FEDERAL ADVISORY COMMITTEES &
THE INTERNAL SEPARATION OF POWERS

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Advisory committees are a common feature in the administrative state. Almost forty thousand experts from outside of 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. Yet the role of these committees in the administrative state remains understudied.

This Article urges administrative law scholars to consider advisory committees as a key arrow in the quiver for agency heads in their intra-agency rivalry with civil servants. Specifically, we argue that advisory committees enable agency heads to draw expertise from beyond the administrative state, reducing agency heads’ reliance on civil servants with political preferences that may differ markedly from their own. We label our theory of advisory committees’ purpose and function the agency-head independence account, and contrast it with the leading congressional control account, which views advisory committees as serving congressional interests.

To test these competing theories, we gather data on the political orientations of nearly 1,400 advisory committee members across three presidential administrations. We find that these committees lean left during Democratic administrations and right during Republican ones. We then examine the political circumstances surrounding the creation of new advisory committees by agency heads. We find that agency heads are more likely to establish new committees as the preferences of civil servants and their political principals diverge.

Taken together, these results support the agency-head independence account. Advisory committees empower agency heads to identify likeminded experts and subsidize the cost of their work. As a result, agency heads may utilize advisory committees to obtain advice from ideological sympathetic experts, thereby bypassing expert-but-potentially-oppositional civil servants. We conclude by considering the

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implications of our findings for the expertise-representativeness tradeoff inherent in delegations of authority and for the intra-agency separation of powers among agency heads, civil servants, and other actors.

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INTRODUCTION

Each year, federal agencies consult with over one thousand advisory committees on a wide range of programs and policies. These advisory committees include almost forty thousand members drawn from the private and nonprofit sectors—over ten times the total number of political appointees across the executive branch. Backed by an annual budget of nearly $400 million in a typical recent year, these committees provide an important source of brainpower to federal agencies, allowing agency heads to supplement the expertise and energy of their own staffs. Yet—despite their ubiquity across agencies—advisory committees’ place in the administrative state is underexplored.

The leading account of advisory committees posits that these bodies are instruments of congressional control over federal agencies.1 According to this account, Congress uses advisory committees to ensure that the same interests that are represented in the legislative process also have the agency’s ear. This representational correspondence reduces the risk that the agency charged with implementing a statute will adopt policies at variance with the preferences of the interest groups that participated in the statute’s enactment. Proponents of this congressional control account point to several features of advisory committees that increase the likelihood of representational correspondence. First, the Federal Advisory Committee Act (FACA) of 1972 mandates that memberships of advisory committees be “fairly balanced in terms of the points of view represented.”2 Second, many statutes require the representation of specific outside interests on certain committees. And while ultimately agency heads appoint members to advisory committees, interest groups can play a significant role in shaping the composition of these bodies by endorsing individual candidates. In this way, Congress can use advisory committees to empower interest groups in the administrative process and to affect the flow of information and advice to agency decisionmakers.

The congressional control account captures an important aspect of the federal advisory committee system. But we believe it provides an incomplete picture of the way in which advisory committees affect the allocation of power within the administrative state. In particular, it misses the fact that advisory committees allow agency heads to draw subject-matter expertise and policymaking assistance from beyond the civil service and the limited coterie of political appointees authorized by Congress. This aspect of the advisory committee system becomes especially


significant, we suggest, when an agency head finds herself out of step with the policy preferences of the agency’s career staff. Under these circumstances, the agency head potentially can use advisory committees to bring in policy perspectives and technical support from ideologically sympathetic outsiders. We call this the agency-head independence account to highlight the ways in which these bodies enable agency leaders to reduce reliance on civil servants and seek out their own sources of advice.

This Article motivates, develops, and tests this agency-head independence account. For the agency-head independence account to be descriptively accurate, agency heads must be able to place ideologically likeminded individuals on advisory committees. Leveraging data on the identities and political leanings of nearly 1,400 members of four policy-focused advisory committees over an 18-year span, we find that this condition is met; the composition of these committees trends right during Republican administrations and left during Democratic ones.

We then examine the political circumstances surrounding the creation of new policy-related advisory committees. We find, first, that Republican administrations—which must rely on a generally left-leaning, and thus perhaps oppositional, civil service workforce—establish these entities more frequently than Democratic administrations. We further find that, under Republican presidents, agencies whose civil servants are considered more liberal are more likely to establish advisory committees and, likewise, during Democratic administrations, agencies with more conservative workforces tend to establish more committees. Taken together, these analyses provide further support for the agency-head independence account. Agency heads use advisory committees as an alternative source of expertise and advice, thus reducing their reliance on career employees whose preferences may be misaligned with those at the top of the org chart.

At first glance, advisory committees may appear to be just another component of what Professors Aziz Huq and Jon Michaels call the “thick political surround,” i.e., the web of extra-agency actors, including congressional committees, other agencies, lobbyists, and journalists—that encase agency decisionmaking.\(^3\) But they are more than that.

For one, advisory committees are important actors in the internal competition for power between political appointees and civil servants within agencies. A growing administrative law literature emphasizes and extols the administrative state’s

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“internal separation of powers” among political appointees, civil servants, and participants in public-facing aspects of agency decision-making. Our findings suggest that agency heads’ ability to seek outside aid through advisory committee tempers the power of the civil service within this internal separation-of-powers system.

We further argue that advisory committees’ unusual position on the fringes of the administrative state—we call it the shallow state—enables political appointees to mitigate the expertise-responsiveness tradeoff inherent in delegations of authority. By bringing likeminded experts into the agency’s doors and subsidizing their work, advisory committees provide agency heads with informed second opinions.

This Article proceeds in four Parts. Part I provides an overview of advisory committees’ operations during the study period. Part II introduces the competing congressional control and agency-head independence accounts. Part III presents our empirical results. Finally, Part IV discusses in greater detail several implications—alluded to supra—of these results for our understanding of the administrative state.

I. FOUNDATIONS

In 2017, the federal government included 1,073 advisory committees, with 39,920 members, across 51 executive departments and independent agencies. In that year, these committees held 4,251 meetings and issued 428 reports. The equivalent of 561 full-time federal employees supported these committees’ work, and the federal government expended over $121 million on their activities. (During the previous three administrations, the federal government spent approximately $400

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5 Figures calculated by the authors based on searches of the FACA Database. General Services Administration, Federal Advisory Committee Act Database, available on-line at https://www.facdatabase.gov/rpt/databaseSearchHistory.asp (last accessed Jan. 7, 2018). Of these 51 departments and agencies, the Departments of Health & Human Services, Agriculture, the Interior, Commerce, Defense, and Homeland Security contained the most advisory committees. See id.

6 Id.

7 Id. This expenditure, while still a significant sum, is a drastic cut from the $450 million spent annually during the Obama years. Id.
million annually on these committees. Compensation to federal employees for committee-support functions comprised almost half of this total. (Although the modal committee did not compensate its members, the 117 committees that offered compensation paid a mean of $1,021 per member.)

Of these 1,073 committees, 56.4% were statutorily mandated, 16.8% were authorized by statute and created at the relevant agency’s discretion, and the remainder were created via executive order or another form of executive branch action without specific legislative authorization. In terms of subject matter, 46.0% are classified as either “scientific technical” or non-scientific program advisory boards,” 13.7% are “national policy issue advisory boards,” and 8.4% perform a grant review function.

Until the Trump administration, advisory committees had gradually become more active over the past several decades. Although the number of committees rose only modestly from 1997 to 2016, the number of individuals serving on those committees almost doubled. Committees also were significantly more active, holding thousands more meetings at the end of this period than at the beginning.

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8 Id.
9 Id.
10 Id.
11 See, e.g., 20 U.S.C. § 1011c(a) (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”).
12 See, e.g., 42 U.S.C. § 282(b)(16) (providing that the Secretary of Health and Human Services, acting through the Director of the National Institutes of Health, may “establish such technical and scientific peer review groups and scientific program advisory committees as are needed”).
13 See, e.g., U.S. Dept. of Agriculture, Departmental Regulation No. 1043-37 (Oct. 17, 2005) (establishing an advisory committee regarding a forest management plan within the spotted owl’s habitat).
14 Supra note 5. The remainder include, inter alia, National Institutes of Health “special emphasis panels,” which cut across subject area, and committees engaged in negotiated rulemakings.
15 In 1997, 963 committees with 36,451 members existed across the federal government. By 2016, those figures were 1,062 committees and 71,385 members.
16 Id. Between these two years, the mean annual number of meetings per committee rose from 5.9 to 7.4. Id.

Advisory committees saw an abrupt reversal of fortune in 2017, however. While the total number of committees continued to inch upward, the number of committee members dropped by almost half.\footnote{Id. As mentioned supra note 15, there were 71,385 committee members in 2016. Only 39,920 individuals served on advisory committees one year later.} Mean annual meetings per committee also declined, and budgets were cut to $121 million total and $112,835 per committee.\footnote{Id. In 2016, there were 7.4 meetings per committee; by 2017, there were only 4.0. Id. For budget figures, nominal amounts were converted to 2016 dollars via Bureau of Labor Statistics, CPI Inflation Calculator, available on-line at https://www.bls.gov/data/inflation_calculator.htm (last accessed Jan. 13, 2018).} Figures 1(a)-(d) chart these developments over the 1997-2017 period.
National policy boards—the 13.7% of advisory committees that are charged with generating new policy proposals within their subject areas—\(^20\) are less volatile.

\(^20\) The General Service 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.” General Services Administration, Common Federal Advisory Committee Questions, available on-line at https://www.facadatabase.gov/rpt/rptq02.asp (last accessed Jan. 7, 2018); accord Congressional Research Service, Creating a Federal Advisory Committee in the Executive Branch, at 5 n.28 (2016), available at https://fas.org/sgp/crs/misc/R44232.pdf (last accessed Jan. 7, 2018) (“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, at 46 (2013),
As Figures 2(a) and (b), respectively, show, their total numbers and the number of members of these committees have been relatively steady during the 1997-2017 period. Figures 2(c) and 2(d) show that their meetings and costs have decreased over this period, although these declines are far from monotonic.

Taken together, Figures 1 and 2 show that advisory committees, including policy-related committees, have been a relatively constant presence during the 1997-2016 period. In the first year of the Trump administration, the activity levels and cost of advisory committees, including policy-related committees, declined dramatically. (Membership figures also decreased significantly for advisory committees overall, but national policy boards bucked this trend.) But while advisory committees’ place in the administrative state may have receded based on these metrics, the total number of advisory committees, including policy boards, exhibited a slight uptick.
It remains too early to tell whether these cutbacks are attributable to a deliberate strategy to reduce the role of advisory committees or are instead merely part of a larger “exceptionally slow” staffing of leadership positions in the first year of the Trump administration.21 That the number of advisory committee held steady while staffing and activity levels dropped, however, counsels in favor of the latter explanation. Even if in a somewhat diminished form relative to the recent past, advisory committees remain a significant component of the executive branch.

II. THEORY

A. The Congressional Control Account

The leading account of advisory committees considers them as serving congressional interests.22 According to this view—advanced primarily by political scientists Steven Balla and John Wright—lawmakers establish committees that are reflective of the preferences of the coalition in Congress that created the relevant agency or program. 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 Congress-favored groups have a continued seat at the table.23 In this way, advisory committees are one of many administrative structures and processes that Congress may vary to alter the relative power of different outside groups in agency decisionmaking.24

Balla and Wright test their theory—which we term the congressional control account—by examining the National Drinking Water Advisory Council, which Congress established to advise the EPA on drinking water standards.25 They observe that the governing statute requires certain interests to be represented on the Council—e.g., that five members be appointed from state and local agencies

23 Id. at 800.
concerned with drinking water—and that individuals endorsed by interest groups that played an active role “in the legislative debate” preceding passage of the statute tend to be selected for these seats.\textsuperscript{26} For Balla and Wright, the fact that interest groups that were players in congressional debates concerning the governing statute also influenced appointment decisions to the Council suggests that this body—and, they conclude, advisory committees in general—are tools of Congress.\textsuperscript{27}

While the congressional control account captures an important function of advisory committees, it is incomplete.\textsuperscript{28} For one, the account applies only to committees created at Congress’s hand.\textsuperscript{29} That leaves the 453 committees in existence today that are not statutorily mandated—or 43\% of the 1,052 current advisory committees—expressly outside of the scope of the congressional control account.\textsuperscript{30}

Further, the “controls” that the legislative branch places on Congress-created advisory committees often are minor. FACA requires only that membership rosters be “fairly balanced in terms of the points of view represented and the functions to be performed.”\textsuperscript{31} Congress-imposed membership restrictions on specific committees also often grant agencies wide latitude. For instance, the 15-member drinking water committee that Balla and Wright examine must include five members of “the general public,” five members from state and local water-safety agencies, and five members representing private organizations with “an active interest in the field of water hygiene and public water supply.”\textsuperscript{32} 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

\begin{footnotes}
\footnotetext{26}{Balla & Wright at 810.}
\footnotetext{27}{Balla & Wright at 810-11.}
\footnotetext{28}{Their theory also is open to challenge on several other fronts, the most apparent being the generalizability of a single-committee study. Further, if interest groups that are powerful in the halls of Congress also happen to be powerful within the EPA, then their research design cannot distinguish between committees as objects of congressional control versus of interest group control. Finally, it is not apparent why the coalition in Congress that enacted the statute would privilege all “active interests in legislative debates,” id. at 810, rather than solely those interests that the enacting coalition favors. (Balla and Wright acknowledge this puzzle, see id. at 801, but do not explain it.)}
\footnotetext{29}{As Balla and Wright acknowledge, committees established via a different mechanism “undoubtedly serve a variety of different purposes.” Id. at 802.}
\footnotetext{30}{These 453 committees were created by executive branch organs, either pursuant to congressional authorization or \textit{sua sponte}. At the time of Balla and Wright’s publication, an even greater proportion of extant committees were created without congressional direction: 556 out of 991 (56\%).}
\footnotetext{31}{5 U.S.C. app. § 5(b)(2).}
\footnotetext{32}{42 U.S.C. § 300j-5(a). Two members of the third group must be “associated with small, rural public water systems.” Id.}
\end{footnotes}
representing industry and agriculture, and everything in between—that hold virtually any conceivable view on water safety. 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.

B. The Agency-Head Independence Account

We offer an alternative view. Our agency-head independence account holds that advisory committees empower agency heads at the expense of their nominal agents in the civil service.33 Agency heads are political actors; they are chosen, in part, to translate the President’s lofty ideological objectives into concrete regulatory policies. But, whereas regulations often are highly technical, agency heads typically are generalists.34 As a consequence, they must rely on others for specialized information and advice.35

An obvious source for this information—indeed, an intended source—is the civil service. According to Professor Jennifer Nou, “in many ways, high-quality information is the bureaucracy’s raison d’être.”36 As Christopher Lu, who served as Deputy Secretary of Labor during the Obama administration, characterized the arrangement: “The politcals set the direction of the agency, but they can only do it effectively if they tap into the expertise of the federal civil service.”37

That arrangement may have worked well for Deputy Secretary Lu, a Democratic appointee to one of the more liberal cabinet departments.38 But what about for an appointee at loggerheads with her department’s workforce—or even one

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33 We consider “the civil service” to comprise all career federal employees, aside from uniformed service-members, who receive a degree of merit-system protections, whether in the traditional merit system or in one of the “excepted” categories that still included in some form of a limited merit system. See Anne Joseph O’Connell, Vacant Offices: Delays in Staffing Top Agency Positions, 82 S. CAL. L. REV. 913, 966-69 (2009).


35 Id.

36 See Nou, supra note 34, at 487.


with designs to “deconstruct” that department?\textsuperscript{39} Here, the notion that civil servants would collaborate wholeheartedly seems dubious.\textsuperscript{40} Instead, the prospect of shirking—i.e., that an agent will undertake action (or inaction) that is contrary to the principal’s objective or desired effort level—looms large.\textsuperscript{41} This concern is particularly acute in the federal government, where civil service protections limit appointees’ ability to fire unfaithful agents.\textsuperscript{42}

Preference divergence between political appointees and civil servant is not merely theoretical. Political scientist Joshua Clinton and several colleagues estimated ideological ideal points for both political appointees and civil servants across the executive branch. Their measure is based on those appointees and civil servants’ responses to a survey administered in 2007 and 2008.\textsuperscript{43}


\footnote{See Pauline T. Kim, \textit{Beyond Principal-Agent Theories: Law and the Judicial Hierarchy}, 105 NW. 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 desired effort levels (“slackers”). See Sean Gallman & John W. Patty, \textit{Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise}, 51 AM. J. POL. SCI. 873 (2007). While most of this Article addresses how principals use advisory committees to mitigate against zealots, we note that these committee also may temper civil servants’ slacking, by, in a sense, providing a “b-team” to double-check their work and perhaps ferret out slacking-induced errors.

\footnote{See, e.g., 5 U.S.C. 2301(b)(8)(A) (“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, \textit{Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives}, 78 N.Y.U. L. REV. 557, 606-16 (2003).

Figure 3 reports Clinton et al.’s findings concerning appointee and civil servant ideology for 15 major cabinet departments. Negative (positive) values signify a more liberal (conservative) orientation for the median appointee and civil servant respondent in each department.

Figure 3 shows sizeable gaps between appointees and civil servants in almost every department. The median political appointee in every department during 2007 and 2008 was significantly right-of-center, whereas the median political appointee in most departments was left-of-center. While the size of this gap varies—it is largest for the Department of Labor, and trivial for the Department of Transportation—it

exists across these departments (as well as the independent agencies and sub-department-level bureaus included in the survey).44

Preference divergence between these two groups presents a dilemma to agency heads. Given the scope and complexity of many regulatory areas and the relatively small cadre of mostly short-term political appointees,45 an agency head is faced with a 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; agency heads can create new committees and, either directly or through their delegates, ensconce their ideological allies on them.46

To be sure, other escape hatches also exist. Agencies solicit outside opinions through notice-and-comment rulemaking and other procedures, and may place greater weight on well-reasoned comments from their ideological brethren than on equally thoughtful comments from their opponents. Agency heads also have no shortage of other extra-agency voices that they may consider in shaping policy, e.g., economists in the White House complex, legislators serving on relevant committees, and some subset of the nearly 50,000 registered federal lobbyists.47

These other sources of outside expertise notwithstanding, we contend that advisory committees are a particularly important—and underappreciated—source of subject-matter expertise and policymaking assistance. The federal government provides significant resource subsidies to facilitate these committees’ operations. As discussed supra, the equivalent of 561 full-time employees organize meetings, procure needed information, and otherwise support advisory committees’ operations.48 Agencies also fund members’ travel to Washington, D.C. or elsewhere for committee activities, pays fees to outside consultants to assist committees, and, for approximately 11% of committees, provides a mean honorarium of $1,021 per members.49 In all, the government funds advisory committees to the tune of $374

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44 See id.

45 See Anne Joseph O’Connell, Vacant Offices: Delays in Staffing Top Agency Positions, 82 S. Calif. L. Rev. 913, 935 (2009) (“[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 2-3 years).

46 As discussed infra, FACA and other laws do not appear to impose meaningful constraints on advisory committees’ ideological compositions.


49 Id.
Preliminary draft for Roundtable

million in 2016.50 These resources amplify committee members’ voices.51 By providing information and staff assistance, agencies subsidize committee members’ development of targeted expertise.52

For these reasons, advisory committees may be uniquely valuable to agency heads, allowing them to sidestep the expertise-responsiveness tradeoff inherent in seeking policy advice from civil servants and offering particular advantages over consulting other extra-agency sources for advice. Accordingly, our agency-head independence account contends that agency heads’ need for expert advice from likeminded individuals motivated the creation and staffing of advisory committees. Unlike the dominant, Congress-focused account, we look to how advisory committees affect how power is allocated within administrative agencies. Rather than serving Congress’s interests, we show how advisory committees empower agency heads at the expense of their nominal agents in the civil service.

III. Empirics

We take two approaches to assessing the competing congressional control and agency-head independence accounts. First, we examine the political ideologies of members of four representative advisory committees over an 18-year period. The agency-head independence account predicts that, as the political leanings of agency heads fluctuate during this period, so too should the ideological composition of advisory committees fluctuate. The congressional control account, by contrast, predicts stasis. To preview our results, we find—consistent with the agency-head independence account—that the composition of these four advisory committees trends left during Democratic administrations and right during Republican presidencies.

Second, we analyze the political circumstances at the time of creation for each policy-related advisory committee established between 1997 and 2017 whose

50 Id.

51 Mark P. Petracca, Federal Advisory Committees, Interest Groups and the Administrative State, 13 CONGRESS & THE PRESIDENCY 83 (1986) (stating that advisory committees “facilitate the permanent institutionalization of linkages between interests and the national executive.”).

52 Further, the prestige that comes with selection to a federal panel may encourage members to devote their energies to their committees’ subject matter. Honoraria that a subset of members receive provides an additional, more direct inducement for members to expend resources on committee works. Finally, by organizing meetings and reimbursing travel expenses, agencies subsidize the costs of forming and deepening professional networks among committee members. These stronger group ties may benefit committee members engaged in policy battles in Congress, the states, or elsewhere—particularly against opponents whose organization the federal government did not subsidize.
establishment was not statutorily required. The notion that agency heads act strategically in constituting new committees is a key implication of the agency-head independence account. By contrast, agency-created committees stand outside of the congressional control account. We find that administrations of Republican Presidents establish these bodies much more frequently than Democratic administrations. Given that the federal workforce leans left overall, greater Republican interest in advisory committees may constitute an attempt by agency heads to reduce reliance on civil servants whose views diverge from the agency head’s own—consistent with the agency-head independence account.

Diving deeper, we then examine the connection between civil servants’ ideological inclinations and appointees’ decisions to create advisory committees across Republican and Democratic administrations. We find that under Republican Presidents, agencies with more liberal civil service workforces are more likely to establish advisory committees. Likewise, when a Democrat occupies the Oval Office, the presence of relatively more conservative civil servants in an agency is positively correlated with the creation of new advisory committees within that agency. Once again, these findings are consistent with the agency-head independence account.

A. Committee Composition

To evaluate these competing accounts, we first determine whether the ideological composition of advisory committees changes with a new administration or maintains the balance of interests involved in earlier congressional debates. To this end, we gather data on 1,387 appointees to four policy-focused advisory committees during the 1997-2016 period. We then identify each advisory committee member’s estimated political preferences using a measure based on that individual’s campaign contributions.

The four advisory committees included in this analysis are the Commodity Futures Trading Commission’s Global Markets Advisory Committee, the Occupational Health & Safety Administration’s Advisory Committee on Construction Safety & Health, the Environmental Protection Agency’s Clean Air Act Advisory Committee, and the Nuclear Regulatory Commission’s Advisory Committee on Reactor Safeguards. All four committees generate new policy proposals concerning technical subjects. While their subject matters may be

53 See Figure 1 supra.

54 The General Service Administration’s FACA Database applies the “national policy issue advisory board” label to “committees devoted to advising agencies on the implementation of National Policy
somewhat obscure to the layperson, clear connections exist between their subjects and overtly partisan debates concerning the scope of government regulation of financial instruments, workplace safety, air quality, and nuclear energy.\textsuperscript{55}

There are, however, important differences among these four advisory committees in terms of their establishment, structure, and other key characteristics. Taken together, the four vary in terms of two important features: (1) establishment pursuant to a statutory mandate versus on the agency’s own initiative,\textsuperscript{56} and (2) location within an executive department versus in an independent agency.\textsuperscript{57} The

\begin{itemize}
\item \textsuperscript{55} See, e.g., Democratic Party Platform (July 21, 2016), available online at http://www.presidency.ucsb.edu/ws/index.php?pid=117717 (proposing a more aggressive regulatory posture at the CFTC, strengthening clear air regulations, increasing workplace protections); Republican Party Platform (July 18, 2016), available online at http://www.presidency.ucsb.edu/ws/index.php?pid=117718 (urging the elimination of “restrictions to allow responsible development of nuclear energy”).

\item \textsuperscript{56} Advisory committees also can be (i) authorized by statute and created at the agency’s discretion or (ii) created via executive order or other presidential action. Of the 1052 advisory committees in existence in 2018, 181 were authorized by statute and 33 were created via presidential action. See FACA Database, supra note 20.

\item \textsuperscript{57} Variation across both dimensions is important for our study. First, the inclusion of both Congress- and agency-created committees allows for an additional test of the congressional control account. If the congressional control account is accurate, then we would expect to observe the ideological composition of committees to vary based on the source of their establishment authority. Recall that the congressional control account holds that committees in the former group were designed to be static—i.e., for a given set of Congress-favored interest groups be represented regardless of which way the partisan winds blow. Accordingly, the congressional control account predicts that the ideological composition of congressional established committees will be relatively less dynamic than other committees.

Second, we include committees located in both executive departments and independent in order to address an unavoidable shortcoming in our research design: we must use the President’s partisanship as a proxy for agency heads’ ideologies. But the assumption that leaders of independent agencies are aligned with the President may not hold water. See \textit{FCC v. Fox Television Stations}, 556 U.S. 502 (2009) (stating that “independent agencies are sheltered not from politics but from the President, and . . . [exhibit] increased subservience to congressional direction”); \textit{id.} at 548 (Breyer, J., dissenting) (independent agencies “enjoy an independence expressly designed to insulate them . . .
following table classifies these four committees based on their establishment authority and situs within the executive branch.

Table 1: Key Characteristics of Included Advisory Committees

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<th>Establishment Authority</th>
<th>Statute</th>
<th>Agency Initiative</th>
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<td>Location In Exec. Branch</td>
<td>Exec. Dept.</td>
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<td>Construction Safety &amp; Health</td>
<td>Clean Air Act</td>
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</table>

Using the General Services Administration’s FACA Database,⁵⁹ we identify every member of these four committees who was appointed between 1997 and 2016—1,387 appointments of 740 unique individuals. To determine each committee member’s ideology, we utilize Professor Adam Bonica’s Database on Ideology, Money in Politics, and Elections (DIME).⁶⁰ 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.⁶¹ CF Scores range from -2 for the most liberal donors and recipients, to 2 for the most

from the exercise of political oversight”). If independent agencies are not subject to a degree of presidential control, that would call our research design’s validity into question with respect to independent agencies. Accordingly, we include both independent agencies and executive departments in our sample.


⁶¹ Id. at 3. 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 [hereinafter Ideological Marketplace], 58 AM. J. POL. SCI. 367, 370 (2014). To be assigned a CF Score, a donor must give to at least two recipients in DIME, and a recipient must receive funds from at least two donors in DIME. Id. at 371.
conservative. 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.

The use of DIME as a measure of political preferences is becoming increasingly common in legal scholarship. To generate preference estimates, DIME employs an algorithm to place donors along a left-right scale such that the distance between donors with similar patterns of political donors is minimized. DIME then constructs a similar scale for recipients. Finally, that some donors also are recipients allows for the merging of the two scales. As a result, Bonica can construct a single ideological scale for all donors and recipients across a 36-year span. The method assumes, essentially, that these donations constitute a form of revealed preferences, providing a window into—if not into donors’ innermost beliefs—than at least the views that they project publicly.

DIME includes CF Scores for 678 of the 1,387 appointees in our dataset. Befitting a group that is actively involved in advising the federal government, this 47.7% contribution rate is significantly higher than the general population’s 5% contribution rate, though not as high as the rates of political giving for members of

62 See Bonica, Ideological Marketplace, at 370.
63 Id. at 369.
65 Bonica, Ideological Marketplace, at 369-70.
66 Id.
67 Id.
68 Id.
69 But see id. at 373 (contending that CF Scores tend to reflect donors’ sincere views, rather than their strategic behavior).
70 Because some individuals were appointed or reappointed multiple times to an advisory committee during this period, 740 of these 1387 appointees are unique individuals. DIME includes CF scores for 344 of these 740 unique individuals, or 46.5%.
71 See Bonica, Clinton, and Sen, supra note 64, at 286.
hyper-elite groups like corporate CEOs and board members, members of federal commissions like the SEC, and former Supreme Court law clerks.\textsuperscript{72}

So what are the ideological views of members of these four advisory committees? And how do these views change over time, as membership rosters turn over?

We first examine the Occupational Health & Safety Administration’s (OSHA) Advisory Committee on Construction Safety & Health.\textsuperscript{73} The Construction Safety Act of 1969 requires the Secretary of Labor to consult the committee “in formulating construction safety and health standards and other regulations.”\textsuperscript{74} OSHA regulations extend this consultation requirement to “whenever occupational safety or health standards for construction activities are proposed,” regardless of whether the Construction Safety Act or another law authorizes the standards.\textsuperscript{75} For instance, following a 1994 consultation with the committee, OSHA modified a proposed rule increasing employers’ record-keeping requirements concerning workplace injuries as applied to the construction industry.\textsuperscript{76}

Figure 4 shows the median CF Score for members of the committee appointed during the 1997-2016 period. (Each two year span, e.g., 1997-1998, 1999-2000, etc., is consolidated as a mark placed at the latter year.) For ease of interpretation, the years of Democratic (Republican) control are denoted as blue circles (red triangles). The bars emanating from each mark signify one median absolute deviation—which is similar to a standard deviation—both above and below the median.

\textsuperscript{72} Feinstein & Hemel, supra note 64 (reporting that 80% of members of multi-member agencies are included in DIME); Adam Chilton, Jacob Goldin, Kyle Rozema, & Maya Sen, The Political Ideologies of Law Clerks, 19 AM. L. & ECON. REV. 96, 105 (2017) (66% for former Supreme Court clerks); 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).

\textsuperscript{73} The Construction Safety Act of 1969, which established the committee, requires the Secretary of Labor appoint three members representing building trades and construction employers, three representing employees, and three that “shall be selected on the basis of their professional and technical competence and experience in the construction health and safety field.” 40 U.S.C. § 3701 et seq., Pub. L. 107-217, Sec. 3704(d). To determine the committee’s membership, OSHA civil servants perform an initial review of nominees and makes recommendations to the Assistant Secretary of Labor for Occupational Safety & Health. Email from Dean McKenzie, Director, Directorate of Construction, OSHA, to authors (Jan. 8, 2017) (on file with authors). The Assistant Secretary then conducts her own review and makes a recommendation to the Secretary of Labor, who makes the final decisions. Id.


\textsuperscript{75} 29 CFR § 1912.3(a).

As Figure 4 illustrates, appointments to this advisory committee have a strong partisan flavor. During the included portion of the Clinton administration, the median appointee’s CF Score is -0.773. During George W. Bush’s presidency, that figure rises to 0.778—an increase of over 1.5 standard deviations. The committee’s ideological composition returns almost exactly to its Clinton-era level during the Obama years, with a median CF Score of -0.735 for new members.

The story is similar for the Environmental Protection Agency’s (EPA’s) Clean Air Act Advisory Committee. Unlike the statutorily mandated OSHA Advisory Committee on Construction Safety & Health, the EPA established its Clean Air Act Advisory Committee on its own authority, in 1990. The committee advises the EPA on, inter alia, innovations in pollution-control technologies and the

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77 55 Fed. Reg. 46992 (Nov. 6, 1990). The committee is comprised of approximately 40 members, who are culled, in no set number, from “business and industry, academic institutions, State, local, and tribal governments, EPA officials, unions, public interest groups, environmental organizations and service groups.” EPA, Clean Air Act Advisory Committee Charter (Sept. 16, 2016), available online at https://www.epa.gov/sites/production/files/2016-11/documents/caaac_charter_2016.pdf (last accessed Jan 7, 2017). This policy-focused advisory committee is not to be confused with the EPA Clean Air Scientific Advisory Committee, a scientific advisory committee with a statutory mandate to advise the EPA on the EPA’s National Ambient Air Quality Standards. 42 U.S.C. § 7409(d)(2).
potential welfare effects of programs designed to implement the Clean Air Act.\textsuperscript{78} For instance, at the EPA’s request, a committee workgroup issued a consensus report with recommendations on how to measure air quality and reduce diesel emissions from seaports.\textsuperscript{79}

Figure 5 displays the median CF Scores for members of this EPA committee appointed between 1997 and 2016.

\textbf{Figure 5:}

\textit{Ideologies of New Appointees to the EPA Clean Air Act Advisory Comm.}

\begin{figure}
\centering
\includegraphics[width=0.5\textwidth]{figure5.png}
\caption{Ideologies of New Appointees to the EPA Clean Air Act Advisory Comm.}
\end{figure}

The ideology of the median new member of this EPA advisory committee fluctuates with White House control: -0.889 during Clinton’s presidency, 0.136 during Bush’s, and 0.750 during Obama’s.


during the Bush years, and -0.883 under Obama. These partisan swings are not as extreme as on the OSHA body; for most of George W. Bush’s presidency, the committee’s membership—though more conservative than during the Clinton or Obama years—is still left-of-center. Further, the median absolute deviation bands extend both below -1 and above 1 in 2001-2002, and shrink only slightly in later years. (Because no new members joined the committee in 2003-2004, the figure does not include an estimate for these years.) Still, we see a rightward shift in this committee during the Bush years relative to the Democratic administrations that bookend it.

The same conclusion applies to the Nuclear Regulatory Commission’s Advisory Committee on Reactor Safeguards. Congress established this committee as part of the Atomic Energy Act of 1954.\textsuperscript{80} The committee is charged with advising the Nuclear Regulatory Commission (NRC), the successor independent agency to the defunct Atomic Energy Commission, on safety issues regarding proposed or existing nuclear reactors.\textsuperscript{81} NRC regulations expand on the committee’s mission, mandating, \textit{inter alia}, that the NRC refer certain applications for new reactor sites and reactor license renewals to the committee, and that the committee issue reports on these applications.\textsuperscript{82}

Figure 6 displays the now-familiar median CF Scores for members appointed during the study period.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{80}] 42 U.S.C. § 2039. No more than 15 individuals may serve on the committee at any given time. \textit{Id.} New members are selected by the NRC commissioners from a slate of candidates produced by one NRC commissioner, one NRC civil servant tasked with assisting the committee, and a second civil servant, preferably from outside the NRC. Advisory Committee on Reactor Safeguards, Bylaws (July 2014), available on-line at https://www.nrc.gov/docs/ML1517/ML15175A340.pdf (last accessed Apr. 13, 2018).
\item[\textsuperscript{81}] \textit{Id.}
\item[\textsuperscript{82}] 10 C.F.R. §§ 52.23, 52.87, 52.53, and 54.25.
\end{itemize}
\end{footnotesize}
The story here is familiar. Notwithstanding its status as an independent agency, the NRC appoints more liberal members to the committee during Clinton and Obama’s presidencies, and more conservative-leaning individuals during the Bush administration.

Finally, we examine an agency-created advisory committee nested within an independent agency: the Commodity Futures Trading Commission’s (CFTC) Global Markets Advisory Committee. The CFTC established this advisory committee pursuant to its own authority, i.e., without specific statutory authorization, in 1998.83

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The committee advises the CFTC on, *inter alia*, setting international standards for the regulation of futures of derivatives and avoiding “unnecessary or operational impediments faced by those doing global business.” For instance, in 2014 a subcommittee issued recommendations regarding how the CFTC should structure a new clearing mandate for certain foreign-exchange swaps. The next year, the full committee held a public meeting to discuss the topic.

Figure 7 illustrates the median CF Scores for new appointees during the 1997-2016 period. As before, we observe noticeable shift towards conservative appointees during the Bush administration—moving from -0.592 in the Clinton years to 0.675 during Bush’s terms in office—and then reversing direction again with Obama, to -0.713.

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*exchanges, regulators and self-regulators, financial intermediaries, end-users, traders and academics* and are appointed by vote of the CFTC commissioners. Notice of Establishment of the Commodity Futures Trading Commission Global Markets Advisory Committee, 63 Fed. Reg. 10595-02 (Mar. 4, 1998); see also CFTC, Renewal Charter, supra note Error! Bookmark not defined., at ¶ 12 (providing the approximate numbers of members that represent various “viewpoint categories”). The CFTC also controls the flow of information from the committee; committee meeting dates and agendas must be approved beforehand by a vote of the commissioners. Email from Ward P. Griffin, Special Counsel, CFTC, to authors (Jan. 8, 2017) (on file with authors).


Figure 7:
Ideologies of New Appointees to the CFTC’s Global Markets Advisory Committee

Figure 8, below, provides a different window on the shifting ideological makeup of the four advisory committees. For each year during the study period, the figure includes a density plot of the CF Scores for members of these committees. Years during the Clinton and Obama administrations are shaded blue; the Bush years are shaded red.
Figure 8 shows that the ideological posture of appointees to advisory committees tends to move in the direction of the President. The distributions skew left during Democratic administrations, and shifts to the right during Republican control of the White House.\textsuperscript{87}

Taken together, the findings in this Part counsel in favor of the agency-head independence account. For the agency-head independence account to be accurate, one necessary (though not sufficient) condition is that agency heads must be able to populate advisory committees with ideologically likeminded individuals.

\textsuperscript{87} Strikingly, the figure also exhibits some bimodality. While the modal appointee during Democratic (Republican) administrations is liberal (conservative), a smaller, second cluster of appointees holds views contrary to the President.
notwithstanding FACA’s mandate that these bodies be balanced. That advisory committees trend left during Democratic administrations (when agency heads presumably are liberal) and trend right during Republican administrations (when they presumably are conservative) suggests that this condition is met.

By contrast, that these findings hold true for statutorily created committees cuts against the congressional control account. Rather than mirroring the (static) views of the Congress in which these committees were created, these committees’ memberships are dynamic, shifting with the preferences of the President (and, presumably, of the agency head whom the President selects).

B. The Principal-Agent Problem and the Creation of Advisory Committees

To further assess these competing accounts, we examine agency heads’ decisions to create new advisory committees. We first explore the frequencies of new committee establishments under Democratic versus Republican administrations, and then show how divergence in ideological posture between civil servants and agency heads is associated with committee creation.

This Part focuses on national policy boards, which propose changes in agency policy concerning a discrete issue. We exclude from the analysis committees whose creation is mandated by statute.

Table 2 reports the mean number of new boards created per year during Clinton’s second term, George W. Bush and Barack Obama’s presidencies, and the first year of the Donald Trump administration. The table shows that Republican presidents exhibit a greater willingness than their Democratic counterparts to create national policy boards; Bush and Trump, on average, establish 35.0 new boards per year, whereas Clinton and Obama establish 28.9.

88 Doherty, supra note 20, at 46.
Table 2: Average Number of New National Policy Boards Per Year, 1997-2017

<table>
<thead>
<tr>
<th>President</th>
<th>New Comms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clinton</td>
<td>34.3</td>
</tr>
<tr>
<td>GWBush</td>
<td>35.5</td>
</tr>
<tr>
<td>Obama</td>
<td>26.3</td>
</tr>
<tr>
<td>Trump</td>
<td>31</td>
</tr>
<tr>
<td>Dem. Presidents</td>
<td>28.9</td>
</tr>
<tr>
<td>GOP Presidents</td>
<td>35.0</td>
</tr>
</tbody>
</table>

That Republicans establish new policy boards more frequently than Democrats is consistent with our agency-head independence account. While agency heads of all stripes benefit from the creation of these entities, which enable them to bring outside voices at relatively low cost, these boards hold particular appeal for conservative agency heads. Because the civil service generally leans left, advisory committees provide an additional benefit to conservative agency heads that is not present for their liberal counterparts: the ability to reduce their reliance on a liberal civil service workforce. To borrow a phrase familiar to conservatives, advisory committee offer conservative agency heads a choice, not an echo.

Pursuing this logic further, the agency-head independence account suggests a more refined, testable hypothesis: agency heads are more likely to create advisory committees where the agency head and civil servants have divergent preferences.

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89 See Table 2, infra. But see Jon D. Michaels, The American Deep State, 93 NOTRE DAME L. REV. 2018 (2018) (discussing survey results showing the proportion of federal civilian workers that identify or lean Republican is only four percentage points lower than the proportion that identify or lean Democratic, while also acknowledging that some agencies are skewed towards one party or the other).
To test this hypothesis, we employ as the dependent variable the number of new policy boards created in each of 16 cabinet departments during the 1997-2017 period.\textsuperscript{90} Constructing the key independent variables—all of which relate to preference divergence between civil servants and department secretaries—requires more legwork. For the preferences of civil servants in each included department, we return to Joshua Clinton and colleagues’ survey-based ideal point estimates.\textsuperscript{91} Recall that Professor Clinton, et al., constructed their estimates based on surveys administered to both political appointees and civil servants. They report the results separately for each of these two categories of respondent,\textsuperscript{92} and we adopt their civil servant-only estimates here.

The drawback of this measure is that it is not dynamic. Clinton et al. administered their survey in 2007 and 2008, but we adopt their estimate for civil servants over the entire 1997-2017 period. We contend that the glacial pace of employee turnover in the civil service justifies our use of this static measure.\textsuperscript{93} For cabinet secretaries’ preferences, we use the President’s party identification as a proxy, based on the established view that the cabinet agencies are mostly faithful agents.\textsuperscript{94}

We then estimate the following Poisson regression model:\textsuperscript{95}

\begin{align}
\text{Poisson regression is appropriate where, as here, the dependent variable is an event count without an upper limit and over-dispersion is not present. See Andrew Gelman & Jennifer Hill, Data Analysis Using Regression and Multilevel/Hierarchical Models 114 (2007).}
\end{align}
Preliminary draft for Roundtable

\[
\ln (\text{NewComms}_{it}) = \alpha + \beta_1 \times \text{CareeristPreferences}_i \times \text{DemPresident}_t + \\
\beta_2 \times \text{CareeristPreferences}_i + \\
\beta_3 \times \text{CareeristPreferences}_i \times \text{DemPresident}_t + \varepsilon_{it}
\]

where:

- \(\text{NewComms}_{it}\) is the number of new national policy boards created in department \(i\) in year \(t\) during the 1997-2017 period;
- \(\text{CareeristPreferences}_i\) is an estimate of the ideological preferences of department \(i\);
- \(\text{DemPresident}_t\) is a dummy variable taking the value 1 if the President in year \(t\) is a Democrat;
- \(\text{CareeristPreferences}_i \times \text{DemPresident}_t\) is an interaction term; and
- \(\varepsilon_{it}\) is an error term for \(it\), clustered at the department level.

Table 3 reports the regression results. Model 1 includes the results for the entire 1997-2017. Model 2 excludes the first year of the Trump administration, on the theory that President Trump’s approach to governance is \textit{sui generis} in several respects,\(^{96}\) and his designs on the administrative state may be unlike those of any other president in the post-New Deal era.\(^{97}\) Accordingly, Model 2 provides an alternative, pre-Trump specification.

Estimates with a meaningful interpretation are appear in bold. Because we include a \textit{Careerist Preferences} * \textit{Dem. President} interaction term, which shows the effect on advisory committee creation of an agency’s more conservative workforce during Democratic administrations, we also must include a stand-alone \textit{Dem. President} covariate. The coefficient estimate for \textit{Dem. President}, however, is not readily interpretable.


Table 3: Appointee-Civil Servant Preference Divergence & the Creation of New Policy Boards

<table>
<thead>
<tr>
<th></th>
<th>Model 1</th>
<th>Model 2</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Careerist Preferences</strong></td>
<td>-1.065***</td>
<td>-1.231***</td>
</tr>
<tr>
<td>(higher values=more conservative)</td>
<td>(0.277)</td>
<td>(0.290)</td>
</tr>
<tr>
<td><strong>Dem. President</strong></td>
<td>-0.003</td>
<td>-0.014</td>
</tr>
<tr>
<td></td>
<td>(0.105)</td>
<td>(0.109)</td>
</tr>
<tr>
<td><strong>Careerist Preferences * Dem. President</strong> (Interaction Term)</td>
<td>0.687†</td>
<td>0.854*</td>
</tr>
<tr>
<td></td>
<td>(0.373)</td>
<td>(0.383)</td>
</tr>
</tbody>
</table>

Unit of Analysis: Cabinet departments in each year during the 1997-2017 (Model 1) or 1997-2016 (Model 2) period. Dependent variable: Event count of new policy boards established per department-year. Model: Poisson regression. Observations: 357 (Model 1), 340 (Model 2). *** signifies \( p < 0.001 \), ** \( p < 0.01 \), * \( p < 0.05 \), † \( p < 0.10 \).

The presence of the interaction term complicates interpretation of these coefficient estimates.\(^98\) The basic conclusions from Table 3 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 *fewer* policy boards being created in that department.

- The positively signed, statistically significant coefficient estimates for the interaction term indicate that during Democratic administrations, more conservative civil servants in a given department are associated with *more* policy boards being created in that department.

The bottom line from Table 3 is that greater preference divergence between civil servants and political appointees is associated with the establishment of more

\(^98\) The presence of logarithmically transformed dependent variables also makes the coefficient sizes less readily interpretable.
policy boards. These results support our theory that presidents and cabinet secretaries use advisory committees as an alternative source of expertise—bypassing career civil servants when appointees’ preferences and those of civil servants are misaligned.

Preference divergence also may be connected to committee capacity—with agency heads providing greater funding to advisory committees when those agency heads’ preferences are in tension with those of the civil service—although the effects are somewhat weaker here. We examine the association between appointee-civil servant preference divergence (using the same independent variables as before) and the amount, in millions of 2016 dollars, that each of 16 cabinet departments spent on advisory committees during each year of the study period. 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. Table 4 report the results.

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99 Also, these results are more substantively and statistically significant in Model 2, which excludes the first year of the Trump administration.

100 We derive our data on committee funding levels from the FACA Database. Nominal figures converted to 2016 dollars via Bureau of Labor Statistics, CPI Inflation Calculator, supra note 17, and expressed in millions of dollars.

101 That the 2017 Omnibus Appropriations Bill includes specific line items for only three advisory committees across the entire federal government provides support for this assumption. Consolidated Appropriations Act of 2017, Pub. L. 115-31, 131 Stat. 135.

Table 4: Appointee-Civil Servant Preference Divergence & Comm. Funding Levels

<table>
<thead>
<tr>
<th></th>
<th>Model 3</th>
<th>Model 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Careerist Preferences</td>
<td>-2.424*</td>
<td>-1.991†</td>
</tr>
<tr>
<td>(higher values=more</td>
<td>(1.142)</td>
<td>(1.054)</td>
</tr>
<tr>
<td>conservative)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dem. President</td>
<td>-0.053</td>
<td>0.985</td>
</tr>
<tr>
<td></td>
<td>(1.131)</td>
<td>(1.108)</td>
</tr>
<tr>
<td>Careerist Preferences</td>
<td>1.547</td>
<td>1.115</td>
</tr>
<tr>
<td>* Dem. President</td>
<td>(1.478)</td>
<td>(1.398)</td>
</tr>
<tr>
<td>(Interaction Term)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Unit of Analysis: Cabinet departments in each year during the 1997-2017 (Model 1) or 1997-2016 (Model 2) period. Dependent variable: Department-wide expenditures on advisory committees, in millions of 2016 dollars. Model: Time-series cross-sectional. Observations: 357 (Model 1), 340 (Model 2). *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$.

The negative coefficient estimates for Careerist Preferences indicate that during Republican administrations, more conservative civil servants in a given department are associated with fewer policy boards being created in that department. This estimate is statistically significant at the conventionally accepted $p < 0.05$ in Model 3, and barely misses this level in Model 4. Because the estimates for the interaction term—although in the hypothesized direction—fall far short of generally accepted levels of statistical significance, we cannot reject the null hypothesis that there is no connection between preference divergence and advisory committee funding levels during Democratic administrations.

IV. IMPLICATIONS

Taken together, these results counsel in favor of viewing advisory committees as serving the interests of agency heads. The ideological composition of these committees is responsive to political leaders’ orientations—in contravention of the spirit, if not the letter, of the Federal Advisory Committee Act. That finding

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103 See supra Part III.

104 5 U.S.C. app. § 5(b)(2) (requiring that advisory committees be “fairly balanced in terms of the points of view represented).
also is in tension with accounts that consider advisory committees as “fire alarms” to Capitol Hill, providing a measure of ongoing congressional control by placing interest groups that were involved in earlier legislative debates with embedded positions within agencies.  

Further, advisory committees are more likely to be established as the ideological gap between civil servants and their political principals grows. That finding suggests that agency heads rely most heavily on advisory committees when they believe the possibility of shirking by civil servants is greatest. Although our tests cannot definitively prove or disprove either theory, in the aggregate these findings suggest that advisory committees serve the interests of agency heads or other political appointees—not Congress.

A. Mitigating the Expertise-Representativeness Tradeoff

These results suggest that advisory committees enable agency heads to mitigate the expertise-responsiveness tradeoff inherent in delegations of authority. Agency heads require professional guidance in making policy. That statement is more than just a normative aspiration—courts require reasoned decision-making. Thus, political principals may rely on advice and expertise not only to ensure that their high-level objectives can be transformed into detailed, effective policy, but also to ensure that sufficient factual findings exist such that their policy decisions hold up in court.

Ordinarily, civil servants are the lowest-cost source of that expertise. But preference divergence between appointees and civil servants introduces the possibility that the latter group will be unfaithful agents. Although savvy

105 See Balla & Wright, supra note 22; see generally Matthew McCubbins & Thomas Schwartz, Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms, 28 AM. J. POL. SCI. 165, 166 (1984).

106 See Sean Gailmard, Expertise, Subversion, and Bureaucratic Discretion, 18 J.L. ECON. & ORG. 536, 553 (2002) (positing that “agency policy output should be less responsive to changes in congressional preferences the greater is the cost of expertise”). Gailmard’s positive theory should hold true not just for congressional preference, but for those of any principal, including the agency head.

107 See Massachusetts v. EPA, 549 U.S. 497, 534 (2007) (faulting an agency for its failure to present “a reasoned justification” for declining to regulate); Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 47-57 (1983) (striking down agency action as arbitrary and capricious where the agency did not consider reasonable alternatives to its preferred option); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (reviewing an administrative decision “based on the full administrative record that was before the Secretary at the time he made is decision”).

108 See supra Part III.
appointees may be able to tweak the ideological composition of the civil service at the margins, \(^{109}\) they simply cannot remake their agencies’ workforces to reflect their preferences. \(^{110}\) As one particularly sophisticated bureaucratic strategist observed, “You go to war with the army you have.” \(^{111}\)

Advisory committees provide an alternative source of expertise. They may not be the lowest-cost provider—but they are awfully close. \(^{112}\) By identifying likeminded experts and subsidizing the cost of their work, agency heads can utilize ideologically similar advisory committees to obtain informed second opinions to the views expressed by civil servants. Accordingly, by providing agency heads with expert advice from ideological allies, advisory committees in some circumstances may enable agency heads to sidestep the expertise-responsiveness tradeoff.

**B. Advisory Committees in the Internal Separation of Powers**

These results also thicken our understanding of the administration state. Whereas conventional wisdom once treated agencies as internally cohesive, unitary actors, \(^{113}\) today we see the archetypal agency as a “they” rather than an “it.” \(^{114}\) As scholars turn over previously unperturbed rocks across the administrative state, they explore how power is delegated and exercised; hierarchical chains of command are violated; and entities promoting differing values or objectives compete to have their voices heard—all within a single agency. \(^{115}\) This Article has a place in this literature; it urges administrative law scholars to consider advisory committees as another example of the pluralism that exists within the administrative state.

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110 See *Rutan v. Republican Party*, 497 U.S. 62, 72-79 (1990) (reiterating that civil service employment decisions based on partisan affiliation are prohibited).


112 See *supra* Part I (discussing the ways in which the government subsidizes committee members’ development of targeted expertise concerning subjects about which agency heads care)


More significantly, the conclusion that agency heads use advisory committees as a means of acquiring information while bypassing civil servants calls for a reevaluation of the balance of power between political appointees and civil servants within agencies. A growing literature in administrative law probes the “internal separation of powers” within administrative agencies. Just as constitutional power is divided among three rivalrous branches in the conventional separation of powers, so too is administrative power apportioned to three competing entities within the administrative state: political appointees, career civil servants, and individuals and groups in society that participate in administrative proceedings. Professor Jon Michaels describes how political appointees’ relative power in this separation-of-powers system can be enhanced by, for instance, establishing new appointed positions deeper into an agency’s organizational chart, promoting privatization of functions formerly performed by civil servants, and curtailing civil service protections and collective bargaining rights.

Advisory committees are another such arrow in the quiver for agency heads in their rivalry with civil servants; they provide expertise from individuals whose views are more aligned with agency heads but (fortunately for agency heads) receive none of the legal protections that undergird the civil service’s independence from their ostensible principals. This function within the intra-agency separation of powers should be familiar to students of the conventional, inter-branch separation of powers. The political branches have developed internal sources of expertise that are not beholden to other branches: Congress with its professional committee staffs and support agencies like the Government Accountability Office, the White House with its cadre of aides and policy czars not subject to Senate confirmation and limited to an advice-giving role. The use of advisory committees suggests that players in the “new” separation of powers have done the same.

C. The Shallowest State


118 Id. at 247; see also Jon D. Michaels, Privatization’s Pretensions, 77 U. CHI. L. REV. 717, 746 (2010) (discussing strategic delegations to private parties to avoid conflict with civil servants).


Whereas the rivalry between civil servants and appointees once may have been seen as an exercise of inside baseball, the term “deep state” recently entered the broader American political lexicon to describe a subset of the civil service—specifically, some attorneys, policy analysts, scientists, and other career bureaucrats with specialized expertise—at odds with political appointees generally and allegedly engaged in open conflict with President Trump and his appointees specifically.121 (In some of these accounts, the deep state’s actions are presented as responses to much more egregious behavior by President Trump,122 but that is not our focus here.)

Adopting this nomenclature, advisory committees can be considered elements of the shallow state. Their members are connected to the administrative state—but just barely: they serve for fixed terms, on a part-time basis, and typically without compensation (except for reimbursements for their expenses). Where the deep state and political appointees are engaged in a rivalry for power within the administrative state,123 appointees often control the memberships of advisory committees and select their ideological allies for these positions.124

Whereas civil service protections and a status quo bias on Capitol Hill limit political actors’ ability to bring the deep state to heel, appointees can create and—for those committees that are not mandated by statute—dissolve committees at will. In a sense, advisory committees are just barely within the government; they are subject to freedom-of-information, record-keeping, and open-meeting requirements to a similar extent as are other governmental entities,125 yet their advisory function, temporary status, low or nonexistent compensation, and lack of employment protections place them near the outer edges of government. They are the deep state’s polar opposite: the shallowest end of the administrative state.

CONCLUSION

Taken together, the empirical results presented in this Article all point to the same conclusion: that agency heads use advisory committees to reduce their reliance on potentially oppositional civil servants. The composition of these committees tends


123 See id.

124 See supra Part III.

125 See 5 U.S.C. app. § 10(a)-(c).
to lean towards the preferences of political appointees, and their establishment is more likely when appointees and civil servants’ preferences are misaligned. The implication of these findings is that—consistent with our agency-head independence account—advisory committees empower agency heads at the expense of civil servants. Civil servants are not monopoly providers of information to their political principals, but rather compete with advisory committees that may be more attuned to the preferences of political appointees.

Because we are not privy to the inner workings of agencies, however, we cannot draw firm conclusions regarding the extent to which advisory committee actually move policy. Nonetheless, there is strong circumstantial evidence that advisory committees are consequential; that political appointees stack committees with ideological allies and tend to create new committees during periods of likely ideological conflict between appointees and civil servants suggests that these committees impact outcomes—why else would appointees engage in this behavior? Still, without knowing advisory committees’ ultimate effect, we cannot definitively assess the competing congressional control and agency-head independence accounts; the most we can say is that necessary conditions for the agency-head independence account to be accurate are met.

While this Article’s contribution is largely positive and descriptive, its implications are prescriptive. With approximately 3,600 presidential appointees overseeing almost 2 million civil servants and millions more private contractors, concerns regarding the ability of political principals to control administration have been voiced at the highest levels of government since at least the Theodore Roosevelt administration. The Trump administration shares these concerns—and

126 Figure for political appointees obtained from Office of Presidential Personnel, Smoothing the Peaceful Transfer of Democratic Power, Rep. 2017-27, available online at http://whitehousetransitionproject.org/wp-content/uploads/2016/10/WHTP2017-27_Office_of_Presidential_Personnel.pdf (last accessed May 31, 2018), at 6. Figure includes Senate-confirmed presidential appointees, non-Senate-confirmed presidential appointees, the 10 percent of senior executive service positions that may be filled based in part on political considerations, and lower-level Schedule C positions, e.g., speechwriters, that also may be filled based in part on political considerations. Id. For number of civil servants, see Anne Joseph O’Connell, After one year in office Trump’s behind on staffing but making steady progress, BROOKINGS INST. REP. (Jan. 23, 2018), available online at https://www.brookings.edu/research/after-one-year-in-office-trumps-behind-on-staffing-but-making-steady-progress/ (last accessed May 31, 2018). For number of contractors, see MICHAELS, supra note 4.

seeks to dramatically change the federal workforce in response.\textsuperscript{128} According to former Speaker Newt Gingrich, who advises the Trump administration on federal workforce issues, “[a]ll those bureaucrats overwhelmingly voted for Clinton,” and so “[t]here won’t be any real cooperation until we change federal law so we can fire them.”\textsuperscript{129} In May 2018, President Trump took a first step to do just that, signing executive orders to streamline the process to discipline and fire civil servants.\textsuperscript{130} Yet the findings in this Article suggest that this response is awfully strong medicine. To the extent that the White House is motivated by a desire to obtain expert analysis that is aligned with its political orientation, the greater use of advisory committees and other shallow-state and extra-state actors may be a better targeted and more practical solution.


\textsuperscript{129} Id.