological preference estimates based on individuals’ records of political contributions. The scores are aligned on a -2 to 2 , liberal-to-conservative scale.) Each two-year span (for example, FY 2013–2014) is consolidated as a mark placed at the latter year.²³⁸ When no new appointees were seated on DACOWITS during a given two-year window, no mark is placed.

Figure 3: New Appointees to DACOWITS



The figure tends to show that new DACOWITS members are more liberal during Democratic administrations and more conservative during Republican administrations. That appointees during the first years of the George W. Bush and Trump Administrations do not differ materially from their immediate predecessors’ appointees may suggest that cleaning house at DACOWITS is not the

238. For ease of interpretation, the years of Democratic control are denoted as circles, and the years of Republican control are denoted as triangles. The bars emanating from each mark signify one median absolute deviation both above and below the median. Also, note that fiscal years, which run from October 1 through September 30, do not align with presidential transitions, which during this period occurred on January 20 of 2001, 2009, and 2017.

first priority for incoming Republican defense secretaries, though they ultimately do so.

The DACOWITS saga both tracks the shallow state model and sheds light on its dynamics. Career officials at the Defense Department and the individual armed services are, according to the estimates above from Professor Clinton and his collaborators,²³⁹ the most conservative careerists anywhere in the Executive Branch. The preference divergence between political appointees and career officials at the Defense Department is thus likely to be largest in a Democratic administration. Indeed, those are exactly the times when we see DACOWITS play a significant role in shaping military gender integration policy. The DACOWITS case study also highlights that advisory committees can do more than provide technical expertise. Through meetings across the country with individuals and groups affected by administration policies, advisory committee members act as force multipliers, and, in Secretary Perry's words, additional "eyes and ears," for political appointees whose own time and attention are divided among an array of issues.²⁴⁰

B. CENTERS FOR DISEASE CONTROL ADVISORY COMMITTEE ON CHILDHOOD LEAD POISONING PREVENTION

The interactions among Bush Administration appointees, career civil servants at the Centers for Disease Control and Prevention (CDC), and advisory committee members during the early 2000s childhood lead poisoning controversy present—if anything—a starker illustration of the shallow state model in action than the DACOWITS case study above. The controversy centered around the Advisory Committee on Childhood Lead Poisoning Prevention, a panel formed by the U.S. Department of Health and Human Services (HHS) to advise the HHS Secretary, Assistant Secretary for Health, and Director of the CDC on scientific issues related to lead in children.²⁴¹ In 1991, acting on the advisory committee's recommendation, the CDC established a new threshold intervention level for childhood lead poisoning: 10 micrograms per deciliter, significantly below the previous threshold of 25 micrograms per deciliter.²⁴² With mounting evidence that lead levels below 10 micrograms per deciliter posed health risks to children, a senior scientist at the CDC told reporters a year and a half into President

239. See *supra* Figure 1.

240. See *supra* note 219.

241. See U.S. DEP'T OF HEALTH & HUM. SERVS., PUB. HEALTH SERV., CTRS. FOR DISEASE CONTROL & PREVENTION, CHARTER: ADVISORY COMMITTEE ON CHILDHOOD LEAD POISONING PREVENTION (2011), https://www.cdc.gov/nceh/lead/ACCLPP/ACCLPP_2011_charter-Web.pdf [<https://perma.cc/K63B-EMDH>]. The committee's most recent charter expired in October 2013. See *Advisory Committee on Childhood Lead Poisoning Prevention (ACCLPP)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nceh/lead/advisory/acclpp.htm> [<https://perma.cc/X8T7-V7LH>] (last reviewed July 30, 2019). The CDC is an agency within HHS.

242. See CTRS. FOR DISEASE CONTROL & PREVENTION, PREVENTING LEAD POISONING IN YOUNG CHILDREN (Oct. 1, 1991), <https://wonder.cdc.gov/wonder/prevguid/p0000029/p0000029.asp> [<https://perma.cc/8UVH-T8CU>]; see also Martha Shirk, *Lead Standard to Have Big Impact*, ST. LOUIS POST-DISPATCH, Aug. 4, 1991, at 1A (discussing advisory committee's influence on CDC standard).

George W. Bush's first term that the advisory committee was likely to recommend a lower threshold and that the CDC was likely to follow that advice.²⁴³

President Bush's HHS Secretary, Tommy Thompson, responded promptly. Secretary Thompson rejected three nominees who had been proposed for the advisory panel by CDC officials,²⁴⁴ including one well-known public health expert who had recently published a paper in a peer-reviewed journal concluding that blood lead concentrations below 5 micrograms per deciliter were associated with deficits in cognitive functioning and academic achievement.²⁴⁵ Instead, Thompson appointed a clinical professor of pediatrics who had served as an expert witness for manufacturers in lead paint litigation²⁴⁶ as well as a pediatric hematologist who acknowledged that his name had been chosen by "someone from the lead industry."²⁴⁷ Another one of Thompson's nominees, a scientist at an environmental consulting firm, withdrew after then-Congressman Ed Markey, a Massachusetts Democrat, revealed that ten of the firm's clients had recently reported releases of lead or lead compounds into the air, land, or surface waters.²⁴⁸

The reconstituted advisory committee published its final report in 2005. Although acknowledging "adverse health effects in children with blood levels less than [10 micrograms per deciliter]," the committee recommended against lowering the intervention threshold.²⁴⁹ The committee cited several factors supporting this recommendation. First, the committee said that it was "critical to focus available resources where the potential adverse effects remain the greatest," which would be at blood lead levels above 10 micrograms per deciliter. Second, it said that "[i]f no threshold level exists for adverse health effects," setting a new level below 10 micrograms per deciliter would be "based on an arbitrary decision."²⁵⁰ Finally, the committee said that the "feasibility and effectiveness" of interventions to address blood lead levels below 10 micrograms per deciliter had "not been demonstrated."²⁵¹

The committee's report supplied the Bush Administration's HHS with the arguments it needed to delay action on lead levels, but after President Obama

243. See Bill Lambrecht, *U.S. Weighs Lowering Acceptable Lead Level in Children*, ST. LOUIS POST-DISPATCH, July 8, 2002, at A1 (quoting Dr. Richard Jackson, director of the CDC's National Center for Environmental Health).

244. See GERALD MARKOWITZ & DAVID ROSNER, *LEAD WARS: THE POLITICS OF SCIENCE AND THE FATE OF AMERICA'S CHILDREN* 224–25 (2013).

245. See Bruce P. Lanphear et al., *Cognitive Deficits Associated with Blood Lead Concentrations <10 Microg/dl in US Children and Adolescents*, 115 PUB. HEALTH REP. 521, 528 (2000).

246. See MARKOWITZ & ROSNER, *supra* note 244, at 225.

247. See Aaron Zitner, *Advisors Put Under a Microscope*, L.A. TIMES, Dec. 23, 2002, at A1.

248. See Gerald Markowitz & David Rosner, *Politicizing Science: The Case of the Bush Administration's Influence on the Lead Advisory Panel at the Centers for Disease Control*, 24 J. PUB. HEALTH POL'Y 105, 117, 127 n.39 (2003).

249. CTRS. FOR DISEASE CONTROL & PREVENTION, *ADVISORY COMM. ON CHILDHOOD LEAD POISONING PREVENTION, PREVENTING LEAD POISONING IN YOUNG CHILDREN*, at ix (2005).

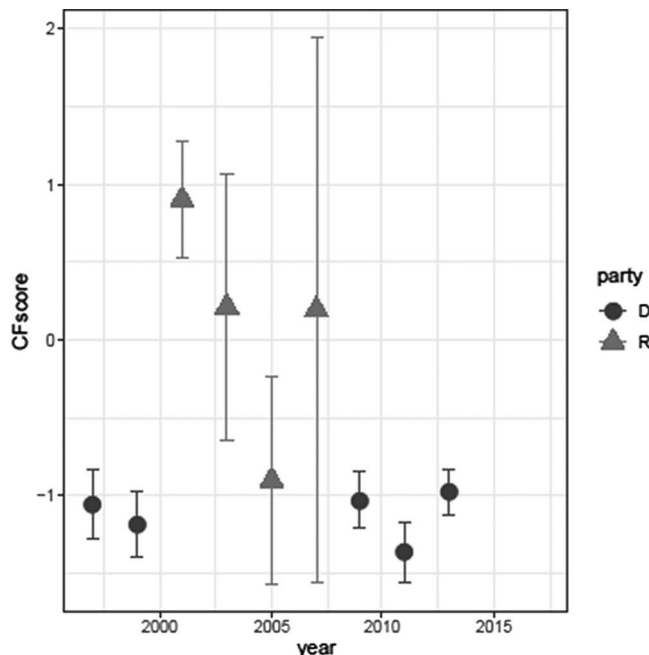
250. *Id.*

251. *Id.*

took office, the agency reversed course. In 2012, HHS adopted the advisory committee's recommendation to lower the blood lead level standard for children from 10 micrograms per deciliter to 5 micrograms per deciliter.²⁵² By this point, the Thompson appointees no longer served on the panel.²⁵³

Once again, CF scores for appointees track the partisan ebb-and-flow narrative, as illustrated in Figure 4.²⁵⁴

Figure 4: New Appointees to the Advisory Committee on Childhood Lead Poisoning Prevention



The story of the Advisory Committee on Childhood Lead Poisoning Prevention appears to be a straightforward case of the shallow state model in action. The Bush Administration—with its ideological inclination against stricter

252. Anemona Hartocollis, *C.D.C. Lowers Recommended Lead-Level Limits in Children*, N.Y. TIMES, May 16, 2012, at A24; see CTRS. FOR DISEASE CONTROL & PREVENTION, ADVISORY COMM. ON CHILDHOOD LEAD POISONING PREVENTION, LOW LEVEL LEAD EXPOSURE HARMS CHILDREN: A RENEWED CALL FOR PRIMARY PREVENTION 6 (2012). The CDC also followed the advisory committee's recommendation to shift from setting "blood lead levels of concern" to identifying "reference values." *Id.* at ix, 5. A blood lead level above the reference value "should trigger an environmental investigation to evaluate potential sources of exposure." *Id.* at 43.

253. CTRS. FOR DISEASE CONTROL & PREVENTION, ADVISORY COMM. ON CHILDHOOD LEAD POISONING PREVENTION, *supra* note 252, at iv-v.

254. As before, the median CF Score for each two-year span is represented by a mark placed at the later year. The bars emanating signify one median absolute deviation both above and below the median. When no new appointees were seated during a given two-year period, no mark is placed.

regulation²⁵⁵ and ties to the lead industry²⁵⁶—found itself at odds with CDC officials who wanted to lower the blood lead level of concern. It responded by adding sympathetic experts to an advisory committee, who in turn produced a report that supplied the administration with reasons to resist regulation. Here, the shallow state did its job.

C. IMMIGRATION AND CUSTOMS ENFORCEMENT ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS

In late 2013 and early 2014, the United States experienced a sudden increase in the number of children and families attempting to cross its southern border with Mexico. The number of unaccompanied children apprehended at the border increased by seventy-seven percent in fiscal year 2014 (October 2013 to September 2014) over the previous twelve months, and the number of families increased more than threefold.²⁵⁷ The Obama Administration responded by opening family detention centers in Texas and Pennsylvania—reviving a controversial and largely abandoned practice.²⁵⁸ It soon came under criticism from academics,²⁵⁹ human rights advocates,²⁶⁰ and congressional Democrats,²⁶¹ all of whom warned about the long-term effects of detention-related trauma on children. A federal district judge in Los Angeles ruled that the Obama Administration’s policy violated a 1997 consent decree and ordered the Department of Homeland Security (DHS) to release children “without unnecessary delay,” which, in many cases, meant releasing parents who had been detained with children.²⁶² DHS was slow to implement the order, and criticism of the administration continued.²⁶³

255. See, e.g., Kevin Drum, *Bush and Lead*, WASH. MONTHLY (Mar. 5, 2004), <https://washingtonmonthly.com/2004/03/05/bush-and-lead> [<https://perma.cc/LNT8-9NA6>].

256. See, e.g., Markowitz & Rosner, *supra* note 248, at 123 (noting Bush Interior Secretary Gale Norton’s past as a lobbyist for the lead industry).

257. See Dara Lind, *The 2014 Central American Migrant Crisis*, VOX (Oct. 10, 2014), <https://www.vox.com/2014/10/10/18088638/child-migrant-crisis-unaccompanied-alien-children-rio-grande-valley-obama-immigration> [<https://perma.cc/K366-V37E>].

258. See Franco Ordoñez, *U.S Looks to Detain More Mother, Child Migrants, Sometimes for Months*, MCCLATCHY DC (Feb. 10, 2015), <https://www.mcclatchydc.com/news/nation-world/national/article/24779941.html> [<https://perma.cc/F7PS-J6F8>].

259. See, e.g., Alfonso Gonzales et al., *Why We Need to End Family Detention—Again*, POLITICO MAG. (Mar. 30, 2015), <https://www.politico.com/magazine/story/2015/03/family-detention-centers-border-crisis-116521> [<https://perma.cc/5JCS-6A6L>].

260. See, e.g., HUMAN RIGHTS FIRST, U.S. DETENTION OF FAMILIES SEEKING ASYLUM: A ONE-YEAR UPDATE 1 (2015), <http://www.humanrightsfirst.org/sites/default/files/hrf-one-yr-family-detention-report.pdf> [<https://perma.cc/93JM-D5JK>].

261. See Letter from Rep. Zoe Lofgren et al. to Sec’y Jeh Johnson, U.S. Dep’t of Homeland Security (July 31, 2015), https://lofgren.house.gov/sites/lofgren.house.gov/files/migrated/UploadedFiles/DHS_Family_Detention_Letter_7.31.15.pdf [<https://perma.cc/F9GQ-AK9G>].

262. See *Flores v. Johnson*, 212 F. Supp. 3d 864, 886–87 (C.D. Cal. 2015), *aff’d in part and rev’d in part*, 828 F.3d 898 (9th Cir. 2016).

263. See Dora Schriro, *Weeping in the Playtime of Others: The Obama Administration’s Failed Reform of ICE Family Detention Practices*, 5 J. MIGRATION & HUMAN SEC. 452, 464 (2017).

In June 2015, DHS Secretary Jeh Johnson announced that he and Immigration and Customs Enforcement (ICE) Director Sarah Saldaña would appoint an advisory committee to counsel DHS regarding family detention facilities.²⁶⁴ The fourteen individuals appointed to the Advisory Committee on Family Residential Centers (ACFRC) included two physicians, several more public health experts, four law school faculty members, and a former Democratic congressman.²⁶⁵ The ACFRC did not, incidentally, include anyone identifiably associated with the Republican Party.²⁶⁶ Of the ten members who have made campaign contributions captured by the Federal Election Commission database, all have given exclusively to Democrats, generating a median CF score of -1.097 .²⁶⁷ The other four included a senior researcher at a San Francisco education nonprofit,²⁶⁸ an immigrant rights advocate,²⁶⁹ an official at the American Academy of Pediatrics,²⁷⁰ and a Washington, D.C.-based criminal justice consultant with a specialty in prison rape elimination strategy.²⁷¹

The committee clashed repeatedly with ICE careerists. According to one committee member, ICE sought to prohibit discussion on certain sensitive topics and curtailed the committee's access to documents that members needed in order to carry out their charge.²⁷² The committee, therefore, looked to other sources—including information from nongovernmental organizations, federal court filings, and individual members' experiences—in writing its final report.²⁷³ The report was highly critical of ICE policies and practices. The committee said that ICE was applying "different and arbitrary" criteria for the release of mothers with children and fathers with children "with insufficient justification."²⁷⁴ It questioned ICE's "commitments to mitigating psychological trauma and creating a

264. Press Release, U.S. Dep't of Homeland Sec., Statement by Secretary Jeh C. Johnson on Family Residential Centers (June 24, 2015), <https://www.dhs.gov/news/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers> [https://perma.cc/BV2Y-8F4N].

265. U.S. DEP'T OF HOMELAND SEC., REPORT OF THE ICE ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS app. at 154 (Oct. 7, 2016) [hereinafter ACFRC REPORT], <https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf> [https://perma.cc/YMJ2-ZSDG].

266. *See id.*

267. Those nine are: William Arroyo, Howard Berman, Karen Musalo, Jennifer Nagada, Leslye Orloff, Sonia Parras-Konrad, Andres Pumariaga, Margo Schlanger, Dora Schriro, and Kurt Schwarz.

268. *See About Us—Staff—BethAnn Berliner*, WESTED, <https://www.wested.org/personnel/bethann-berliner> [https://perma.cc/9BY4-QWZT] (last visited July 26, 2019).

269. *See Our Staff—Michelle Brané*, WOMEN'S REFUGEE COMM'N, <https://www.womensrefugee.commission.org/about/staff/173-migrant-rights-justice/1791-michelle-brane> [https://perma.cc/U3DT-RP7T] (last visited July 26, 2019).

270. *See Executive Staff*, AM. ACAD. OF PEDIATRICS, <https://www.aap.org/en-us/about-the-aap/aap-leadership/Pages/Executive-Staff.aspx> [https://perma.cc/39G3-LL6F] (last visited July 26, 2019) (Judy Dolins).

271. *See The TMG Team*, MOSS GROUP, INC., <https://www.mossgroup.us/who-we-are/tmg-team> [https://perma.cc/3PKW-BDS2] (last visited July 26, 2019) (Andie Moss).

272. Schriro, *supra* note 263, at 465.

273. *See ACFRC REPORT*, *supra* note 265, at 1–2.

274. *Id.* at 16.

safe residential environment.”²⁷⁵ It criticized the lack of “cultural competence” among ICE staff.²⁷⁶ And it blasted the agency’s unwillingness to disclose “basic information” about detainees that state and local agencies “routinely” provide.²⁷⁷ The committee called for a prompt end to family detention except in “rare cases when necessary . . . to mitigate individualized flight risk or danger.”²⁷⁸

The advisory committee approved its final report in October 2016, just weeks before Donald Trump’s election. Far from following the committee’s recommendations, the Trump Administration adopted an explicit policy of family detention.²⁷⁹ Perhaps unsurprisingly, the Trump Administration never convened a committee meeting and has allowed the committee’s charter to expire.²⁸⁰

In the last respect, the ACFRC story is broadly consistent with the shallow state model. The careerists at the Homeland Security Department are among the most conservative civil servants in the Executive Branch,²⁸¹ and policy toward families crossing the border has proven to be particularly polarizing. Preference divergence between political appointees and civil servants—especially on this issue—was likely greater under the Obama Administration than under the Trump Administration, and the former, but not the latter, utilized ACFRC in response to that preference divergence. Equally importantly, the ACFRC case study highlights the shallow state’s principal weaknesses. Advisory committee members’ access to information depends in part on the cooperation of careerists, who may have an incentive to stonewall. And although advisory committee members can sometimes play a role in policy implementation—as in the DACOWITS case discussed above²⁸²—that role is circumscribed by resource constraints and a lack of formal authority.

D. ENVIRONMENTAL PROTECTION AGENCY CLEAN AIR SCIENTIFIC ADVISORY COMMITTEE

The prior three case studies show how political appointees in the last three administrations have attempted to use advisory committees as counterweights to careerists—with varying degrees of success. The pattern continues under the Trump Administration. Activists and media organizations have noted a number of instances in which the Administration appears to have stacked advisory

275. *Id.* at 26.

276. *Id.* at 36.

277. *Id.* at 39.

278. *Id.* at 2.

279. See Dara Lind, *It’s Official: The Trump Administration Has Replaced Family Separation with Indefinite Family Detention*, VOX (June 30, 2018), <https://www.vox.com/2018/6/30/17520820/families-together-detention-separate-camp-military> [<https://perma.cc/4X8N-RYKZ>].

280. See *Meetings, Advisory Committee on Family Residential Centers (ACFRC)*, IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/acfrc> [<https://perma.cc/QMQ8-3QVA>] (last updated Jan. 3, 2018).

281. See *supra* Figure 1.

282. See *supra* Section IV.A.

committees with ideological allies—including at the State Department,²⁸³ the Agriculture Department,²⁸⁴ and the Interior Department.²⁸⁵ But no agency has drawn more attention—or uproar—than the EPA, where changes to the composition of the Clean Air Scientific Advisory Committee (CASAC) have elicited concerns from environmentalists as well as congressional Democrats.²⁸⁶

Unlike the three committees in the prior case studies—all of which were established by agency initiatives—CASAC is a creature of Congress’s creation. The Clean Air Act Amendments of 1977 mandate that the EPA review its national primary and secondary ambient air quality standards every five years, and the statute requires the EPA Administrator to appoint and consult a seven-member “independent scientific review committee” as part of its quinquennial process.²⁸⁷ The statute also sets forth specific criteria for committee membership: the panel must include at least one member of the National Academy of Sciences, one physician, and one person representing state air pollution control agencies.²⁸⁸ An accompanying report from the House Committee on Interstate and Foreign Commerce notes that committee members “anticipated” that all seven members would be “selected on the basis of their special expertise in . . . toxicology, epidemiology

283. Two State Department advisory committees have become flashpoints for controversy: the Commission on Unalienable Rights, *see* Tim Fitzsimons, *Trump Administration’s New Human Rights Commission Alarms LGBTQ Advocates*, NBC NEWS (July 10, 2019, 7:20 PM), <https://www.nbcnews.com/feature/nbc-out/trump-administration-s-new-human-rights-commission-alarms-lgbtq-advocates-n1028276> [<https://perma.cc/HSG9-EK5P>], and the Cultural Property Advisory Committee, where the one Native American member was replaced by a campaign finance lawyer whose clients include the Trump Organization, *see* Maxine Speier, *Trump Removed the Only Native American Member from the Cultural Property Advisory Committee*, PAC. STANDARD (July 17, 2019), <https://psmag.com/news/trump-removed-the-only-native-american-member-from-the-cultural-property-advisory-committee> [<https://perma.cc/ZC84-T8ZH>].

284. The Union of Concerned Scientists has charged that the 2020 Dietary Guidelines Advisory Committee, which counsels Agriculture Department as well as HHS on their once-every-half-decade update to nutritional standards, is heavily weighted toward meat and supplement industry interests. *See* Derrick Z. Jackson, *Food Companies at the Table in Trump Administration’s Dietary Guidelines Committee*, UNION OF CONCERNED SCIENTISTS: BLOG (Apr. 1, 2019, 11:02 AM), <https://blog.ucsusa.org/derrick-jackson/trump-administrations-dietary-guidelines-committee> [<https://perma.cc/63JY-HTDC>].

285. An environmental organization filed a lawsuit in August 2018 challenging the establishment and operation of the Royalty Policy Committee, a panel advising the Interior Department, which the plaintiff group said was tilted toward oil and gas industry interests; a district court dismissed the challenge to the panel’s composition but allowed other FACA claims to proceed. *See* W. Org. of Res. Councils v. Bernhardt, 362 F. Supp. 3d 900, 904, 916 (D. Mont. 2019). The Interior Department allowed the committee’s charter to expire in April 2019. *See* Nate Hegyi, *Trump Administration Abandons Controversial Oil and Gas Advisory Committee*, KUER: MOUNTAIN WEST NEWS BUREAU (May 1, 2019), <https://www.kuer.org/post/trump-administration-abandons-controversial-oil-and-gas-advisory-committee#stream/0> [<https://perma.cc/6TX3-83N3>].

286. *See* Press Release, Env’tl. Def. Fund, House Hearing Highlights New GAO Finding that Trump EPA Interfered in Selection of Science Advisors (July 16, 2019), <https://www.edf.org/media/house-hearing-highlights-new-gao-finding-trump-epa-interfered-selection-science-advisors> [<https://perma.cc/AT62-DK5G>].

287. 42 U.S.C. § 7409(d)(1)–(2) (2012).

288. *Id.* § 7409(d)(2)(A).

and/or clinical medicine, or in the fields of environmental or ecological systems.”²⁸⁹ The report adds that the committee is “intended to have complete independence.”²⁹⁰

Since its creation, CASAC has played an important role in developing national ambient air quality standards, participating at several stages of the process. For each pollutant subject to an air quality standard, the five-year review entails a structured sequence in which civil servants issue four technical reports, culminating in a determination by the EPA Administrator to retain or revise the current standards.²⁹¹ The proposed rule then is subject to several rounds of interagency review and public comment. Following the issuance of each draft report, CASAC has an opportunity to provide input, which civil servants then seek to integrate into the final version.²⁹² At the end of the process, the EPA Administrator can review the full paper trail detailing the back-and-forth between CASAC and civil servants.²⁹³

The critique from environmentalists and congressional Democrats that the Trump Administration has stocked CASAC with its ideological allies is in some ways unsurprising; CASAC’s membership has long reflected the political orientation of the party in power. Figure 5 displays the now-familiar median CF scores for new committee members appointed between fiscal years 1997 and 2017. As the figure shows, CASAC evidences a liberal orientation during the Clinton Administration, shifts rightward during the George W. Bush years, and then reverts to its liberal posture during Obama’s presidency.

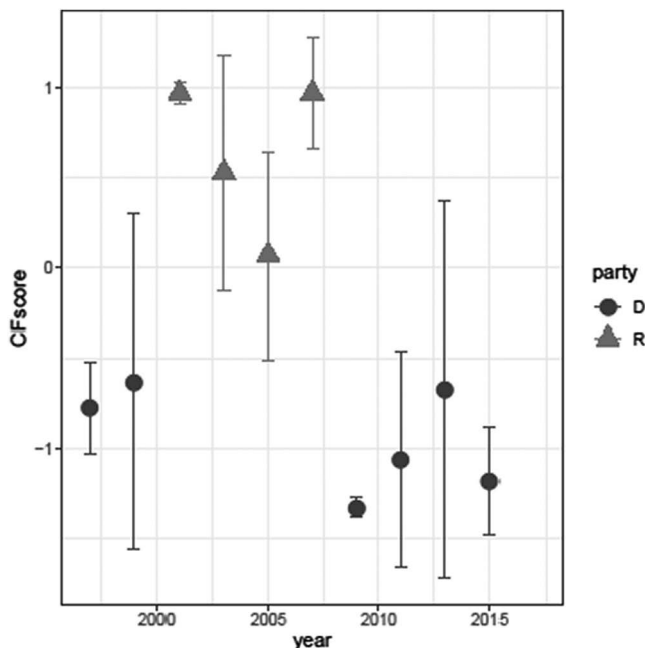
289. H.R. REP. NO. 95-294, at 183 (1977).

290. *Id.* at 182.

291. *See Process of Reviewing the National Ambient Air Quality Standards*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/criteria-air-pollutants/process-reviewing-national-ambient-air-quality-standards> [<https://perma.cc/5W23-T876>] (last visited July 28, 2016). These reports are: an integrated review plan, integrated science assessment, risk/exposure assessment, and policy assessment, and each report is submitted at least once to CASAC for review. *Id.* The reports are produced by civil servants deep in the agency’s hierarchy: the National Center for Environmental Assessment (a sub-unit within the Office of Research and Development) produces the integrated science assessment; the Office of Air Quality Planning and Standards (a sub-unit within the Office of Air and Radiation) produces the risk/exposure assessment and the policy assessment; and the two collaborate on the integrated review assessment that kicks off the process. *See, e.g.*, ENVTL. PROT. AGENCY, DRAFT INTEGRATED REVIEW PLAN FOR THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR PARTICULATE MATTER 1-6 to 1-7 (2016). Both the National Center for Environmental Assessment and the Office of Air Quality Planning and Standards are headed by career civil servants. S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 114TH CONG., 2D SESS., UNITED STATES GOVERNMENT: POLICY AND SUPPORTING POSITIONS 158 (Comm. Print 2016); *About the Director of EPA’s National Center for Environmental Assessment (NCEA)*, ENVTL. PROTECTION AGENCY, https://19january2017snapshot.epa.gov/aboutepa/about-director-epas-national-center-environmental-assessment-ncea_.html [<https://perma.cc/8CK4-BTRT>] (last visited July 28, 2019).

292. *See* ENVTL. PROT. AGENCY, DRAFT INTEGRATED REVIEW PLAN FOR THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR PARTICULATE MATTER, *supra* note 291, at 1–5 tbl.1-1.

293. *Id.*

Figure 5: New Appointees to CASAC

Nevertheless, interactions between EPA civil servants and Republican-appointed CASAC members have not always been conflictual. Sheila Jasanoff, reflecting on CASAC's role in the Reagan years, wrote that the committee had "established a fundamentally sympathetic working relationship with agency staff."²⁹⁴ Although the George W. Bush Administration added members to CASAC whose campaign contributions suggest a more conservative bent than the generally liberal EPA staff (see Figure 5), CASAC members and EPA civil servants nonetheless found themselves on the same side of standard-setting debates.²⁹⁵

294. JASANOFF, *supra* note 5, at 121.

295. For example, CASAC and EPA staff both proposed more stringent standards for fine particulate matter (PM_{2.5}) early in President Bush's second term. See ROBERT ESWORTHY & JAMES E. MCCARTHY, CONG. RESEARCH SERV., RL33254, AIR QUALITY: EPA'S 2006 CHANGES TO THE PARTICULATE MATTER (PM) STANDARDS 18 (2008). And both suggested a primary ozone standard as low as sixty parts per billion in 2007. See ENVTL. PROT. AGENCY, EPA-452/R-07-007, REVIEW OF THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR OZONE: POLICY ASSESSMENT OF SCIENTIFIC AND TECHNICAL INFORMATION 6-86 (2007) (staff recommendation); *id.* at attachment B, at 2 (CASAC recommendation); see also Bob Weinhold, *Ozone Nation: EPA Standard Panned by the People*, 116 ENVTL HEALTH PERSP. A302 (2008) (noting general agreement between CASAC and agency staff). In both cases, EPA Administrator Stephen Johnson rejected the advice of CASAC and the EPA careerists, choosing a less stringent standard for PM_{2.5} and setting the primary ozone level at seventy-five parts per billion. See ESWORTHY & MCCARTHY, *supra* at 17-18; see also Shahrzod Hanizavareh, *Affirming the Status Quo? Regulating the National Ambient Air Quality Standards for Ozone*, 36 ECOLOGY L.Q. 559, 602-03 (2009).

CASAC returned to the limelight after President Trump took office, and this time, its interactions with political appointees and agency staff have been much more in line with the shallow state model. President Trump's first EPA Administrator, Scott Pruitt, immediately and unsurprisingly found himself at odds with the agency's career staff. Pruitt's official biography on the Oklahoma Attorney General website described him as "a leading advocate against the EPA's activist agenda,"²⁹⁶ and EPA careerists were none too happy about their new boss. One retiring EPA official described "staff openly dismissing and mocking the environmental policies" of the Trump Administration and Pruitt.²⁹⁷ The president of a union representing over 9,000 EPA civil servants charged that "Pruitt's assault on clean air risks our ability to safeguard children's health" and "address climate change."²⁹⁸

Unlikely to find support from EPA career staff in implementing his deregulatory agenda, Pruitt turned to CASAC and other similar panels for advice and expertise—exactly as the shallow state model would predict. He began by making several changes to the panel's membership. In October 2017, he chose Tony Cox—a private-sector consultant whose past clients include Exxon Mobil and the American Petroleum Institute²⁹⁹—to chair the panel, replacing a well-known

To the extent that CASAC clashed with anyone during the George W. Bush years, it was with EPA Administrator Johnson rather than with the agency rank-and-file. Johnson even considered curtailing CASAC's role in the standard-setting process by eliminating the committee's ability to give input on the civil servants' last report before publication. *See* ESWORTHY & MCCARTHY, *supra* at 2. EPA Administrators Scott Pruitt and Andrew Wheeler would ultimately adopt this proposal under President Trump. *See* Letter from Andrew R. Wheeler, Adm'r, Env'tl. Prot. Agency, to Louis Anthony Cox, Jr., Chair, Clean Air Scientific Advisory Comm. 2 (July 25, 2019) [hereinafter Wheeler Letter], [https://yosemite.epa.gov/sab/sabproduct.nsf/0/6CBCB3025E13B4852583D90047B352/\\$File/EPA-CASAC-19-002_Response.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/0/6CBCB3025E13B4852583D90047B352/$File/EPA-CASAC-19-002_Response.pdf) [<https://perma.cc/TD2E-EFQY>] (calling for "simultaneous review" of EPA policy assessment by CASAC and public); Memorandum from E. Scott Pruitt, Adm'r, Env'tl. Prot. Agency, to Ass't Adm'rs, Back-to-Basics Process for Reviewing National Ambient Air Quality Standards 9, 10 fig.1 (May 9, 2018), <https://www.epa.gov/sites/production/files/2018-05/documents/image2018-05-09-173219.pdf> [<https://perma.cc/6KJV-2USB>].

Johnson's clashes with CASAC are especially interesting because Johnson himself was a veteran EPA scientist who was respected among environmentalists prior to his appointment, despite his promotion by a deregulatory Republican administration. *See* Felicity Barringer, *E.P.A. Scientist Is Bush's Pick as New Chief*, N.Y. TIMES, Mar. 5, 2005, at A1.

296. *About the Attorney General*, OK.GOV, https://web.archive.org/web/20170108114336/https://www.ok.gov/oag/Media/About_the_AG [<https://perma.cc/M6XL-PM AJ>] (last visited July 29, 2019).

297. Hal Bernton, *Retiring Seattle EPA Staffer Blasts New Leadership on His Way Out*, SEATTLE TIMES (Apr. 12, 2017, 3:34 PM), <https://www.seattletimes.com/seattle-news/environment/retiring-seattle-epa-staffer-blasts-new-leadership-on-his-way-out> [<https://perma.cc/KGY4-USXX>].

298. John J. O'Grady, *Don't Be Diverted by Scott Pruitt's Ethics Scandals: The Real Harm He's Causing Is to the Environment and Public Health*, ALTERNET (Apr. 13, 2018), www.alternet.org/environment/dont-be-diverted-scott-pruitts-ethics-scandals-real-harm-hes-causing-environment-and [<https://perma.cc/ET8Z-D8UQ>].

299. *See* Jean Chemnick, *Meet 7 Science Advisers Under Trump*, E&E NEWS (July 24, 2019), <https://www.eenews.net/stories/1060780563> [<https://perma.cc/WA2J-637N>]; Eli Stokols, *EPA Bars Scientists It Funds From Advisory Roles*, WALL ST. J. (Oct. 31, 2017, 6:05 PM), <https://www.wsj.com/articles/epa-bars-scientists-it-funds-from-advisory-roles-1509487548>.

academic epidemiologist whose term was expiring.³⁰⁰ That same month, he announced that scientists receiving EPA grants would no longer be eligible to sit on CASAC or other scientific advisory panels—a policy that led to the departure of two more committee members and thus two more openings for Pruitt to fill.³⁰¹ Then, in April 2018, President Trump sent a memo to Pruitt calling on the EPA to “reduc[e] unnecessary impediments to new manufacturing and business expansion.”³⁰² In an unusual show of specificity, the President expressly mentioned CASAC as a body with a role in carrying out that agenda.³⁰³

Pruitt resigned in July 2018 and was replaced by Andrew Wheeler, a former coal lobbyist who appears to share Pruitt’s pro-industry bent.³⁰⁴ Wheeler soon had an opportunity to utilize CASAC to counter EPA civil servants and further the Trump Administration’s deregulatory objectives. In October 2018, EPA civil servants involved in reviewing the national ambient air quality standard for particulate matter released an assessment finding that long-term exposure to particulate matter is likely to cause cancer (among other health effects).³⁰⁵ That conclusion went further than their previous assessment, which stopped short of declaring a causal link.³⁰⁶ It counseled in favor of greater regulation of emissions—not the direction that the Trump Administration appeared to be urging.

Shortly before the civil servants’ assessment was released, Wheeler disbanded a CASAC-affiliated auxiliary panel comprising a mix of Pruitt appointees and Obama Administration holdovers that had aided CASAC in its review of EPA’s particulate matter assessments.³⁰⁷ Once the auxiliary panel was terminated, CASAC’s seven members became the sole outside advisers charged with vetting the particulate-matter standard.³⁰⁸ Wheeler then cleaned house at CASAC, replacing every committee member except Cox and one other individual—Mark Frampton, a University of Rochester pulmonologist with no obvious political ties whose presence on the panel satisfied the requirement that one member be a

300. Frank Kummer, *Drexel Dean, Former EPA Science Advisory Chair, Blasts New Pruitt ‘Ethics’ Rule*, PHILA. INQUIRER (Nov. 3, 2017), <https://www.inquirer.com/philly/health/environment/epa-scott-pruitt-drexel-ethics-federal-grants-20171103.html> [<https://perma.cc/4TQG-LPDB>].

301. See Lila Thulin, *Here’s the Expertise Scott Pruitt Is Removing From the EPA’s Advisory Boards*, SLATE (Nov. 2, 2017), <https://slate.com/technology/2017/11/a-list-of-expertise-scott-pruitt-is-removing-from-the-epa.html> [<https://perma.cc/R9PY-KA87>].

302. Memorandum for the Administrator of the Env’tl. Prot. Agency, 2018, 83 Fed. Reg. 16,761, 16,762 (Apr. 16, 2018).

303. *Id.* at 16,764.

304. See Timothy Cama, *New EPA Chief Draws Sharp Contrast to Pruitt*, HILL (July 15, 2018), <https://thehill.com/policy/energy-environment/396985-new-epa-chief-draws-sharp-contrast-to-pruitt> [<https://perma.cc/VZ6H-STKY>].

305. ENVTL. PROT. AGENCY, INTEGRATED SCIENCE ASSESSMENT FOR PARTICULATE MATTER 10-1 (2018), <https://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=341593> [<https://perma.cc/7NP6-WMG3>].

306. ENVTL. PROT. AGENCY, INTEGRATED SCIENCE ASSESSMENT FOR PARTICULATE MATTER 7-68 (2009), <https://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=216546> [<https://perma.cc/CCF8-5XFH>].

307. Sean Reilly, *Trump’s EPA Scraps Air Pollution Science Review Panels*, SCIENCE MAG. (Oct. 12, 2018), <https://www.sciencemag.org/news/2018/10/trump-s-epa-scraps-air-pollution-science-review-panels> [<https://perma.cc/6DUJ-S266>].

308. Lisa Friedman, *E.P.A. to Disband a Key Scientific Review Panel on Air Pollution*, N.Y. TIMES (Oct. 11, 2018), <https://www.nytimes.com/2018/10/11/climate/epa-disbands-pollution-science-panel.html>.

physician.³⁰⁹ Four of Wheeler's five appointees work for state environmental agencies in Republican-controlled states.³¹⁰ One of them—Sabine Lange, a toxicologist at the Texas Commission on Environmental Quality—had previously criticized EPA staff for concluding that a lower ozone standard would produce health benefits, a conclusion that Lange and her colleagues questioned.³¹¹ Another Wheeler appointee, Utah Division of Air Quality toxicologist Steve Packham, had previously questioned the lung-related health impacts of fine particulate matter.³¹²

Two months later, members of Wheeler's CASAC released a detailed 114-page response to the civil servants' assessment.³¹³ As part of that response, Chairman Cox pressed EPA staff to consider and cite studies of a coal ban in Ireland that—in Cox's view—suggested an ambiguous relationship between airborne particulate matter and mortality.³¹⁴ Lange, the Texas toxicologist, provided sixty-nine pages of critical commentary, including an argument that civil servants failed to account for all possible confounders before asserting a causal link between particulate matter and the incidence of cancer.³¹⁵ CASAC amplified its criticism of the career staff's work in April 2019, stating that the staff did “not provide a sufficiently comprehensive, systematic assessment of the available science.”³¹⁶

Wheeler's role in selecting CASAC's members notwithstanding, it would be a mistake to conclude that the committee serves solely as the agency head's mouthpiece. One member—the pulmonologist Frampton—has defended the EPA staff's particulate matter assessment and spoken out against Cox's stewardship of CASAC.³¹⁷ And in April 2019, the full committee sent a letter to Wheeler asking

309. See Press Release, Env'tl. Prot. Agency, Acting Administrator Wheeler Announces Science Advisory for Key Clean Air Act Committee (Oct. 10, 2018), <https://www.epa.gov/newsreleases/acting-administrator-wheeler-announces-science-advisors-key-clean-air-act-committee> [<https://perma.cc/67VY-8M5V>].

310. See *id.*

311. See Bryan W. Shaw et al., *Lowering the Ozone Standard Will Not Improve Public Health*, EM MAG., May 2015, at 26.

312. See Katie Peikes, *Air Quality Impacts Health, Professor Says*, HERALD J., (Jan. 25, 2016), https://www.hjnews.com/allaccess/air-quality-impacts-health-professor-says/article_406e0713-fb38-554c-a2f5-4efaf3c86092.html [<https://perma.cc/ZHL4-7G5W>] (quoting Packham).

313. EPA CLEAN AIR SCIENTIFIC ADVISORY COMM., ENVIRONMENTAL PROTECTION AGENCY, PRELIMINARY COMMENTS FROM MEMBERS OF CASAC ON EPA'S INTEGRATED SCIENCE ASSESSMENT FOR PARTICULATE MATTER (2018), https://www.eenews.net/assets/2018/12/11/document_gw_07.pdf [<https://perma.cc/SGN9-CY3P>].

314. *Id.* at 9–10 (comments of Tony Cox).

315. *Id.* at 39, 84–89, 98 (comments of Lange). Packham, for his part, submitted only four pages of comments that—he noted—had “been prepared in haste.” *Id.* at 111.

316. Letter from Louis Anthony Cox, Jr., Chair, CASAC., to Andrew R. Wheeler, Adm'r, EPA, *CASAC Review of the EPA's Integrated Science Assessment for Particulate Matter 1* (Apr. 11, 2019) [hereinafter Cox Letter], [https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebReportsLastMonthCASAC/6CBCBBC3025E13B4852583D90047B352/\\$File/EPA-CASAC-19-002+.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebReportsLastMonthCASAC/6CBCBBC3025E13B4852583D90047B352/$File/EPA-CASAC-19-002+.pdf) [<https://perma.cc/TDD7-7XQZ>].

317. *CASAC Research Scientist Attacks Panel Chairman's NAAQS Review Shift*, INSIDE EPA (Mar. 26, 2019), <https://insideepa.com/daily-news/casac-research-scientist-attacks-panel-chairman%E2%80%9999s-naaqs-review-shift> [<https://perma.cc/Q7A8-T5M5>].

him to reappoint the particulate-matter auxiliary panel that he had dismissed several months earlier or else to “appoint a panel with similar expertise.”³¹⁸ Wheeler rebuffed that request three months later, instructing the committee to instead consult “subject matter expert consultants” on an “as needed” basis.³¹⁹ Wheeler also rejected CASAC’s request for more time to complete its review.³²⁰

Whether CASAC ultimately functions as an arrow in Wheeler’s quiver or a thorn in his side remains to be seen.³²¹ So far, though, the substantive advice from CASAC members has been in line with what the shallow state model would predict. CASAC has provided a counterweight to the EPA staff, supplying arguments that political appointees can potentially use to advance the administration’s agenda over careerists’ objections.

E. TAKING STOCK

Our qualitative analysis in this Part presents two cases in which an advisory committee served as a successful counterweight to careerists with divergent preferences—the Clinton-era Defense Advisory Committee on Women in the Services and the CDC Advisory Committee on Childhood Lead Poisoning Prevention during George W. Bush’s presidency. The analysis also presents one case, concerning the ICE Advisory Committee on Family Residential Centers during the Obama years, that illustrates the limits on advisory committees’ ability to effect change when faced with a committed, oppositional civil service. For the fourth case, concerning the EPA Clean Air Scientific Advisory Committee under President Trump, it is too soon to say whether appointees will succeed in using the committee to check their agency’s civil servants.

These outcomes do not, however, exhaust the full range of ways in which advisory committees can influence administration policy. Although we have emphasized that advisory committees can be counterweights to careerists, their role also can be confirmatory. That is, a political appointee who is skeptical of the civil service’s conclusions, but not in outright disbelief, may empanel an advisory committee with ideologically sympathetic members to check bureaucrats’ work. Under these circumstances, the fact that the advisory committee supported the civil servants’ finding is not necessarily evidence of the committee’s irrelevance. Rather, the committee’s confirmatory report may play an important role in persuading the political appointee to adopt the civil service’s recommendation.

318. Cox Letter, *supra* note 316, at 2.

319. Wheeler Letter, *supra* note 295, at 2.

320. *Id.*; see also Amina H. Saiyid, *EPA Adamant That Air Standards Reviews Get Done by December 2020*, BLOOMBERG L. (July 26, 2019), <https://news.bloombergenvironment.com/environment-and-energy/epa-adamant-that-air-standards-reviews-get-done-by-december-2020> [<https://perma.cc/KYT5-4K92>].

321. Wheeler has set a goal for CASAC to complete its review of the EPA staff’s as-yet-released policy assessments for particulate matter and ground-level ozone by the end of calendar year 2019. See Wheeler Letter, *supra* note 295, at 2. That deadline sets an ambitious timetable that could cause strains between the Administrator and the advisory committee. On Wheeler’s expedited schedule. See Jeff Tollefson, *Air Pollution Science Under Siege at US Environment Agency*, NATURE (Mar. 28, 2019), <https://www.nature.com/articles/d41586-019-00937-w> [<https://perma.cc/Y3HJ-5VHA>].

Consider, for instance, the role that the EPA National Drinking Water Advisory Council played in the EPA setting a new standard for arsenic in drinking water in 2001. In the waning days of the Clinton Administration, the EPA announced a rule reducing the maximum allowable arsenic in drinking water from fifty to ten parts per billion.³²² Although Christine Todd Whitman, the newly confirmed Bush Administration's EPA Administrator, supported a reduction from the old level, she voiced skepticism that the ten parts per billion cutoff—developed by EPA civil servants during a Democratic administration³²³—adequately considered implementation costs.³²⁴ Accordingly, she withdrew the rule and ordered additional scientific reviews and a reopened public comment period.³²⁵ In August 2001, a National Drinking Water Advisory Council working group released a report concluding that the civil servants “produced a credible estimate of the cost of arsenic compliance.”³²⁶ By November, Whitman was convinced that the science behind the Clinton EPA's rule was sound and announced that the EPA would adopt the ten parts per billion level.³²⁷

The drinking water episode is, at a broad level, consonant with the story that emerges from the four case studies above: across agencies, administrations, and issues, advisory committees provide appointees with a potentially valuable alternative to civil servants as information providers. In some cases, advisory committees will enable appointees to move policy away from civil servants' preferences and toward their own. On other occasions, advisory committees may play a confirmatory role, helping an agency head decide to heed the advice of career staff. Advisory committees will not always influence the outcomes of agency

322. Elizabeth Shogren, *EPA Revokes New Arsenic Standards for Drinking Water*, L.A. TIMES (Mar. 21, 2001), <https://www.latimes.com/archives/la-xpm-2001-mar-21-mn-44369-story.html>.

323. The rule was supported by economic and scientific analyses conducted by independent consultants at the behest of the EPA Office of Ground Water and Drinking Water. See *Arsenic in Drinking Water Rule: Economic Analysis*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/dwreginfo/support-documents-final-arsenic-rule> [<https://perma.cc/9BZK-SGQ5>] (last visited July 30, 2019); *Analytical Methods Support Document for Arsenic in Drinking Water*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/dwreginfo/support-documents-final-arsenic-rule> [<https://perma.cc/9BZK-SGQ5>] (last visited July 30, 2019). That EPA office was then (as now) helmed by a career bureaucrat. See GOV'T PRINTING OFFICE, 2000 PLUM BOOK, <https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2000/pdf/GPO-PLUMBOOK-2000-7-22.pdf> [<https://perma.cc/C4C3-XUHP>].

324. Shogren, *supra* note 322.

325. *Id.*

326. ENVTL. PROT. AGENCY, REPORT OF THE ARSENIC COST WORKING GROUP TO THE NATIONAL DRINKING WATER ADVISORY COUNCIL 2 (2001), https://www.epa.gov/sites/production/files/2015-09/documents/2005_11_10_arsenic_ndwac-arsenic-report.pdf [<https://perma.cc/2SKL-S7F7>].

327. Katharine Q. Seelye, *E.P.A. to Adopt Clinton Arsenic Standard*, N.Y. TIMES, Nov. 1, 2001, at A18. Other potential influences on Whitman's decision included a September 2001 report by the National Research Council linking arsenic exposure to bladder and lung cancer as well as pressure from members of Congress for more stringent arsenic standards. See NAT'L RESEARCH COUNCIL, ARSENIC IN DRINKING WATER: 2001 UPDATE CH.1 (2001), <https://www.nap.edu/read/10194/chapter/1> [<https://perma.cc/Q6H4-GBNE>]; Douglas Jehl, *House Demanding Strict Guidelines on Arsenic Levels*, N.Y. TIMES, July 28, 2001, at A1; The Associated Press, *Senate Backs New Standards for Arsenic Levels*, N.Y. TIMES, Aug. 2, 2001, at A16.

decisionmaking processes, but in some instances they will—and sometimes quite profoundly.

V. IMPLICATIONS

Taken together, the quantitative evidence in Part III and case studies in Part IV tell a coherent story: political appointees stack advisory committees with individuals who share the administration's ideological inclinations and then use those committees as counterweights to career civil servants whose preferences diverge from the party in power. The fifth branch can thus be characterized as a shallow state whose membership follows the political tides and whose members balance the power of the so-called “deep state” of career civil servants. This shallow state story has potentially profound—though nuanced—implications for the study and practice of administrative law. We begin section V.A by examining the implications for congressional control of the administrative state. We then, in section V.B, consider the import of our findings for “presidential administration”—defined by then-Professor Elena Kagan as the “comparative primacy” of the Presidency “in setting the direction and influencing the outcome of administrative process.”³²⁸ In section V.C, we ask what the existence of the shallow state means for judicial review of administrative action. Finally, in section V.D, we consider how our findings can contribute to the increasingly high-profile and high-stakes debate over the internal separation of powers and the legitimacy of the administrative state.

A. CONGRESS AND THE SHALLOW STATE

Perhaps most starkly, our findings challenge accounts of advisory committees that characterize these panels as instruments of congressional control over administrative agencies. Recall that these “congressional control” accounts took two forms: one that casts committees as “fire alarms” to alert current lawmakers of agency activities (and thus aid in their oversight efforts), and another that conceives of committees as tools that allow Congress to “stack the deck” in favor of certain interests at the time that legislation is enacted. In tension with the “fire-alarm” account, we find no evidence that the composition of advisory committees reflects the preferences of the current Congress—if committees serve as monitors for lawmakers, then they are unreliable fire alarms at best. And contrary to the “deck-stacking” account, we find no indication that panel composition reflects the preferences of the legislative coalition that enacted the legislation creating the committee.

We should emphasize that our aggregate findings and four case studies do not rule out the possibility that advisory committees *ever* serve congressional interests. Surely sometimes they do. As an example of a panel that was especially effective in this regard, Balla and Wright—the most prominent proponents of the “congressional control” view—point to the Advisory Committee on Student

328. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001).

Financial Assistance, which was established as part of the Higher Education Act Amendments of 1986³²⁹ and remained in operation until 2015.³³⁰ The committee, which had its own six-member staff, communicated directly with the Legislative Branch in the drafting of the 1992 and 1998 reauthorizations of the Higher Education Act.³³¹ According to a former congressional staffer, the committee “emerged as an important source of information and guidance” for Congress in crafting education policy.³³²

The Advisory Committee on Student Financial Assistance is more likely the exception than the rule. A number of the panel’s unusual features distinguished it from the mine-run of advisory committees. First, the committee was almost entirely independent of the Department of Education—it had its own budget, and its reports to Congress were not subject to the Education Secretary’s preapproval.³³³ Second, the committee had authority to hire its own employees,³³⁴ freeing it from reliance on the Education Department for staff support. Finally, the Education Secretary named only a minority of the panel’s members (three out of eleven).³³⁵ Four members were appointed by the President pro tempore of the Senate—two on the recommendation of the Senate Majority Leader, two on the recommendation of the Senate Minority Leader³³⁶—and a similar structure allowed the majority and minority parties in the House to split control over the four remaining spots.³³⁷

The contrasts between the Advisory Committee on Student Financial Assistance and the shallow state story in Parts II and III suggest a number of lessons for lawmakers seeking to strengthen the role of advisory panels as instruments of congressional control over administrative agencies. Enshrining a committee in a statute is unlikely to be enough to ensure that the committee remains a robust monitor of agency activities and a participant in the policymaking process. If the committee is dependent upon an agency for financial and staff support, then it may be constrained in its ability to function as an independent voice. Moreover, FACA’s “fairly balanced” requirement is far too loose to prevent panel membership from following the preferences of the presidential administration. Even more specific membership criteria (such as the statutory requirement that the Clean Air Scientific Advisory Committee include a physician, a National Academy of Sciences member, and representative of state air pollution control agencies)³³⁸ are not sufficient to stop the partisan ebb and flow.

329. Pub. L. No. 99-498, § 491, 100 Stat. 1268, 1492 (codified at 20 U.S.C. § 1098 (2012)).

330. 20 U.S.C. § 1098(k) (2012).

331. See Balla & Wright, *Can Advisory Committees*, *supra* note 13, at 181.

332. See *id.* at 182.

333. See 20 U.S.C. § 1098(b).

334. See *id.* § 1098(h)(1).

335. See *id.* § 1098(c)(1)(C).

336. See *id.* § 1098(c)(1)(A).

337. See *id.* § 1098(c)(1)(B).

338. See *supra* note 288 and accompanying text.

How, then, can lawmakers—or at least, lawmakers who take seriously their responsibility of congressional oversight—leverage advisory committees as tools of that task? Independent funding and separate staff for advisory committees may be important steps, but they cannot be the only steps. Placing budget and staff beyond the control of an agency head will not ensure that the advisory committee acts as an effective check if the agency head still has plenary power to appoint and remove committee members.

One option is to follow the model of the Advisory Committee on Student Financial Assistance: allocate appointment authority among Senate and House leaders. The obvious advantage of this approach is that it allows members of Congress to install committee members who are more likely to serve as faithful “fire-alarm” monitors. The potential objections are constitutional and practical. The constitutional objection—though it is a rather weak one—would be that Article II, Section 2, Clause 2 reserves the power of appointment to the President, the courts, and the “Heads of Department.”³³⁹ We say that it is a rather weak objection because the Appointments Clause has long been understood *not* to apply to “purely advisory” positions.³⁴⁰

The practical problems with congressional appointment of advisory committee members are more serious. Recall that there are more than 75,000 such positions. If the House and Senate Majority and Minority Leaders were to divide those posts among themselves, each would be responsible for nearly 19,000 appointments. With two-year terms, that would mean more than twenty-five appointments for each leader each day (including weekends and holidays). Vetting responsibilities could be farmed out to other caucus members or to staffers, but even so, the scope of the shallow state is likely too vast to make congressional appointment of every advisory committee member a sensible strategy. The congressional-appointment approach may be viable for a select number of high-profile committees (and given the significant stakes associated with national ambient-air-quality standards, the Clean Air Scientific Advisory Committee may be among this select

339. U.S. CONST. art. II, § 2, cl. 2.

340. This proposition is arguably implicit in Supreme Court opinions stating that the Appointments Clause applies only to individuals who exercise “significant authority pursuant to the laws of the United States.” *See, e.g.,* *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam); *see also* *Edmond v. United States*, 520 U.S. 651, 662 (1997) (“The exercise of ‘significant authority pursuant to the laws of the United States’ marks . . . , as we said in *Buckley*, the line between officer and non-officer.”).

Further, the proposition is explicit in opinions of the Justice Department Office of Legal Counsel stating that a “purely advisory position” is not an office of the United States and its occupant is not an officer to whom the Appointments Clause applies. *See* *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 77 (2007) (stating that “an individual who occupies a purely advisory position (one having no legal authority) . . . does not hold a federal office” for purposes of the Appointments Clause); *Application of the Emoluments Clause to a Member of the President’s Council on Bioethics*, 29 Op. O.L.C. 55, 63, 71 (2005) (stating that “a purely advisory position” is not an office for purposes of the Foreign Emoluments Clause and that the scope of the Foreign Emoluments Clause matches the scope of the Appointments Clause).

number). If Congress is to tame the shallow state, however, it will likely need to consider other alternatives.

Another option is to mandate partisan balance on certain advisory committees. In other work, we have together examined the effect of partisan balance requirements on the ideological composition of independent regulatory commissions such as the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC), and we have found that these requirements do in fact operate as meaningful constraints—especially in more recent years.³⁴¹ Again using campaign contributions as a proxy for appointee preferences, we find that individuals appointed to cross-party seats on multimember commissions tend to be genuine members of the opposition party. That is, President Obama generally named conservative Republicans—rather than “Republicans in name only”—to cross-party seats, and President George W. Bush generally named liberal Democrats. The efficacy of partisan balance requirements in the context of independent regulatory commissions suggests that similar mandates might help Congress maintain ideological balance on advisory committees.

Although we think this suggestion deserves serious consideration, we note a number of caveats as well. For one, the low profile of many advisory committees and the lack of a Senate confirmation requirement may limit the efficacy of party balance mandates in that context. Although the media can be expected to highlight instances in which a President seeks to manipulate the ideological composition of a high-profile commission such as the FTC,³⁴² and although Senators from the opposing party might be expected to object in the confirmation process, the sheer number of advisory committee appointments may limit the extent to which partisan balance requirements for those panels can be policed.

The mirror image of the above concern is that partisan balance requirements may prove *too* constraining in the advisory committee context. In some instances, expertise may be more important than ideology, and finding an ideologically diverse group of experts may be difficult. For example, one recent study finds that the ratio of registered Democrats to registered Republicans on the history faculties of forty elite universities is 33.5 to 1.³⁴³ For an advisory committee whose work requires advanced knowledge of historical study, such as the nine-member State Department Advisory Committee on Historical Diplomatic Documentation,³⁴⁴ it

341. See Feinstein & Hemel, *supra* note 158, at 15.

342. See, e.g., *id.* at 41–48; see also Robert D. Hershey, Jr., *Washington Watch; No Democrats Seen for F.T.C.*, N.Y. TIMES (Oct. 28, 1985), <http://www.nytimes.com/1985/10/28/business/washington-watch-no-democrats-seen-for-ftc.html>.

343. See Mitchell Langbert et al., *Faculty Voter Registration in Economics, History, Journalism, Law, and Psychology*, 13 ECON J. WATCH 422, 425 fig.2 (2016).

344. See 22 U.S.C. § 4356(a)(1) (2012) (establishing Advisory Committee on Historical Diplomatic Documentation); *id.* § 4356(a)(3) (requiring that members of committee be “appointed by the Secretary of State from among distinguished historians, political scientists, archivists, international lawyers, and other social scientists who have a demonstrable record of substantial research pertaining to the foreign relations of the United States”).

could be a challenge to achieve partisan balance while maintaining a high level of subject-matter expertise.³⁴⁵

The challenge does not appear to us to be insuperable, however. Note that partisan balance requirements typically limit the number of members from any one party; they do not mandate equal representation from both parties.³⁴⁶ Thus, a simple-majority partisan-balance requirement applied to the Advisory Committee on Historical Diplomatic Documentation would limit the number of Democrats on the panel to five. The remaining four members could be Republicans, independents, Libertarians, Green Party registrants, and so on. The same study that found that Democrats outnumber Republicans on history faculties by a 33.5-to-1 margin also found that forty-two percent of academic historians are not affiliated with either party.³⁴⁷ Thus, even in this rather extreme case, the State Department could likely satisfy a typical partisan-balance requirement by naming independents to the non-Democratic seats on the committee if it could not find a sufficient number of registered Republicans with the requisite qualifications.

Although partisan balance requirements may strengthen the “fire-alarm” function of advisory committees, we are substantially more skeptical that they will work as “deck-stacking” tools. Recall that the theory of “deck-stacking” was to conform the composition of advisory committees to the preferences of the enacting coalition in Congress. If the enacting coalition comprised primarily members of one party, deck-stacking would seem to suggest that the advisory committee should be skewed toward that party too. But a requirement that, say, ninety percent of an advisory committee’s members must be Republican because ninety percent of the lawmakers who voted for the bill creating the committee were Republican seems quite unlikely. A “partisan imbalance” requirement of this sort would be vulnerable to a constitutional challenge on First Amendment grounds,³⁴⁸ and even apart from constitutional considerations, the poor optics of

345. One might legitimately wonder whether ideology is even relevant to the work of a panel such as the Advisory Committee on Historical Diplomatic Documentation. The answer appears to be yes. The committee participated in the State Department’s 2014 decision to publish documents related to the Central Intelligence Agency’s role in the 1953 overthrow of the Iranian Prime Minister. *See* Steven Aftergood, *History of 1953 CIA Covert Action in Iran to Be Published*, FED’N AM. SCIENTISTS (Apr. 16, 2014), <https://fas.org/blogs/secrecy/2014/04/iran-frus> [<https://perma.cc/3JCJ-AZCK>]. The Trump Administration sought to disband the panel in 2017 but backtracked after realizing that the panel’s continued existence had been codified by Congress. *See* Charles Levinson, *Under Trump, Expert Panels on the Decline*, REUTERS (July 30, 2019), <https://www.reuters.com/article/us-usa-trump-panels/under-trump-expert-advisory-panels-on-the-decline-idUSKCN1UP15J> [<https://perma.cc/S3FF-ZL8L>]. The committee’s chair, an academic historian, recently noted concerns about “politicization” of the panel. *See id.* (quoting Richard Immerman).

346. *See* Feinstein & Hemel, *supra* note 158, at 19.

347. *See* Langbert et al., *supra* note 343, at 433.

348. The constitutional challenge would have considerable force, but it would also involve considerable complications. The Supreme Court has held that public employment cannot be conditioned on party affiliation under the First Amendment. *See* *Rutan v. Republican Party*, 497 U.S. 62, 75 (1990). A plaintiff challenging a “partisan imbalance” requirement would face a formidable obstacle, though, in establishing standing. Two challenges to partisan balance requirements for independent regulatory commissions have failed on standing grounds. *See* Nat’l Comm. of the Reform Party v. Democratic Nat’l Comm., 168 F.3d 360, 365 (9th Cir. 1999); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 824

an explicit statutory preference for one party over another would seem to be a dealbreaker.

Before applying partisan balance requirements to advisory committees, though, members of Congress should consider whether the partisan balance on those panels is indeed desirable. There is a strong argument that the status quo—under which agency heads can stack advisory committees with their ideological allies—adds to the legitimacy of the administrative state. We consider that argument in section V.D. The key point for present purposes is that, if advisory committees are intended as instruments of congressional control over the administrative state, then it is doubtful whether they fulfill that purpose. But as we discuss below, the ability of political appointees to shape the composition of panels may be a feature—not a bug—of the advisory committee system.

B. THE EXECUTIVE BRANCH AND THE SHALLOW STATE

While our findings indicate that advisory committees are weaker instruments of congressional control over the administrative state than some political scientists have suggested, our conclusions also suggest that advisory committees may be more effective tools of presidential control over agencies than some scholars and judges had feared. Recall again then-Professor Bybee's concern that FACA's fair-balance requirement—among other provisions of the 1972 law—would undermine the utility of advisory committees in the President's eyes. Professor Bybee acknowledged that the evidence for his claim was “anecdotal,”³⁴⁹ and our more systematic analysis suggests the opposite: FACA's fair balance requirement and more specific statutory membership criteria do not in fact prevent political appointees from stacking advisory committees with their co-partisans.³⁵⁰

Our results suggest a role for advisory committees in addressing what is arguably the central challenge in public administration: the tradeoff between expertise and

(D.C. Cir. 1993); *see also* Feinstein & Hemel, *supra* note 158, at 21–22 (discussing these cases). A Democrat or Independent—in our hypothetical involving a pro-Republican partisan imbalance requirement—might argue that she has suffered a “denial of a fair opportunity to compete” for an advisory committee position. *See Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1235–36 (10th Cir. 2004) (finding—at a preliminary stage—that two individuals have standing to challenge the composition of an advisory committee that was required by regulation to have a “fair membership balance”). The argument would be far from certain to succeed, however. *Cf. Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 426 (D.C. Cir. 1989) (*per curiam*) (Silberman, J., concurring in the judgment) (stating that plaintiffs lack standing to challenge composition of advisory committee on the ground that it fails to satisfy FACA's fair balance requirement).

349. Bybee, *supra* note 14, at 125.

350. In Professor Bybee's defense, the fair balance requirement was not the only FACA provision that concerned him. FACA's open meeting and public inspection requirements may (though may not) inhibit advisory committee members from giving their unvarnished views on controversial subjects. *Id.* Our case studies highlight instances in which panel members provided information and policy recommendations that contravened the advice of career civil servants and appeared to align with the administration's agenda—examples that suggest that these committees remain quite useful to the President. But we cannot, concededly, observe the counterfactual in which advisory committees meet behind closed doors and offer their advice to political appointees out of public view. FACA has not allowed that for nearly a half century.

responsiveness.³⁵¹ Presidents and other political principals require expertise in order to translate their high-level objectives into real-world results. This requirement of expertise arises in part out of complexity: one needs vast technical knowledge—more than any single person likely possesses—in order to design an efficacious system of bank regulations or air quality standards. It also arises out of judicial review, which forces agencies to justify their actions in terms that will hold up to court scrutiny.³⁵² The problem for Presidents and their administrations is that the career civil servants who possess the necessary expertise to translate high-level objectives into successful policies may not share the President's high-level objectives. The advisory committee structure allows Presidents and their political appointees to enlist the assistance of sympathetic outside experts without having to contend with the cumbersome restrictions on hiring and firing federal employees.³⁵³

If advisory committees truly help presidential administrations address the expertise-responsiveness tradeoff, then President Trump's recent actions regarding advisory committees present a puzzle. In June 2019, President Trump ordered all executive agencies to terminate one-third of their self-created committees by the end of September 2019.³⁵⁴ He also imposed a requirement that agencies obtain a waiver from the Office of Management and Budget (OMB) before creating a new panel if the number of existing agency-created committees across the Executive Branch exceeds 350 (excluding committees attached to independent regulatory agencies).³⁵⁵ Why would a President restrict the creation—and order the destruction—of advisory bodies that can advance his agenda?

History offers a possible answer. This is not the first time that a President has ordered a reduction of one-third in the number of advisory committees or mandated that new committees be cleared by OMB. Indeed, President Clinton issued an almost identical order in February 1993.³⁵⁶ The number of advisory committees fell from 1305 in fiscal year 1993 to a trough of 921 five years later—a decline of twenty-nine percent—but the number of members rose by forty-five

351. On the tradeoff between expertise and responsiveness, see generally Francis E. Rourke, *Responsiveness and Neutral Competence in American Bureaucracy*, 52 PUB. ADMIN. REV. 539 (1992).

352. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 34 (1983) (holding that agencies must provide adequate reasons to support their decisions); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 249 (2d Cir. 1977) (“Adequate review of a determination requires an adequate record . . .”).

353. See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 612 (2003). As Mendelson notes, political appointees may review and influence civil service hiring decisions, see *id.* at 611, but this has nuanced implications for the expertise-responsiveness tradeoff. Within administrations, it may allow political appointees to choose civil servants whose preferences align with the President's. Across administrations, it may have the opposite effect: political appointees in an outgoing administration may “burrow” likeminded individuals in the civil service so that the incoming President faces a more resistant bureaucracy. See *id.* at 612.

354. Exec. Order No. 13,875, 84 Fed. Reg. 28,711, 28,711 (June 19, 2019).

355. *Id.*

356. Exec. Order No. 12,838, 58 Fed. Reg. 8,207, 8,207 (Feb. 10, 1993).

percent during the same period and spending rose by more than a quarter.³⁵⁷ The reduction in the number of committees does not appear to have prevented these panels from serving the function that the shallow state model posits. To the contrary, involving the White House more directly in the advisory committee formation process may serve to reinforce the role of these panels as instruments of the presidential administration.³⁵⁸

C. THE JUDICIARY AND THE SHALLOW STATE

The implications of our findings for judicial review of agency action are cross-cutting. Recall the argument by Sheila Jasanoff that concordance between advisory committees and agency staff should be seen by courts as *prima facie* evidence of the reasonableness of the agency's position.³⁵⁹ On the one hand, the fact that advisory committee composition reflects not only expertise but also the ideological preferences of the presidential administration might weigh against Jasanoff's argument. If advisory committees are not neutral arbiters of scientific fact, but bodies with distinct ideological leanings, then perhaps courts should consider the committees' conclusions with skepticism. On the other hand, if agency heads use advisory committees as counterweights to the career civil service—as

357. Compare U.S. GEN. ACCOUNTING OFFICE, GAO/T-GGD-98-24, FEDERAL ADVISORY COMMITTEE ACT: OVERVIEW OF ADVISORY COMMITTEES SINCE 1993, at 9 (1998), with REPORTING FISCAL YEAR 1998 GOVERNMENT TOTALS, FACA DATABASE (2017), <https://www.facadatabase.gov/FACA/apex/FACAPublicTotals?fy=1998> [<https://perma.cc/2PNR-2VZZ>] (last visited July 31, 2019) (comparing total number of committees, committee members, and committee costs in 1993 to those in 1998).

358. History does not always repeat. The Trump Administration is different from previous administrations in all sorts of ways. It has been much slower than its predecessors to fill Senate-confirmed posts across the Executive Branch—despite the fact that the Senate is controlled by the President's own party, and despite the fact that the filibuster no longer applies to nominations. See Juliet Eilperin, Josh Dawsey & Seung Min Kim, *'It's Way Too Many': As Vacancies Pile Up in Trump Administration, Senators Grow Concerned*, WASH. POST (Feb. 4, 2019, 3:53 PM), https://www.washingtonpost.com/national/health-science/its-way-too-many-as-vacancies-pile-up-in-trump-administration-senators-grow-concerned/2019/02/03/c570eb94-24b2-11e9-ad53-824486280311_story.html. The reasons for this torpid pace are not entirely clear, but one possible explanation is that opposition to President Trump among elites in academia, law, and even business has reduced the pool of qualified people willing to serve in executive branch positions. See Lisa Rein & Abby Phillip, *Help Wanted: Why Republicans Won't Work for the Trump Administration*, WASH. POST (June 17, 2017), https://www.washingtonpost.com/politics/help-wanted-why-republicans-wont-work-for-the-trump-administration/2017/06/17/61e3d33e-506a-11e7-b064-828ba60fbb98_story.html. If this phenomenon is real, it may affect the Trump Administration's ability to fill advisory committee posts with experts who will serve as counterweights to career staff.

The data do not yet bear out this prediction. The total number of advisory committees in the first full fiscal year of the Trump Administration is almost exactly equal to the number of committees in the last full fiscal year of the Obama Administration (declining trivially from 1006 in fiscal year 2016 to 1003 two years later). Compare REPORTING FISCAL YEAR 2016 GOVERNMENT TOTALS (2016), FACA DATABASE, <https://www.facadatabase.gov/FACA/apex/FACAPublicTotals?fy=2016> [<https://perma.cc/P6X3-ZYJN>] (last visited July 31, 2019), with FACA DATABASE, *supra* note 1. The number of members has risen by 4.7 percent; the number of meetings has declined by one percent; and total spending has remained stable. *Id.* So far, we see no evidence that advisory committees have ceased to be instruments of presidential administration under Trump.

359. See JASANOFF, *supra* note 5, at 249.

our results in Part III suggest—then perhaps the fact that committees and careerists agree should be an especially powerful indication that the agency’s position is correct.

Importantly, the composition of advisory committees is likely endogenous to the legal environment in which they operate. By that, we mean that if concordance between advisory committees and agency staff was taken by courts to be *prima facie* evidence of the reasonableness of the agency’s position, then agency heads—even at agencies where the preferences of civil servants are aligned with the President’s—would have a strong incentive to convene these committees, stack them with ideological allies, and use them to insulate the agency’s position from judicial interrogation. This endogeneity claim also has potential implications for Adrian Vermeule’s argument that agencies should be required to abide by the recommendations of expert panels unless they can supply a valid second-order reason for doing otherwise.³⁶⁰ The more weight that courts place on advisory committees, the less likely—we think—they are to be a “parliament of experts” and the more likely they are to be a “parliament of partisans.”

Our observations are speculative because—as Vermeule notes—current doctrine does not require agencies to hew to the views of expert panels (or else to supply a valid second-order reason for deviating).³⁶¹ Our finding that panel composition changes with the partisan ebb and flow might be seen as bolstering the current rule. At the very least, our results regarding panel partisanship merit consideration as part of any proposal to enhance the role of advisory committees in judicial review of agency action.

D. THE DEEP STATE AND THE SHALLOW STATE

Finally, and perhaps most significantly, our findings shed light on the debate over the American administrative “deep state”—a term that has gained new currency in the two years since President Trump’s inauguration. As Jon Michaels observes, “[b]roadly speaking, prior to 2017 our deep state has simply been referred to as our state.”³⁶² At the deep state’s center, Michaels notes, lie “the vast expanse of federal administrative agencies” and “the personnel entrusted with the day-to-day operations of those agencies.”³⁶³ Michaels argues that the American bureaucracy—which he sees as transparent, inclusive, and diverse—“often serves as the last, if not best, check on presidential and agency-head overreach.”³⁶⁴

360. See Vermeule, *supra* note 99, at 2235.

361. See *id.* at 2242; see also Metzger, *supra* note 27, at 452 n.128 (noting that the involvement of expert advisory committees is not “generally deemed an acceptable basis for expanded deference”). Only occasionally will a court mention an advisory committee’s approval or disapproval as a factor in its decision regarding the reasonableness of agency action. See, e.g., *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 230–34 (E.D.N.Y. 2006). And even in those relatively rare cases, the advisory committee’s view is one among many factors, not *prima facie* evidence of reasonableness or unreasonableness. See *id.*

362. Michaels, *supra* note 20, at 1655.

363. *Id.* at 1655–56.

364. *Id.* at 1660, 1665.

Critics of the bureaucratization of American governance, on the other hand, have long-expressed concerns about the concentration of power in the hands of agencies who are accountable to voters only tenuously, if at all.³⁶⁵

Our findings inform (but do not resolve) this debate over what scholars refer to as the “new” or “internal” separation of powers—that is, the checks on executive power that arise from within the Executive Branch.³⁶⁶ Advisory committees—by providing political appointees with an alternative to the civil service as a source of expertise—tilt the internal balance of power further in the political appointees’ direction, even though they do not always tip the scales. In this respect, the shallow state ought to temper conclusions about the deep state’s influence, which, depending upon one’s attitude toward internal separation, may be a cause for comfort or concern.

Considering the ways in which advisory committees do and do not function as serviceable substitutes for career staff can also help us understand the circumstances in which internal checks and balances will be most robust. Advisory committees, we posit, will be most useful to political appointees when the rate-limiting factor on policy development is the ability to collect and analyze information. Advisory committees can do that too—and in some cases, can do so as well as or even better than the civil servants inside agencies. When, for example, the task facing the Health and Human Services Secretary or his delegate is to determine the appropriate parts-per-billion limit for arsenic in drinking water and to substantiate that decision so as to satisfy judicial review, advisory committees potentially allow the Secretary to overcome civil servant resistance. Where advisory committees will be less useful, however, is when the challenge is one of implementation rather than information. For example, it is exceedingly unlikely that the Health and Human Services Secretary could rely on an advisory committee to build a working version of Healthcare.gov (though as three prominent commentators argued in the wake of the Healthcare.gov debacle, a technical advisory committee that included IT professionals, state officials, and insurance industry representatives might play a useful role in developing a workplan for site maintenance).³⁶⁷

The information–implementation dichotomy is a fuzzy one. General Cartwright’s discussion of DACOWITS illustrates the blur: advisory committee members, by identifying and reporting problems with specific units at particular locations,³⁶⁸ facilitated the implementation of the Clinton Administration’s agenda. And even on the information-gathering side, advisory committee support

365. On the justifications for bureaucratization (and for a critique of those justifications), see generally Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984).

366. See Michaels, *supra* note 27, at 229; Katyal, *supra* note 27, at 2316–17.

367. See Neera Tanden, Zeke Emanuel & Topher Spiro, *A New Management Structure for a New Phase of the Affordable Care Act*, CTR. AM. PROGRESS, (May 17, 2014, 7:00 AM), <https://www.americanprogress.org/issues/healthcare/reports/2014/05/17/89780/a-new-management-structure-for-a-new-phase-of-the-affordable-care-act> [https://perma.cc/9L27-7D56].

368. See Dua, *supra* note 222.

is not always a perfect substitute for civil servant cooperation. Consider again the example of ICE and the Advisory Committee on Family Residential Centers. According to advisory committee members, entrenched bureaucrats at ICE sought to circumscribe the Committee's information-gathering activities.³⁶⁹ The deep state sometimes may be able to keep the shallow state in the dark.

Ultimately, our conclusion is not that advisory committees allay all concerns about bureaucratization or that these panels always allow political appointees to overcome civil servant resistance. The complexity of public administration is rarely amenable to absolutes. Our more modest claim is that, when knowledge is power, then advisory committees—by providing political appointees with an alternative base of knowledge—also supply them with an additional power source. Yet knowledge is not always power; sometimes power lies in the ability to implement policies of national scope. The relative importance of information versus implementation will be a significant factor in whether the shallow state can or cannot counterbalance the deep.

CONCLUSION

The story that emerges from our study is partly one of conflict. Advisory committees, we find, are most likely to be utilized when preferences of political appointees diverge from those of careerists—when the power centers within the agency are at odds with one another. The composition of advisory committees, moreover, reflects the partisan tussle. “To the victor belong the spoils”³⁷⁰ no longer describes the allocation of most federal jobs in our post-patronage age, but it still applies—more or less—to advisory committee posts.

But our story is also one of symbiosis. The shallow state, we suggest, can bolster the deep state in several ways. By double-checking the findings and judgments of career civil servants, advisory committees can validate the bureaucracy's advice in the eyes of political appointees. By checking the bureaucracy's informational power, advisory committees can also assuage concerns about the deep state's lack of democratic accountability. They might, moreover, be able to enhance congressional oversight over administrative agencies, though this—as we suggest—may require the insertion of partisan balance requirements into committee charters.

The relationship operates in both directions. Some might see our findings regarding the partisan ebb and flow of advisory committee composition as damning to the shallow state. But our analysis above suggests another possible account.

369. See Schriro, *supra* note 263, at 465.

370. The statement is attributed to then-Senator William L. Marcy of New York, a Jacksonian Democrat, who in January 1832 was defending President Jackson's appointment of Martin Van Buren as Minister to England. RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780–1840*, at 250 (1969). Rather ironically, the spoils did not belong to the victor in that case: Van Buren's nomination was defeated in the Senate. DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 378 (David M. Kennedy ed., 2007).

Precisely because civil servants are not themselves “neutral” experts, the non-neutrality of advisory committees can be understood as a needed counterweight. Even apart from the countless cases in which agency staffers and advisory committees cooperate outright, their conflicts can be seen as mutualistic and not purely antagonistic.

In the end, then, the “fifth branch” of advisory committees deserves a place on conceptual maps of federal administration, not only because of the independent significance of these panels but also because of their importance to the federal government’s other elements. These 75,000 sets of eyes and ears significantly augment the Executive Branch’s capacity to gather and synthesize information while also undermining the civil service’s informational monopoly. As the administrative state endures growing criticism from scholars and judges who question the immense influence of unelected agency officials,³⁷¹ defenders of the status quo can point to the use of advisory committees as one more mechanism that checks the power of careerists and connects agency decisionmaking to electoral outcomes. In addition to providing agencies with subject-matter expertise and technical advice, then, advisory committees can offer agencies a measure of political accountability as well. For an “administrative state under siege” from those who question its democratic legitimacy, this may now be precisely what agencies most need.³⁷²

371. See generally Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8–51, 71 (2017) (summarizing “anti-administrativist” arguments).

372. *Id.* at 1.

APPENDIX

This Appendix reports regression results for our tripartite assessment of advisory committees' reputation-boosting potential for agencies. First, we examine whether agency engagement with advisory committees is associated with fewer reported infractions in the next year. (As usual, we operationalized "engagement" in three ways: new committees, committee budget, and committee meetings.) Table A.1 reports the results.

TABLE A.1: COMMITTEE ACTIVITY AND FUTURE INFRACTIONS

	(1)	(2)	(3)	(4)
New Committees	1.043 (0.828)			1.036 (0.836)
Committee Budget		-0.115 (0.493)		-0.289 (0.510)
Committee Meetings			0.098 (0.074)	0.109 (0.077)
Unit of Analysis: Cabinet departments in each year, 1997–2012. Dependent Variable: Number of infractions reported one year after the observation year. Model: Negative binomial regression. Observations: 252. *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$. All models include dept.-level fixed effects and standard errors clustered at the department level. <i>Committee Budget</i> is measured in millions of real (2016) dollars.				

Second, we analyze whether greater engagement with advisory committees is associated with agencies being the subject of fewer congressional oversight hearings in the next year.³⁷³ Table A.2 reports these results.

TABLE A.2: COMMITTEE ACTIVITY AND FUTURE CONGRESSIONAL OVERSIGHT

	(1)	(2)	(3)	(4)
New Committees	0.402 (0.355)			0.389 (0.359)
Committee Budget		-0.054 (0.211)		-0.063 (0.219)
Committee Meetings			0.007 (0.032)	0.009 (0.033)
Unit of Analysis: Cabinet departments in each year, 1997–2012. Dependent Variable: number of congressional oversight hearings held concerning the agency one year after the observation year. Model: Negative binomial regression. Observations: 252. *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$. All models include department-level fixed effects and standard errors clustered at the department level. <i>Committee Budget</i> is measured in millions of real (2016) dollars.				

373. Data on congressional oversight hearings obtained from Frank Baumgartner & Bryan Jones, *Congressional Hearings, Comparative Agendas Project: U.S. Policy Agendas*, www.comparativeagendas.net/us [https://perma.cc/QG5N-54Y6].

For a description of our method for identifying which hearings in the Baumgartner & Jones database qualify as "oversight," see Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1189, 1215 (2018). This measure is available only for the 1997–2012 period.

Third, we determine whether agencies that engage more with advisory committees in one year receive increases in their discretionary budget authority in the next.³⁷⁴ Congress may be more apt to fund agencies held in high esteem, so a positive relationship between an agency’s engagement with committees and a boost in that agency’s discretionary budget would support the notion that engagement with advisory committees enhances an agency’s reputation. Table A.3 reports correlations between our three measures of committee engagement and the inflation-adjusted percentage change in Congress’s grant of discretionary budget authority to the agency in the next year.³⁷⁵

TABLE A.3: COMMITTEE ACTIVITY AND FUTURE AGENCY FUNDING

	(1)	(2)	(3)	(4)
New Committees	0.025 (0.025)			0.027 (0.026)
Committee Budget		-0.002 (0.016)		-0.002 (0.065)
Committee Meetings			0.003 (0.033)	0.00008 (0.000)
Unit of Analysis: Cabinet departments in each year, 1997–2017. Dependent Variable: Percentage-point change in a department’s discretionary budget authority one year after the observation year. Model: OLS. Observations: 357. *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$. All models include department-level fixed effects and standard errors clustered at the department level. <i>Committee Budget</i> and DV are measured in millions of real (2016) dollars.				

These analyses yield null results; we cannot reject the null hypothesis that these measures of advisory committee engagement are unconnected to agency infractions in the previous year, future agency budget growth, agency infractions in the next year, or congressional oversight hearings held in the next year. To the extent that these activities serve as proxies for reputation, these results cast doubt on the notion that agencies can boost their reputations through greater engagement with advisory committees.

374. Budget data obtained from OFFICE OF MGMT. & BUDGET, *supra* note 205. Figures expressed in 2016 dollars, converted using *Databases, Tables & Calculators by Subject: CPI Inflation Calculator*, DEP’T OF LABOR, https://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/XA4P-7D4S>] (last visited Nov. 11, 2019).

375. Given the slow, path-dependent nature of agency-level changes in the federal budget in most years, *see* Bryan D. Jones et al., *An Integrated Theory of Budgetary Politics*, 58 AM. J. POL. SCI. 561, 561 (2014), this relative lack of year-to-year budgetary change is unsurprising. As a check, we also regressed these same explanatory variables on budget authority two and third years out. The results are substantially similar.