

Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process

Jarrod Shobe*

ABSTRACT

The scope and power of the administrative state in implementing law is a common theme in academic discussions and judicial decisions, but the role that agencies play in drafting the laws that they implement has gone mostly unexplored. Based on interviews with fifty-four agency staff who work on legislative matters, this Article provides an unprecedented account of the role of agencies in the legislative process. The interviews reveal that agencies are deeply involved in drafting and reviewing statutory text before enactment, and show that Congress often relies heavily on agencies' significant legislative resources and expertise. Respondents reported previously unnoticed external and structural factors that affect the agency-Congress relationship in the legislative process and provided important insight into the ways in which agencies communicate with Congress during the legislative process. This Article argues that these findings can provide judges and scholars with more accurate assumptions about congressional intent to defer to agencies. This Article also raises new questions about the President's and Congress's ability to monitor and control the modern administrative state. It further shows that the legislative drafting process is more fragmented than commentators have realized, and that this fragmentation generally happens along agency lines. This Article's findings provide a more complete account of the complexity of the legislative process and an initial framework for approaching foundational questions raised by agency involvement in lawmaking.

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* Associate Professor of Law, Brigham Young University. For helpful discussions and comments, the Author is grateful to Abbe Gluck, Bill Eskridge, Jerry Mashaw, John Morley, Lisa Larrimore Ouellette, Nick Parrillo, Peter Strauss, Chris Walker, and Megan Wright. A special thanks to all of the agency staff who spoke with the Author and helped him with this project. Questionnaire results are on file with the author.

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INTRODUCTION

This Article asks to what extent, and in what ways, agencies are able to influence Congress’s lawmaking process. Existing legal scholarship and judicial decisions generally operate under the mostly unquestioned assumption that Congress drafts statutes and that the role of agencies begins only after a statute has been drafted and enacted. Scholars and courts have occasionally speculated that the executive branch plays some role in reviewing or drafting statutes before enactment,¹ but what that role is, and how it works, is lacking an empirical account.² Recent empirical studies have begun to shed light on how

1 See Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 758 (2014) [hereinafter Gluck & Bressman, *Part II*] (“[O]ur respondents told us that first drafts are typically written by, respectively, the White House and agencies, or policy experts and outside groups, like lobbyists. Empirical work is lacking for the details of this account”) (footnote omitted); Brigham Daniels, *Agency as Principal*, 48 GA. L. REV. 335, 404 (2014) (“Sometimes Congress asks agencies to draft language, and sometimes agencies do so without being asked. It is just the way the game is played, and those with much experience in Washington openly acknowledge this.”); Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1146 (2012) (“The agency may have helped to draft the statutory language, and was likely present and attentive throughout its legislative consideration. Its views about statutory meaning may have been shaped in the immediate wake of enactment, under the enacting Congress’s watchful eye.”).

2 See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 905 (2013) [hereinafter Gluck & Bressman, *Part I*]; *id.* at 1021 (“There are likely external networks of these noncongressional drafters of federal legislation, with deep resources of institutional and legal knowledge, that may influence statutory drafting in ways that have been underappreciated and merit their own separate study.”). See *infra* Section I.A, for a discussion of a few recent articles that provide some empirical evidence of agency involvement in the legislative process as part of larger studies of different topics.

Congress's legislative process works,³ but this literature does not account for the role agencies play. To the extent scholars have examined the executive branch's involvement in creating legislation, they have focused primarily on Congress's interactions with the President rather than with agencies.⁴

As detailed in Part I, this Article is the first extensive empirical study into the role of agencies in the legislative process. From August through November 2014, the Author conducted in-person and telephone interviews with fifty-four agency staff working in fourteen of the fifteen executive agencies and eleven different independent agencies.⁵ Respondents included agency legislative counsel and staff working in agency offices of legislative affairs, as well as both career employees and political appointees. The use of oral interviews allowed for rich, qualitative explanations from respondents about their experiences, including many descriptions of the process and their roles in it, that the Author had not previously considered. One of the most valuable aspects of the study is that it lays out the types of agency actors involved in legislation and details the internal mechanisms and processes agencies use. This adds context and structure to the indefi-

³ See generally Gluck & Bressman, *Part I*, *supra* note 2; Gluck & Bressman, *Part II*, *supra* note 1.

⁴ See, e.g., GEORGE C. EDWARDS III, *AT THE MARGINS: PRESIDENTIAL LEADERSHIP OF CONGRESS* xiii (1989); WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 26 (4th ed. 2007) (“[T]he President exerts substantial influence over the shape of the political agenda.”); PAUL C. LIGHT, *THE PRESIDENT’S AGENDA: DOMESTIC POLICY CHOICE FROM KENNEDY TO CLINTON* (3d ed. 1999); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 *Geo. L.J.* 523, 529–32 (1992); Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725, 1818–19 (1996) (“[President] Wilson’s proactive approach, if not always a success, has since become the norm, so much so that the President has aptly been termed the ‘legislator-in-chief.’”); Vasav Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 *WM. & MARY L. REV.* 1, 48–49 (2002); Rajiv Mohan, *Chevron and the President’s Role in the Legislative Process*, 64 *ADMIN L. REV.* 793, 801–06 (2012) (discussing the President’s use of the veto power).

⁵ What exactly constitutes an independent agency, and therefore how many independent agencies exist, are not easy questions to answer. One effort to count these agencies came to this conclusion:

Every list of federal agencies in government publications is different. For example, FOIA.gov lists 78 independent executive agencies and 174 components of the executive departments as units that comply with the Freedom of Information Act requirements imposed on every federal agency. This appears to be on the conservative end of the range of possible agency definitions. The *United States Government Manual* lists 96 independent executive units and 220 components of the executive departments. An even more inclusive listing comes from USA.gov, which lists 137 independent executive agencies and 268 units in the Cabinet.

DAVID E. LEWIS & JENNIFER L. SELIN, *SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES* 15 (2012) (footnotes omitted).

nite impressions that scholars and judges have about agency involvement in creating legislation. For example, the generally unrecognized fact that agencies have their own legislative counsel whose sole work is to review and draft legislation, in a way that is almost identical to Congress's own legislative counsel, shows the substantial investment agencies make in influencing the legislative process.

Part II lays out the responses to questions relating to legislative drafting and shows that much enacted statutory text is written by agencies rather than members of Congress or their staff. Respondents described various ways their agencies are involved in legislative drafting. The vast majority of respondents said their agency originates legislative proposals. That the executive branch submits proposals to Congress is no secret, but respondents said that although these proposals are commonly submitted as administration proposals coming from the White House, they originate within agencies and are then reviewed at the White House level before being sent to Congress. Perhaps more surprisingly, and something that is not imagined by the Constitution or most commentators, respondents reported that Congress also sometimes asks agencies to draft legislative proposals for Congress instead of relying on congressional staff or Congress's Offices of Legislative Counsel.

Almost all respondents reported that their agency also plays an important role as reviewer and editor of statutory language drafted outside their agency, either by request from Congress or as a result of the agency's own monitoring of legislation. Respondents reported that agency review involves substantial negotiation with Congress and frequently results in extensive changes to statutory language. This agency review process involves all levels of an agency, including staff in agency program offices tasked with implementing statutes and who are more familiar with the on-the-ground issues that legislation could create.

Respondents stressed that before an agency can submit draft legislation or take policy positions on legislation, it is subject to oversight and clearance by the Office of Management and Budget ("OMB"), a part of the Executive Office of the President. Less formal agency interactions with Congress, however, escape presidential oversight. An important and extensive scholarly discussion exists around the role that OMB plays in overseeing and clearing agency regulatory processes through its Office of Information and Regulatory Affairs.⁶

⁶ See *infra* Section II.D.

Scholars, however, have paid virtually no attention to a similar role that OMB plays overseeing agency legislative work. This Article provides the first scholarly account of OMB's oversight and clearance of agency action in the legislative process, explaining how the process affects the relationship between agencies and Congress. This Article's findings thus raise new questions about the operation of presidential control of agencies.

Part II also adds new contours to the legislative history debate. According to respondents, although Congress works closely with agencies on legislation, Congress generally does not ask agencies to review or draft committee reports or conference reports.⁷ The most important types of legislative history are instead generally drafted by congressional staff, meaning they are more closely connected to politically accountable staff and members. Legislative history also generally does not benefit from review by expert agencies, however, meaning there is a greater risk of congressional staffers adding language to legislative history that is incoherent or inconsistent with the statutory language generated by the full legislative process. This Article's findings can plausibly strengthen arguments both for and against the use of legislative history, yet either way, it is important for scholars and judges to acknowledge the role of agencies when they make these arguments.

Part III describes a number of external and structural factors that affect whether, and to what extent, agencies provide input in the legislative process. Nearly all respondents emphasized that agencies have much more subject-matter expertise than congressional staff, and because of this, Congress is unable to draft legislation that is both detailed and effective without significant agency input. This goes against common judicial and scholarly assumptions about Congress's ability to draft specific statutes to circumscribe agency discretion. The information asymmetry inherent in the relationship between agencies and Congress makes it difficult for Congress to control agencies legislatively. Agency expertise allows agencies to control much of the legislative dialogue with Congress and important portions of the resulting legislative text.

Congress does not always benefit from agency expertise. Respondents described various personnel and political factors that determine how, and to what extent, agencies play a role in originating and reviewing legislation. Some of these factors would be difficult for outsid-

⁷ See *infra* Part II.

ers to detect, like the personal relationships between agency and congressional staff. Other factors that determine agency involvement in the legislative process are readily discernable. For example, respondents revealed that agency involvement is heavily dependent on the political parties of those involved. Respondents working in executive agencies reported that they generally interact more closely with congressional staff whose members are of the same political party as the President, and that these staff are more likely to use agency-proposed drafts of legislation and to accept agency comments on legislation drafted in Congress. According to respondents, in times of divided government, Congress is more likely to want to limit agency authority, especially that of executive agencies, and executive agencies are often more likely to want to stop legislation than promote legislation.

Part III uses these findings to argue that the assumptions underlying *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁸ are more likely to be incorrect when there is conflict between an agency and Congress. Political scientists have shown that Congress delegates less to executive agencies in times of divided government.⁹ This political science literature, much like the legal literature, assumes that Congress is able to draft the specific and detailed statutes necessary to limit agency discretion, but this Article's findings on congressional expertise call into question Congress's ability to constrain agencies legislatively.¹⁰ This Article argues that when ambiguity exists in a statute that was drafted in times of divided government, it is more likely this ambiguity was unintentional, and courts should therefore not assume that this is a signal from Congress of an intent to defer. The assumptions provided in this Article about the effect of political parties are not perfect, but they are less crude than the existing judicial assumptions, and would allow courts to better tailor agency interpretive space to the variety of agency-Congress relationships, something the Supreme Court has explicitly pursued.¹¹

Part IV describes underappreciated ways in which agencies influence interbranch communications and the structure of legislation. A common claim among legislation scholars is that Congress does not have the ability or desire to coordinate with courts.¹² Congressional

⁸ 467 U.S. 837 (1984).

⁹ See *infra* note 258 and accompanying text.

¹⁰ See *infra* Sections III.A.2, III.C.1.

¹¹ *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001) ("Justice Scalia's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety.").

¹² See *infra* note 286 and accompanying text.

staff also generally reject the idea of a direct courts-Congress dialogue.¹³ This is unsurprising given the lack of a direct connection between Congress and courts. Respondents said that agencies, on the other hand, have direct feedback loops with both courts and Congress. Those within an agency who work on litigation issues can inform those working on the legislative side of the agency of any judicial decisions to which the agency may want to respond (for example, by drafting a legislative fix for Congress or lobbying Congress with respect to that issue). This shows that agencies may hold the key to a courts-Congress dialogue but in a more indirect way than scholars appreciate.

This Article's findings also show that a presumption of consistent usage should apply based on agency jurisdiction. Respondents frequently emphasized that their agency has its own unique terminology and drafting style that are generally not relevant to other agencies. Scholars and judges regularly debate whether to apply a presumption of consistent usage of terms within bills and across bills.¹⁴ One major claim made by Professors Gluck and Bressman is that the committee structure in Congress makes it so that each committee has its own consistent drafting processes and terminology, but that these are not consistent across committees.¹⁵ Agency respondents, however, emphasized that drafting and terminology is agency-specific, not committee-specific or bill-specific. The fact that agencies operate in their own legislative worlds also complicates calls for standardization of the legislative process, either through standardized drafting materials or congressional processes.¹⁶

The findings explained in Parts II through IV, taken together, show that the full complexity of the legislative process, and agencies' central role in the process, has been underexplored. This Article's empirical study provides a richer account of the complexity of the legislative drafting process that courts should incorporate into their decisionmaking process. As with any investigation of this type, the results are subject to a number of methodological limitations. Although the findings are only suggestive, they establish a new perspective on the legislative process and the relationships between courts, agencies, the President, and Congress. This is a big project for a single article.

¹³ See Gluck & Bressman, *Part II*, *supra* note 1, at 765.

¹⁴ See *infra* Section IV.B.1.

¹⁵ Gluck & Bressman, *Part II*, *supra* note 1, at 749–50.

¹⁶ See *id.* at 778 (“[W]e do think there are some efforts Congress itself could attempt, be it coordinating or standardizing some drafting practices or changing other internal drafting norms, to respond to courts’ assumptions.”).

One article, however, can reveal enough about the process to show that many of the assumptions and theoretical justifications underlying commonly held theories of statutory interpretation and administrative delegation are at best incomplete without a full consideration of the variability and complexity of legislative realities. More research, both empirical and theoretical, is left to be done, and this Article aims to provide a helpful framework from which this research can begin.

I. OVERVIEW OF THE STUDY

This study is the first extensive empirical examination of the role that agencies play in the legislative process. This study explores the important role that agencies play in every aspect of the legislative process, including drafting and reviewing statutory text before enactment, and lays out the first sustained analysis of when and how agencies are involved in the process before legislation is enacted.

A. *Previous Empirical Work*

Scholars have only very recently begun to examine the empirical realities of the congressional process as it relates to the creation of legislation. The most prominent examples are two recent articles by Professors Gluck and Bressman about the roles and knowledge of legislative drafters within Congress.¹⁷ The Author also recently conducted a more limited empirical study of the drafting process along with an analysis of the changes this process has undergone in recent years and its effects on the content of statutes.¹⁸ In another study, Professor Walker built on Professors Gluck and Bressman's articles by surveying agency rulemakers about their interpretive practices.¹⁹ Professor Walker's survey included a few questions that offered only a "limited window" into agencies' role in drafting legislation and legislative history.²⁰ These studies provide much needed insight into the black boxes of congressional drafting and agency interpretation. They

¹⁷ See generally Gluck & Bressman, *Part I*, *supra* note 2; Gluck & Bressman, *Part II*, *supra* note 1. Professors Gluck and Bressman's work was an expansion of an earlier and more limited study done by Victoria Nourse and Jane Schacter. See generally Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).

¹⁸ See generally Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807 (2014).

¹⁹ See generally Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015).

²⁰ *Id.* at 1038.

do not, however, provide much insight into how and when agencies are involved in the legislative process before legislation is enacted.

Subsequent to this Article's study, the Administrative Conference of the United States ("ACUS") commissioned a study, conducted by Professor Walker, about the role agencies play in the technical aspects of legislation.²¹ The Author was consulted in regard to the ACUS study's interview and survey design. The ACUS study confirmed many of this Article's findings about agency involvement in the technical aspects of legislation.²² The ACUS study, however, was limited to agency technical assistance so it did not cover many important aspects of the role of agencies in creating legislation.²³ The ACUS study also did not consider the normative aspects of what agency involvement in legislation means for statutory interpretation and agency delegation.

Furthermore, a few recent articles touch on the role that agencies play in the legislative process as part of studies of other topics. A recent article by Professor Eskridge and Matthew Christiansen examining congressional overrides of Supreme Court statutory interpretation decisions provides evidence that agencies work with congressional staff to draft override legislation, and lobby for such legislation, based on an examination of committee hearings and reports.²⁴ Additionally, a recent historical article by Professor Parrillo documents the key role of agencies in the legislative process during the New Deal era as part of a larger study of the rise of the use of legislative history.²⁵ This Article confirms and builds on these findings to provide a more wide-ranging account of agency involvement in the legislative process.

B. Study Methodology

Between August and November 2014, the Author interviewed fifty-four individuals, each of whom worked as agency legislative counsel or in an agency office of legislative affairs.²⁶ Given the nature

21 See generally CHRISTOPHER J. WALKER, *FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS: TECHNICAL ASSISTANCE IN STATUTORY DRAFTING* (2015).

22 See *id.* at 4.

23 See *id.* at 1.

24 See Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 *TEX. L. REV.* 1317, 1323, 1377 (2014).

25 Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 *YALE L.J.* 266, 338–42 (2013).

26 Some agencies use the name "Office of Congressional Affairs," rather than "Office of Legislative Affairs," for the office that manages the agency's legislative work. For simplicity, this Article refers to all such offices as "offices of legislative affairs."

of interviewing government employees, and to induce agency employees to agree to be interviewed, the Author agreed to keep the identity and any identifying information of respondents confidential. All of the interviews were conducted orally, with fifty-four percent occurring in person and the remainder over the phone.²⁷ In-person interviews were generally conducted in the office of the person being interviewed. Interviews ranged from thirty minutes to two hours, with an average interview time around one hour. The Author asked each respondent fifty-five questions, a number of which contain subparts.²⁸ The responses to these questions were recorded by hand on copies of the questionnaire. Respondents also had unlimited opportunity to provide further qualitative comments.²⁹ The Author transcribed all of the qualitative comments, which resulted in over 50,000 words of additional qualitative data. These qualitative comments are one of the primary benefits of the oral interview format because, without the benefit of hindsight, it was impossible to ask every relevant question. These comments were coded where themes became apparent.³⁰

To determine relevant individuals to contact, the Author searched the websites of each executive and independent agency. The Author supplemented this with searches of the Federal Regulatory Directory³¹ and of a Congressional Research Service Report listing the congressional liaison contacts for selected federal agencies.³² These searches netted a group of 277 potential respondents for which the Author was

²⁷ To ensure consistency of questioning the Author read all questions from the script and did not allow respondents to see the written questions.

²⁸ See Appendix for interview questions. Because many of the questions built on each other and each section generally followed a theme, all questions were asked in the same order. There is some risk of response-order effects. See, e.g., Jon A. Krosnick & Duane F. Alwin, *An Evaluation of a Cognitive Theory of Response-Order Effects in Survey Measurement*, 51 PUB. OPINION Q. 201, 215–16 (1987); William S. Sekely & Vicki L. Blakney, *The Effect of Response Position on Trade Magazine Readership and Usage*, 37 J. ADVERT. RES. 53, 53 (1994). Professors Gluck and Bressman used two versions of their survey with different ordering of questions and found that changing the ordering did not affect responses. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: Methods Appendix*, 65 STAN. L. REV. 1, 12 & 12 n.45. (2013).

²⁹ The Author entered all responses by hand onto paper copies of the survey and then used these to enter the responses to specific questions into Microsoft Excel and the qualitative responses into Microsoft Word.

³⁰ This type of approach, known as the general inductive approach, is common in qualitative studies. See, e.g., David R. Thomas, *A General Inductive Approach for Analyzing Qualitative Evaluation Data*, 27 AM. J. EVALUATION 237, 237 (2006).

³¹ CQ PRESS, FEDERAL REGULATORY DIRECTORY (17th ed. 2016).

³² AUDREY CELESTE CRANE-HIRSCH, CONGRESSIONAL LIAISON OFFICES OF SELECTED FEDERAL AGENCIES (2014).

able to determine a working email address.³³ This is certainly much fewer than the relevant population within agencies, however, many agencies do not make information about their employees publicly available, and others only list relatively senior employees who may be less likely to respond to unsolicited emails requesting an interview. For scheduling purposes, the Author contacted this list on a rolling basis over a three-month period until everyone had been contacted. The Author sent two follow-up emails for those who did not respond to prior emails. This outreach effort resulted in fifty-four respondents. Given the expected reticence of potential respondents, the willingness of respondents to speak openly and candidly exceeded the Author's expectations.

There is an inherent potential for self-selection bias in a study such as this where respondents have the option to choose whether to participate. The Author tried to mitigate this bias by interviewing individuals working in different agencies and filling different roles within those agencies. As described in detail below, the respondents came from a wide variety of independent and executive agencies, and, within those agencies, the respondents work both as legislative counsel and as staff in offices of legislative affairs. Some of the respondents were career employees and others were political appointees. Although a variety of individuals were interviewed, it is impossible to avoid the possibility of bias because the Author had to rely on volunteers.³⁴ It is also impossible to determine the baseline population in each agency that is involved in the legislative process given the size and complex structures of each executive department and the components within it.³⁵ Because of the inability to use a random sample and the other

³³ Each executive department, and many agencies and bureaus within those departments, have consistent email conventions based on some combination of an individual's first and last name and the name of the relevant agency. Through various internet searches of publicly available information, the Author was able to either find each person's email address or the convention used by the relevant agency which the Author could use to guess the correct email address. If an email bounced back, then the Author tried different conventions.

³⁴ There are other sources of potential bias. For example, the personality of the interviewer can influence responses. See Herbert M. Kritzer, *Stories from the Field: Collecting Data Outside over There*, in *PRACTICING ETHNOGRAPHY IN LAW: NEW DIALOGUES, ENDURING METHODS* 143, 154–55 (June Starr & Mark Goodale eds., 2002). It is also possible that respondents are affected by social desirability bias, in that they want to provide responses that they believe are appropriate or that indicate a level of expertise or importance. See, e.g., Harold A. Sackeim & Rubin C. Gur, *Self-Deception, Self-Confrontation, and Consciousness*, in *2 CONSCIOUSNESS AND SELF-REGULATION: ADVANCES IN RESEARCH AND THEORY* 139 (Gary E. Schwartz & David Shapiro eds., 1978).

³⁵ For example, the Department of Commerce is comprised of twelve different bureaus, each of which has its own expansive scope of responsibility. These bureaus generally each have

limitations noted above, this Article conveys the findings descriptively using the raw data.

Although this Article reports statistics on the responses given by respondents, these should not be mistaken as a claim that they are necessarily a quantitatively accurate description of what the responses would be if the Author had been able to interview a representative population. The nature of this study made it so that it was best done with a primarily qualitative focus. Because there is so little previous empirical work on this topic, the study was more hypothesis generating than hypothesis testing, with many of the most interesting findings coming from unprompted responses from respondents. Also, the study is not comprehensive, and there are certainly other avenues that could and should be explored.

The goal of this Article is therefore to provide a qualitative account of agency involvement from the perspective of my respondents. This is the same approach that other similar studies have required.³⁶ However, given the study's focus on agencies' day-to-day involvement in the legislative process, which is less subject to bias than an individual's knowledge of certain information, and given the number of questions where respondents from different agencies provided similar responses, it appears that many of the findings reported here would likely hold true in a representative investigation. There are also a number of publicly available documents produced by agencies describing their roles in the legislative process and, wherever possible, the Author tried to confirm information provided by respondents with these publicly available sources.³⁷

their own legislative affairs and general counsel's offices involved in drafting and reviewing statutes. And beneath those structures are various program offices that primarily administer the work of the bureau but which also likely have some involvement in reviewing and commenting on legislation relevant to the program office's work. See *Bureaus and Offices*, DEP'T COMMERCE, <http://www.commerce.gov/about/bureaus-and-offices> (last visited Jan. 25, 2017).

³⁶ See Gluck & Bressman, *Part I*, *supra* note 2, at 923 ("Out of an abundance of caution, moreover, we have chosen to report our findings in a descriptive manner mostly using only the raw data rather than engaging in more sophisticated hypothesis testing to explore whether there were statistically significant drivers of certain answers."); Walker, *supra* note 19, at 1016 ("[B]ecause of the methodological limitations imposed by the participating agencies . . . and the exploratory nature of the study, the Article limits itself to presenting a descriptive picture of these particular 128 agency rule drafters.").

³⁷ Combining methods of compiling data helps to validate the claims that arise in an initial study like this one. See, e.g., Wendy Olsen, *Triangulation in Social Research: Qualitative and Quantitative Methods Can Really Be Mixed*, in 20 DEVELOPMENTS IN SOCIOLOGY: AN ANNUAL REVIEW 103 (Martin Holborn ed., 2004).

C. *Study Respondents*

1. *Respondent Characteristics*

Study respondents included individuals with various backgrounds before their current jobs. Twenty-six respondents (48%) previously worked as a staffer in Congress and twenty respondents (37%) previously worked in a different agency from the one in which they currently work. Thirty-nine respondents were involved in drafting statutes in previous jobs (72%). Eight respondents had worked in their current office for three years or less (15%), twenty-two for four to eight years (41%), and twenty-four (44%) for nine or more years.

2. *Agencies Covered*

Thirteen respondents (24%) work in independent agencies and forty-one (76%) work in executive agencies. Respondents included individuals working in fourteen of the fifteen executive agencies and eleven different independent agencies.³⁸ The Author found that those he interviewed within an agency tended to provide similar responses about their agency's role, so rather than focusing on interviewing a large number of people within an agency (which may have been possible by asking for referrals) the Author relied primarily on unsolicited emails to interview individuals from as many different agencies as possible. The breadth of agencies covered confirms many similarities between agencies' involvement in the legislative process.

3. *Agency Offices of Legislative Affairs*

Twenty-eight respondents (52%) work in an agency's office of legislative affairs. Each executive department, and many bureaus within each department, have an office of legislative affairs charged with controlling the agency's relationship with Congress.³⁹ They serve

³⁸ Those interviewed for each executive department include: the Department of Agriculture (2); the Department of Commerce (6); the Department of Defense (4); the Department of Education (1); the Department of Energy (2); the Department of Health and Human Services (4); the Department of Homeland Security (4); the Department of Housing and Urban Development (2); the Department of Interior (5); the Department of Justice (2); the Department of Labor (2); the Department of State (2); the Department of Transportation (2); the Department of Treasury (3). The only agency not covered was the Department of Veterans Affairs. To maintain confidentiality, the independent agencies where respondents work are not disclosed. The number of individuals working as legislative counsel or in legislative affairs in many independent agencies is very small, so to reveal the names of the independent agencies would narrow the number of potential individuals in a way that risks anonymity. However, the fact that thirteen individuals at eleven different independent agencies were interviewed ensures that a diversity of experiences was observed.

³⁹ See, e.g., U.S. DEP'T OF STATE, OPEN GOVERNMENT PLAN 15 (2011),

as the primary liaison between an agency and Congress and are generally supposed to be the only group in an agency directly communicating with congressional staff to ensure consistent messaging from the agency.⁴⁰ A significant portion of their work involves coordinating agency legislative proposals and coordinating the process by which agencies comment on and revise legislation drafted in Congress.⁴¹ These offices are generally staffed with a combination of career and political appointees: of the twenty-eight individuals interviewed who work in an office of legislative affairs, eight are political appointees and twenty are career employees. Ten of these twenty-eight respondents are lawyers and the rest are nonlawyers. These offices are less involved in the actual drafting of statutory language than are agency legislative counsel, but they are very involved in the policy issues and politics surrounding agency involvement in drafting and commenting on legislation.

4. Agency Legislative Counsel

Twenty-six respondents (48%) work as agency legislative counsel. Most executive departments have legislative counsel whose primary job is to draft and review legislation, much like Congress's Offices of Legislative Counsel,⁴² and some of these agency legislative counsel even previously worked for Congress's offices.⁴³ The fact that agencies have their own legislative counsel whose entire job is to draft and review legislation is likely news to most scholars and judges. It is generally understood that agencies have unique expertise and knowledge, but the fact that most agencies have their own legislative counsel

<https://www.state.gov/documents/organization/164473.pdf> ("The Executive Office of the Bureau of Legislative Affairs (H/EX) is responsible for Legislative Operations with oversight of Department of State support activities provided to Members of Congress and their staff.").

⁴⁰ Twenty-nine respondents (54%) made an unprompted statement to this effect. Ucode1. As one legislative counsel said, "Our congressional affairs office is the gatekeeper with Congress. We have direct contact mostly with congressional affairs people." Ucode1.

⁴¹ See, e.g., U.S. DEP'T OF STATE, *supra* note 39, at 15 ("This office monitors all significant legislation involving the Department of State and serves as the liaison in the legislative clearance process, coordinating views between OMB, National Security Council, and other executive agencies.").

⁴² Shobe, *supra* note 18, at 826–31.

⁴³ See, e.g., OFFICE OF LEGISLATIVE COUNSEL, OFFICE OF LEGISLATIVE COUNSEL GUIDANCE FOR DRAFTING LEGISLATIVE TEXT FOR PROPOSALS FOR THE ANNUAL NDAA, <http://www.dod.mil/dodgc/olc/docs/OLCDraftingHintsforFY16.pdf> (last visited Jan. 25, 2017) ("[P]lease be aware that two of OLC's attorneys previously worked in the House Office of Legislative Counsel and that one of these attorneys was the lead House drafter of the annual NDAA from 1977 through 2006 (and, thus, had a hand in formulating many of the drafting conventions followed in the annual NDAA).").

whose sole job is to work with substantive experts within agencies to create agencies' legislative agendas is important to note. Not only do agencies have expertise, but they have the staff to exploit that expertise to their benefit, both before and after legislation is enacted.

All of the legislative counsel interviewed were lawyers and only three of the twenty-six were political appointees.⁴⁴ Legislative counsel's job is to coordinate the agency's legislative agenda and to draft and revise legislation with the help of substantive experts within the agency. They generally have little direct contact with congressional staff, including Congress's legislative counsel. Because they are generally career employees, rather than political appointees, agency legislative counsel, much like Congress's legislative counsel, are generally not involved in political disputes or agency lobbying.

5. *Departments Versus Bureaus*

Of the forty-one respondents who work in executive agencies, twenty-three (56%) work at the department level and eighteen (44%) work in a bureau within the department.⁴⁵ Each executive department has its own unique structure; however, given the size of most of these departments, there are generally many bureaus within the larger department that specialize in certain areas of the department's mission. How closely interrelated these bureaus are depends on the particular department. For example, the Department of Commerce has twelve different major bureaus including everything from the National Oceanic and Atmospheric Administration to the United States Census Bureau to the United States Patent and Trademark Office.⁴⁶ Because some executive departments cover so many areas, the agency's substantive legislative work frequently occurs at the bureau level, with

⁴⁴ Eight different respondents made unsolicited comments that agency legislative counsel are career employees, as compared to legislative affairs, which generally have a mix of career and political employees. Ucode9.

⁴⁵ These bureaus have different titles in different executive departments. They may be referred to as agencies, bureaus, offices, components, or administrations. For simplicity, this Article refers to all of these components as bureaus. Because independent agencies are generally much smaller than executive agencies, they generally do not have bureaus.

⁴⁶ See *Bureaus and Offices*, *supra* note 35 (listing the various bureaus and offices of the Department of Commerce, including the Bureau of Economic Analysis, Bureau of Industry and Security, U.S. Census Bureau, Economic Development Administration, Economics and Statistics Administration, International Trade Administration, Minority Business Development Agency, National Institutes of Standards and Technology, National Oceanic and Atmospheric Administration, National Technical Information Service, National Telecommunications and Information Administration, and United States Patent and Trademark Office).

those at the department level playing more of a coordinating role between agencies and Congress.⁴⁷

II. AGENCIES AND LEGISLATIVE DRAFTING

Part I laid out the basics of the study, and this Part turns to the substance of the study's findings. While scholars have made claims that agencies act as legislators, these claims pertain primarily to agencies' rulemaking role, where they have the ability to take quasi-legislative action.⁴⁸ Some have also considered the President's role in creating legislation, generally from the perspective of the Recommendation Clause of the Constitution⁴⁹ and the President's veto power.⁵⁰ This Part examines the role that agencies play in the lawmaking process, both pursuant to the Recommendation Clause and in other ways not imagined by the Constitution or the Supreme Court.

This Part presents the findings from various questions relating to agency involvement in legislative drafting. It shows that, according to

⁴⁷ For example, four respondents made unprompted comments about how the department serves primarily a coordination role. As one respondent said: "I work at the department level, and at our level we do more coordination and less substance. The substance happens at the agency level. Our clients are the agencies. Each person at the department level has a few 'clients' or agencies they oversee." Q22code1.

⁴⁸ See, e.g., Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1005, 1015, 1038 (2015).

⁴⁹ The Recommendation Clause of the Constitution, found in Article II, Section 3, states that "[The President] shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. CONST. art. II, § 3. This provision underwent multiple drafts and the changes provide helpful context of what the Framers expected out of the President from this clause. In an earlier draft the clause allowed the President to recommend legislation but did not require him to do so. See J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2081 (1989) ("James Madison's notes on the Constitutional Convention for August 24, 1787, reveal that the Framers explicitly elevated the President's recommendation of measures from a political prerogative to a constitutional duty . . ."). An earlier version also contained the word "matters" rather than "measures." *Id.* at 2084. This change "reinforces the inference that the Framers intended the President's recommendations to be more than precatory statements." *Id.* This indicates that the Framers intended the President to make specific legislative proposals in the form of bill language. See Kesavan & Sidak, *supra* note 4, at 48–49.

⁵⁰ Article I, Section 7 of the Constitution requires that the President sign a bill passed by both Houses of Congress for it to become law. U.S. CONST. art. I, § 7. The Supreme Court has stated that the Recommendation Clause and the veto power are where the President's authority to make law begins and ends:

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

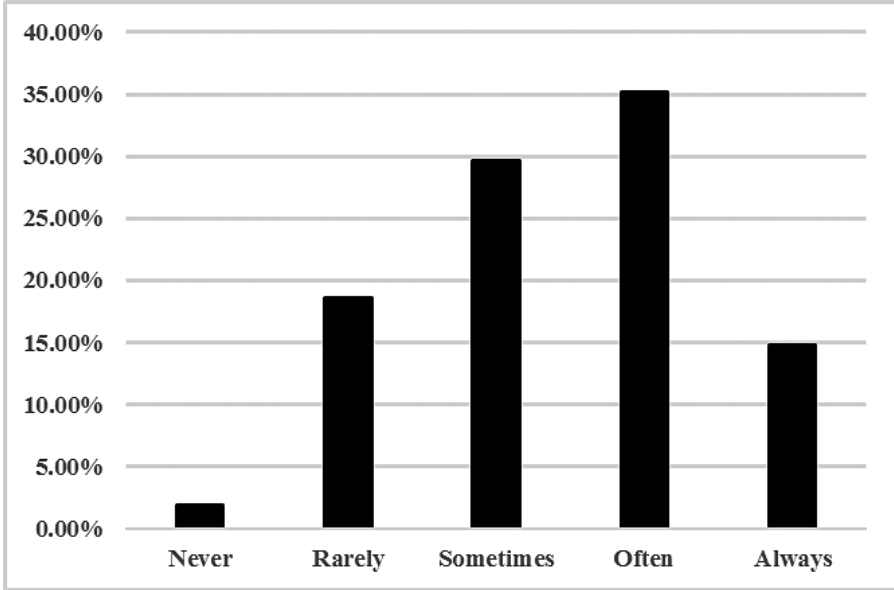
respondents, agencies commonly originate their own legislative proposals and also draft legislation at Congress's request. More frequently, agencies provide extensive review of, and revisions to, statutory language drafted by outside agencies. This happens either at Congress's request or as a result of an agency's own monitoring of legislative action. This agency review process generally involves all levels of an agency including agency program offices tasked with implementing statutes. Substantive agency legislative drafts and comments are overseen and cleared by the President, through the OMB, before they are sent to Congress. This Part closes with respondents' comments about agencies' interactions with lobbyists in the drafting process and the role that agencies themselves play as lobbyists in their legislative work.

A. Agencies as Primary Drafters

The study asked several questions aimed at determining the role agencies play in originating legislative language, either as an agency proposal or by request of Congress. It is commonly understood, and envisioned by the Constitution, that the President will originate legislative proposals. Respondents said that these proposals generally do not originate in the White House, but instead are drafted within agencies and then reviewed at the White House level before being sent to Congress as an administration proposal. More intriguingly—and something that is not imagined by the Constitution or commentators—respondents reported that Congress also asks agencies to draft legislation from scratch for them, essentially letting agencies do their job for them. This Section describes the role that agencies play as primary drafters of legislation.

1. Agency-Originated Legislative Proposals

FIGURE 1. DO AGENCIES DRAFT PROPOSALS WITHOUT A REQUEST FROM CONGRESS?



As Figure 1 illustrates, twenty-seven respondents (50%) said that their agency always or often originates legislative proposals (meaning proposals drafted within an agency without a specific request from Congress), while another sixteen (30%) said that their agency sometimes does.⁵¹ These proposals are generally sent to Congress from the White House, but respondents said that these proposals actually come from within agencies. As one respondent remarked: “It is no secret that the President proposes bills to Congress. But where does that language come from? It doesn’t appear by magic. Someone in an agency is the one who wrote it.”⁵²

Agency proposals frequently begin as an idea at the program level within an agency, which is where the day-to-day implementation of legislation occurs.⁵³ Staff at the program level see a need for a new authority or a modification of its existing authority and want to create

⁵¹ Q9.

⁵² Q9. Executive Order 12,988 provides direction for agencies in their drafting and reviewing of legislation. The order instructs agencies to “eliminate drafting errors and ambiguity” from legislation, to write in a way so as to “minimize litigation” and to “provide a clear legal standard for affected conduct” along with a more detailed list of best practices in the legislative area. Exec. Order No. 12,988, 61 Fed. Reg. 4729, 4731 (Feb. 5, 1996).

⁵³ Ucode5. A total of thirteen respondents (24%) made an unprompted statement to this effect.

legislation to do so. They contact relevant staff in their bureau or at the department level who then draft a proposal to fit the program's needs. The bureau or department then distributes the proposal through the department for clearance. For example, the Department of Defense has a formal process that begins with an annual call memo soliciting the submission of legislative proposals by a certain date from each bureau within the Department of Defense to the Department's Office of Legislative Counsel.⁵⁴ Bureaus generally draft proposals and send them to a department's office of legislative affairs, which then undertakes an internal agency clearance process that allows other parts of the agency to express concerns or suggest edits. This process ensures that everyone in the agency is on the same page.⁵⁵ Agencies want to present a united front to Congress and do not want to propose legislation from one bureau that is subsequently opposed by another. Legislative affairs staff and legislative counsel then resolve any internal conflicts through discussions and meetings with interested parties. At this point the bill must be submitted to the OMB for coordination and clearance before it can be sent to Congress, which is discussed in detail later in this Part.⁵⁶

The most common and substantive agency proposals are those that agencies create on a regular basis and that Congress expects to receive. The most prominent examples are the National Defense Reauthorization Act⁵⁷ and the Farm Bill.⁵⁸ These bills are drafted within the Department of Defense and Department of Agriculture as part of a coordinated agency process.⁵⁹ These are regular "must-pass" bills that even a dysfunctional Congress will pass, and many other agencies will sometimes submit their proposals along with these bills to ensure they are considered.⁶⁰

⁵⁴ See DEP'T OF DEF., OFFICE OF LEGISLATIVE COUNSEL, AN OVERVIEW OF DoD'S LEGISLATION PROGRAM 7 (2006).

⁵⁵ This process is similar to the OMB process described below. *See id.* at 12 ("The OMB interagency coordination process is very similar to the coordination process DoD follows, as indicated earlier in this document. Where OLC strives to achieve consensus throughout DoD, OMB strives to achieve consensus throughout the Executive Branch.").

⁵⁶ *See infra* Section II.D.

⁵⁷ *See* National Defense Authorization Act for Fiscal Year 2017, H.R. 4909, 114th Cong. (2d Sess. 2016).

⁵⁸ *See* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act for Fiscal Year 2017, H.R. 5054, 114th Cong. (2d Sess. 2016).

⁵⁹ Thirteen different respondents (24%) made unsolicited comments that program offices generally generate the legislative ideas that are then drafted and circulated within the agency or department. Ucode5.

⁶⁰ Ucode2. This can create coordination issues because the lead agencies have control of

Proposals generated by agencies can be long and comprehensive and can include input from various executive departments. For example, the Department of Transportation recently drafted an expansive proposal to fund improvements to transportation infrastructure.⁶¹ Although the Department of Transportation is the lead agency, the 350-page draft bill includes roles for various agencies, including the Environmental Protection Agency, Department of Interior, and Department of Labor.⁶² The Department of Transportation submitted this proposal to Congress as a complete draft that Congress could use as a starting point.⁶³ The agency has even undertaken a promotional campaign to sell both Congress and the public on the bill.⁶⁴

A number of respondents noted that their agency generally follows the same legislative drafting conventions as Congress's legislative counsel. As one respondent remarked, "When we draft bills we want Congress's legislative counsel to think the bill looks perfect."⁶⁵ The Department of Defense's guidance on drafting legislative text takes the same approach:

[I]t is the position of the Office of Legislative Counsel (OLC) that DoD legislative proposals for the annual NDAA will be drafted in accordance with the conventions used by the drafters at the House Office of Legislative Counsel (HOLC) and Senate Office of Legislative Counsel (SOLC) as reflected in recent NDAAs.⁶⁶

Bills that emerge from agencies are generally intended to be a finished product that Congress can use without much tinkering. Indeed, a few respondents noted that using the same conventions and formatting as Congress's legislative counsel reduces congressional revisions that could inadvertently affect the substance of the bill.⁶⁷

the process so other agencies that try to insert their language have a harder time tracking changes as the bill proceeds and have less influence on the process as secondary actors.

⁶¹ See *Grow America*, U.S. DEP'T OF TRANSP., <http://www.transportation.gov/grow-america> (last updated Jan. 20, 2015).

⁶² See *GROW AMERICA Act*, U.S. DEP'T OF TRANSP., https://www.transportation.gov/sites/dot.gov/files/docs/GROW_AMERICA_Act_1.pdf (last visited Jan. 28, 2017) (describing roles for various departments).

⁶³ See *id.*

⁶⁴ The Secretary of the Department of Transportation participated in a "virtual town hall" and a bus tour to discuss and promote the bill. The Department of Transportation also maintains a website with information about the bill and how it will affect each state. See *supra* note 61.

⁶⁵ Nine respondents (17%) made a comment to this effect without prompting. Ucode4.

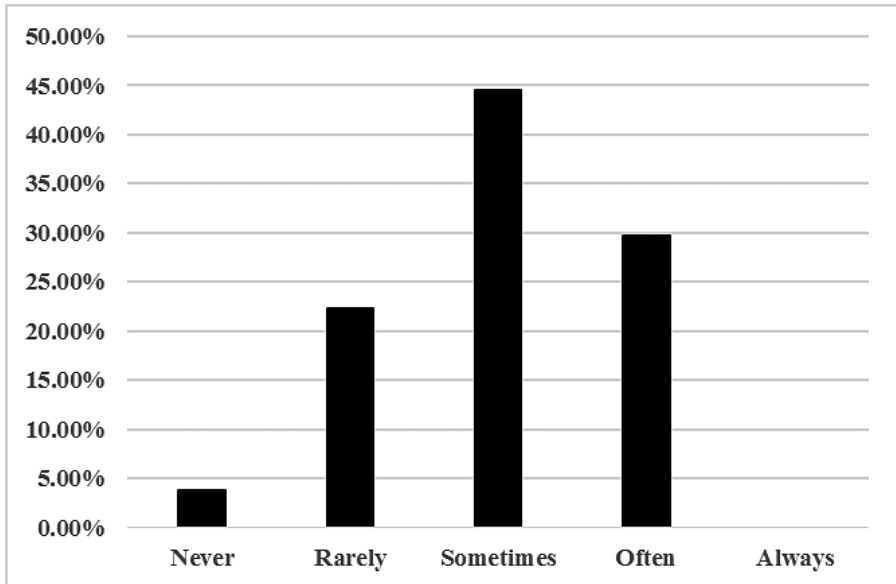
⁶⁶ OFFICE OF THE LEGISLATIVE COUNSEL, *supra* note 43, at 1.

⁶⁷ Ucode4. As one respondent said: "If we make [the bill] look right and use the correct drafting conventions then Congress is more likely to take it as is. If they make changes for stylistic reasons then [they] can introduce errors." Ucode4.

A number of respondents said that whether their agency proposes legislation partially depends on who is President. Without prompting, ten respondents (19%) volunteered that the Obama Administration has been less likely to originate proposed legislation than prior administrations.⁶⁸ The Obama Administration's reluctance to be involved in originating legislation appears to have been confirmed by Obama himself, who, in the context of a discussion about the drafting of the Affordable Care Act,⁶⁹ "acknowledged . . . that his hands-off approach to health care legislation had likely been a mistake and that he had 'probably left too much ambiguity out there' by allowing Congress to take the lead in drafting a bill."⁷⁰

2. Agency Drafting for Congress

FIGURE 2. DO AGENCIES DRAFT BILLS FOR CONGRESS AT CONGRESS'S REQUEST?



The study asked about the role that agencies play in drafting bills for Congress at Congress's request.⁷¹ Given that Congress has its own legislative counsel whose entire job is to draft bills for Congress, the

⁶⁸ Q9code1.

⁶⁹ The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

⁷⁰ Sheryl Gay Stolberg, *Hands-Off Approach May Have Been a Mistake, Obama Says*, N.Y. TIMES: PRESCRIPTIONS (Sept. 9, 2009, 12:23 PM), http://prescriptions.blogs.nytimes.com/2009/09/09/hands-off-approach-may-have-been-a-mistake-obama-says/?_r=0.

⁷¹ Q10.

Author expected respondents to generally answer this question in the negative. Figure 2 shows that a surprising number of respondents, however, said that they often (sixteen respondents, or 30%) or sometimes (twenty-four respondents, or 44%) draft bills for Congress at Congress's request. One respondent expressed surprise at the frequency with which Congress requests that agencies draft statutes for Congress:

Sometimes we scratch our heads and wonder why they don't go to the House Office of Legislative Counsel for the drafting. I guess there are some things that are very specific to us and we have information that Congress and House Legislative Counsel wouldn't have, so it makes sense that they would start with us.⁷²

The way respondents described the process by which an agency drafts legislation at Congress's request is similar to the process by which Congress's legislative counsel drafts legislation.⁷³ Respondents explained that legislation drafted at Congress's request generally starts with a congressional staffer coming to an agency with a rough idea of legislation they want drafted—typically in the form of bullet points or a very rough statement of what they intend to do—and asking the agency to turn it into a fully-drafted bill.⁷⁴ Agencies do this drafting as a service for Congress, and this type of agency-drafted bill is supposed to effectuate the requestor's policy, not necessarily the agency's policy preferences.⁷⁵ That being the case, agencies are very careful to label these bills as an unofficial drafting service that does not necessarily reflect the agency's or administration's position. As a result, these bills avoid OMB review and clearance.⁷⁶

⁷² Q10; Q26code1.

⁷³ Shobe, *supra* note 18, at 826–31.

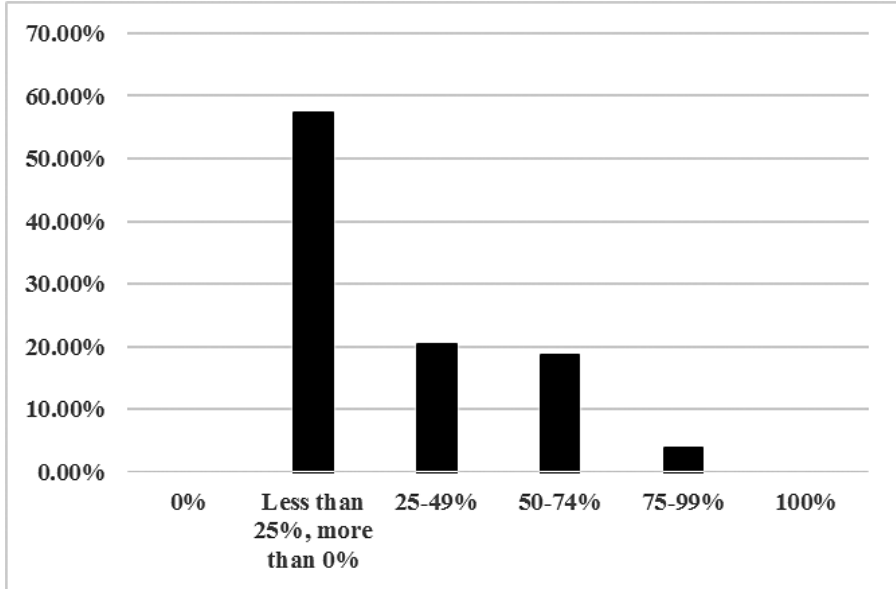
⁷⁴ Q10. The following comment was typical: “Sometimes committee staff ask us to draft a bill that does X. They will give us bullet points and ask us to draft from scratch.” Q13code1; Q10.

⁷⁵ Q10. As one respondent put it: “We fulfill requests even if it is something that we don't agree with. We always say it is technical assistance and clearly label it that way when we send to Congress—we make it clear that this is not our position.” Q10.

⁷⁶ Q10.

3. How Often Are Agencies the Primary Drafter?

FIGURE 3. WHAT PERCENT OF STATUTORY LANGUAGE ORIGINATES IN AGENCIES?



To further explore the extent to which agencies serve as primary drafters, the Author asked respondents to estimate the percentage of enacted statutory language in the areas covered by their agency that originated in their agency.⁷⁷ As Figure 3 shows, a slight majority of respondents (thirty-one respondents, or 57%) said that less than 25%, but more than 0%, of statutory text originated in their agency. Eleven respondents (20%) said that their agency originates between 25–49%, ten (19%) said that their agency originates 50–74%, and two (4%) said that their agency originates 75–99%.⁷⁸ While agencies play a significant role as primary drafters, if these responses are generalizable then it would appear that a minority of legislation originates in agencies. This is unsurprising given the number of other possible sources of legislation, which include congressional staff, congressional legislative counsel, and lobbyists or other outside groups.

The study also asked how enacted language proposed by an agency differs from language the agency proposed.⁷⁹ The responses are reflected in Figure 4. Because responses could vary for different

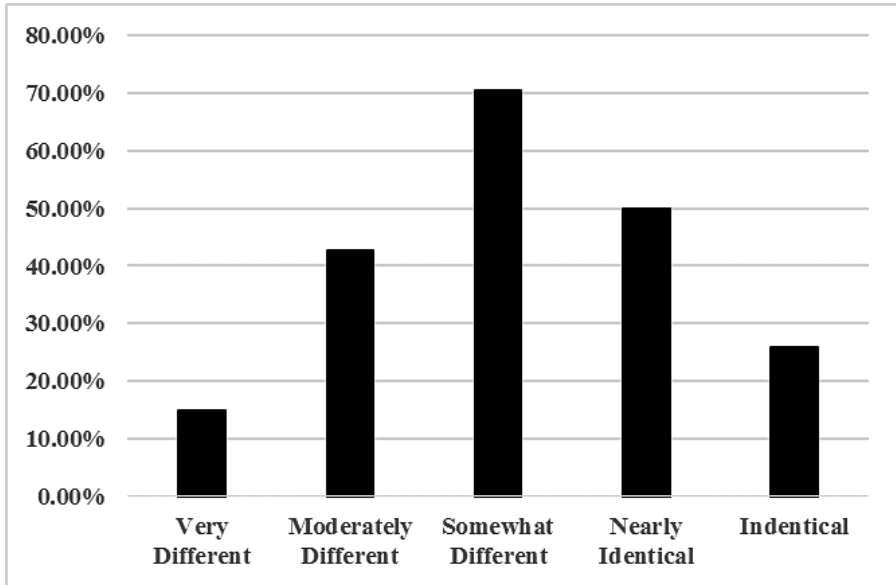
⁷⁷ Q11.

⁷⁸ Q11.

⁷⁹ Q12.

bills, the Author allowed respondents to provide multiple answers to this question, and responses therefore add up to greater than 100%.

FIGURE 4. HOW DIFFERENT IS LANGUAGE DRAFTED BY THE AGENCY FROM WHAT IS ENACTED?



These responses in Figure 4 show that when an agency is the primary drafter, Congress is likely to make at least some changes; however, a significant portion of agency-originated language ultimately makes it through the process relatively unchanged. As one respondent said: “When we are working on drafting or making edits to a bill, we know that [S]enate legislative counsel or members may change it. What we get out on the other end of the process might be only 60–80% of what we want.”⁸⁰ The extent of revisions may also depend on the type of bill. One respondent noted: “The more discrete things we draft are more likely to be accepted wholesale. Bigger, more complicated things get tinkered with more. Longer pieces get chopped, revised, added to.”⁸¹ Another factor could be the type of staffer the bill is being drafted for. For example, individual member staff, who are relatively inexperienced, may be more willing than committee staff to accept what an agency drafts without question.⁸² As one re-

⁸⁰ Q12.

⁸¹ Q12.

⁸² Q28. One respondent expressed this view: “Individual member staff are much less experienced. We have to coddle them more. If we are talking with committee staff then we can get in the weeds.” Q28.

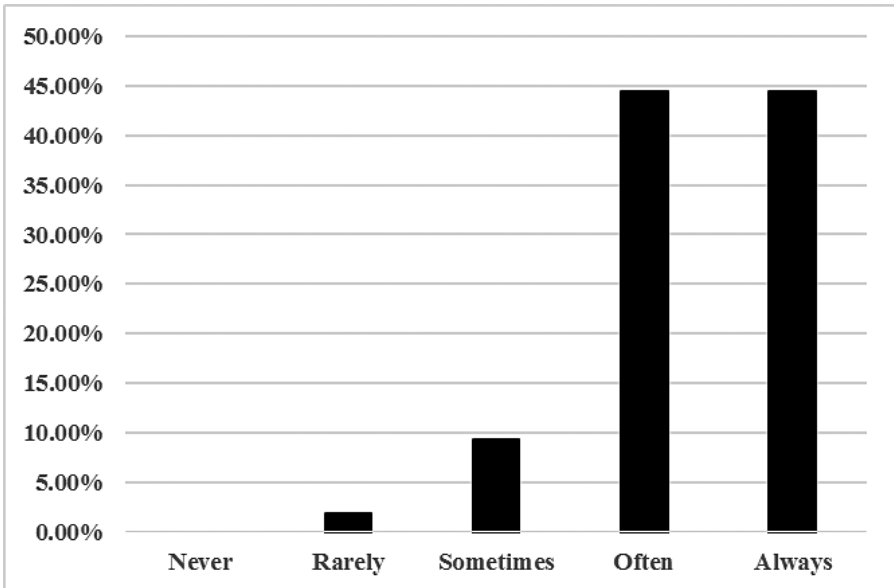
spondent said: “Individual member staff are more willing to listen and more likely to take what we give them wholesale.”⁸³

B. Agencies as Legislative Reviewers

The previous Section explored agencies’ role as primary drafters, and this Section examines the role of agencies as reviewers and editors of statutory language drafted outside of an agency.

1. Congressional Requests for Agency Review

FIGURE 5. DOES CONGRESS SOLICIT COMMENTS ON DRAFT BILLS?



The first question on this topic asked whether Congress solicits comments from agencies on bills drafted outside of agencies (e.g., bills drafted within Congress or by outside groups).⁸⁴ As illustrated in Figure 5, respondents said it is very common for Congress to ask relevant agencies to review and comment on draft legislation. Forty-eight respondents (89%) said that Congress often or always requests agency review, only one respondent said rarely (2%), and no respondents said never.⁸⁵ Given the overwhelmingly positive response to this ques-

⁸³ Q12. Another respondent made the opposite point with respect to committee staff: “Congress used to just take everything we wrote because they trusted that we knew it better than them, but now our committees have more senior staff that are more independent and try to rewrite things to a certain degree.” Q12.

⁸⁴ Q13.

⁸⁵ Q13.

tion, it seems highly likely that agency review of draft bills is a common occurrence across virtually all agencies.

Respondents generally said that this agency review is deep and substantive because agencies have superior subject-matter expertise.⁸⁶ Respondents generally described their relationship with Congress as a collaborative one. To quote two respondents: “There is a general desire at the staff level to find common ground with the agency. Congress understands that they don’t know everything and that if they are directing the agency to carry out laws they need to make sure agencies can carry it out”;⁸⁷ “They want to know if there is anything they are missing. They want to know what they aren’t thinking about that is relevant to us. We are the sounding board for their ideas, and they want us to vet them. They know we have subject-matter expertise.”⁸⁸ Agency review can also result in substantial edits or redrafts from an agency. As one respondent said: “We try to figure out what Congress thinks it does and then redraft it for them in a way that actually does what they think it does.”⁸⁹

Congressional staff also speak with agencies before they create a bill, rather than waiting until a draft is already prepared, to make sure what they are planning to do makes sense operationally and so they can account for any agency concerns early in the process. As one respondent said: “Even when Congress is in the process of starting to draft a bill—when it is in the formative stages—they come to us to discuss as they are drafting. They cannot come up with a coherent first draft without speaking with us first.”⁹⁰

A number of respondents volunteered that agencies are generally willing to review draft legislation for members of both political parties (whether or not an agency agrees with the policy behind the legislation). One respondent noted that:

Sometimes there are bills we don’t like, but we still try to make it the best we can. When we give technical assistance we are trying to help the drafter make the bill the best we can even if we don’t like it. If it ultimately passes it is better that we have input than not.⁹¹

⁸⁶ See *infra* Section III.A.

⁸⁷ Q27code1.

⁸⁸ Q13; Q27code1.

⁸⁹ Q13.

⁹⁰ Q13.

⁹¹ Q13.

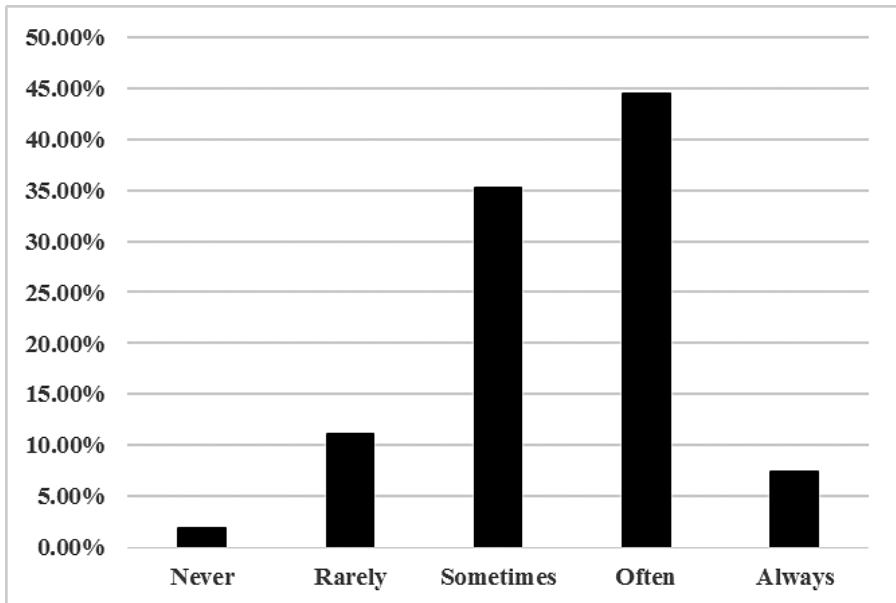
Another said: “Even if we don’t like a bill we spend a lot of time reviewing and providing substantive comments so that even though we don’t like it, we will at least know what to do and how to implement it.”⁹² This sentiment was not universal, however, as some respondents noted that an agency has less incentive to improve a bill that the agency opposes.⁹³ As one respondent put it:

We usually will help out Congress any time they request technical assistance. However, if our department hates a bill, we don’t want to fix it for them because from our perspective it can’t be fixed. If we strongly oppose the bill we are not going to help them make technical changes to make it better.⁹⁴

If these respondents are representative, then it appears that agencies are frequently involved in reviewing and revising legislation at Congress’s request, although there are some factors that can influence the depth of agency involvement.

2. Agency Monitoring of Legislative Action

FIGURE 6. DO AGENCIES REVIEW LEGISLATION WITHOUT A REQUEST FROM CONGRESS?



⁹² Q13.

⁹³ Q13.

⁹⁴ Q13.

The study also asked whether agencies review and comment on legislation when Congress has not requested agency input.⁹⁵ Figure 6 shows that twenty-eight respondents (52%) said that their agency always or often reviews legislation without a request from Congress, while another nineteen (35%) said they sometimes do. A number of respondents reported using tracking methods, either through internal spreadsheets or the use of trade presses like Congressional Quarterly or Bloomberg, to keep up to date on legislative activity in Congress.⁹⁶ Eighteen respondents (33%), however, said that they do not spend much time reviewing bills without a request from Congress because many of these bills are intended merely to send a political message and are unlikely to pass.⁹⁷ For example, one respondent said: “There are lots of bills drafted in Congress that are never going to see the light of day. Those are usually in response to a specific constituent’s request and we don’t really bother looking at those.”⁹⁸ Another said: “We don’t spend time looking at every bill that is drafted. Most bills never go anywhere, so we don’t care unless a committee is the one working on the bill or if it looks like it is going to move.”⁹⁹ It is interesting to note that while agencies are able to avoid spending time on this type of legislation, Congress’s legislative counsel have no such ability to pick and choose what they draft, no matter how unlikely to pass.¹⁰⁰ It appears that agencies are able to spend more of their time working on bills that have a realistic chance of passing.

3. Agency Review at Various Stages of the Legislative Process

Two of the study’s questions asked about agencies’ involvement in reviewing legislation at significant stages of the legislative process including markups, floor debates, conference committees, and last-minute changes.¹⁰¹ Forty-five respondents (83%) reported always or often being involved in markups, with another eight respondents (15%) reporting being sometimes involved.¹⁰² One respondent explained: “During markups we are there and set up a war room so we

⁹⁵ Q14.

⁹⁶ Q14code1.

⁹⁷ Q14code2.

⁹⁸ Q14code2.

⁹⁹ Q14code2.

¹⁰⁰ Shobe, *supra* note 18, at 828 (“The offices . . . serve all members of Congress without preference.”).

¹⁰¹ Q33, Q34.

¹⁰² Q33.

can quickly review amendments and send our comments back.”¹⁰³ Agencies use markups as a chance to draft and propose their own amendments to bills.¹⁰⁴ Slightly fewer respondents reported being involved during floor debates, conference committees, and other last minute changes to bills, with forty respondents (74%) reporting being often or always involved and another twelve (22%) reporting being sometimes involved.¹⁰⁵ The legislative affairs staff generally said that they keep a close eye on last-minute changes and coordinate within their agency to provide real-time comments to Congress up until a bill passes.¹⁰⁶ As one respondent remarked:

We are aware of any changes made all the way through the end. A lot of negotiating is done at the last minute and both Republicans and Democrats will check in to make sure their changes make sense. Even Republicans ask because they don't want to draft something that is operationally ridiculous.¹⁰⁷

Another explained: “We are at the table during a conference committee when they do walkthroughs of the bill. We give our interpretation of how statutory language would be implemented and what our suggestions are for how the bill should be changed to be more workable.”¹⁰⁸

4. *Congressional Acceptance of Agency Comments*

The previous questions in this Section discussed how agencies review and comment on legislation relevant to them but they did not consider whether agencies' comments influenced the ultimate legislative outcome. To explore this question, the Author asked respondents whether Congress accepts their agency's technical and substantive comments.¹⁰⁹

¹⁰³ Q33.

¹⁰⁴ Q33. As one respondent put it: “Sometimes we want changes to a bill or an amendment, so we get a member to introduce our language as an amendment during markup.” Q33.

¹⁰⁵ Q34.

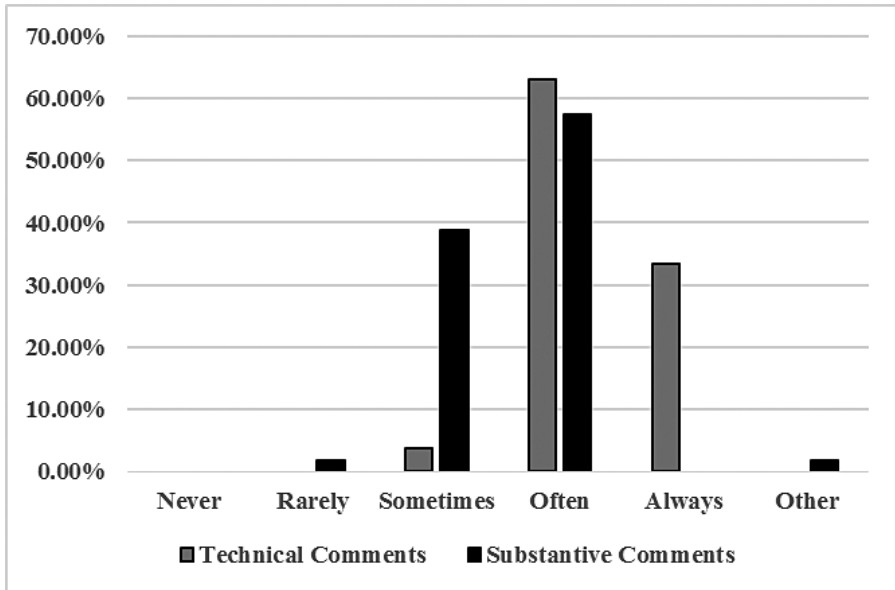
¹⁰⁶ Q34. A few respondents did report that getting Congress to accept changes at the last minute is more difficult. As one said, “After the markup it gets to the really late stages of the process if we want to raise an issue we really have to push hard because no one wants us to be bringing up issues. You have to convince them to make changes at that point.” Q34.

¹⁰⁷ Q34; Q31code2.

¹⁰⁸ Q34; Q42code1.

¹⁰⁹ Q15; Q16.

FIGURE 7. DOES CONGRESS ACCEPT AGENCY COMMENTS?



As shown in Figure 7, respondents overwhelmingly reported that Congress accepts technical comments. Fifty-two respondents (96%) said that Congress always or often accepts technical comments.¹¹⁰ Unsurprisingly, Congress is less likely to accept policy or other substantive comments, although thirty-one respondents (57%) did indicate that Congress often accepts substantive comments.¹¹¹ This is consistent with the way congressional staff described their relationship with agencies in the context of deference to agency interpretation and implementation. As Gluck and Bressman’s respondents said: “It depends on how complex the area is—the more complex, the more for the agency”; and “We are more likely to defer when an agency has technical expertise.”¹¹² Many respondents in this study also noted that the general increase in political polarization in Congress often makes even relatively minor issues highly politicized and that agency involvement is therefore less likely to be accepted.¹¹³ One respondent said: “There is less compromise in the current political environment, so it is

¹¹⁰ Q15.

¹¹¹ Q16.

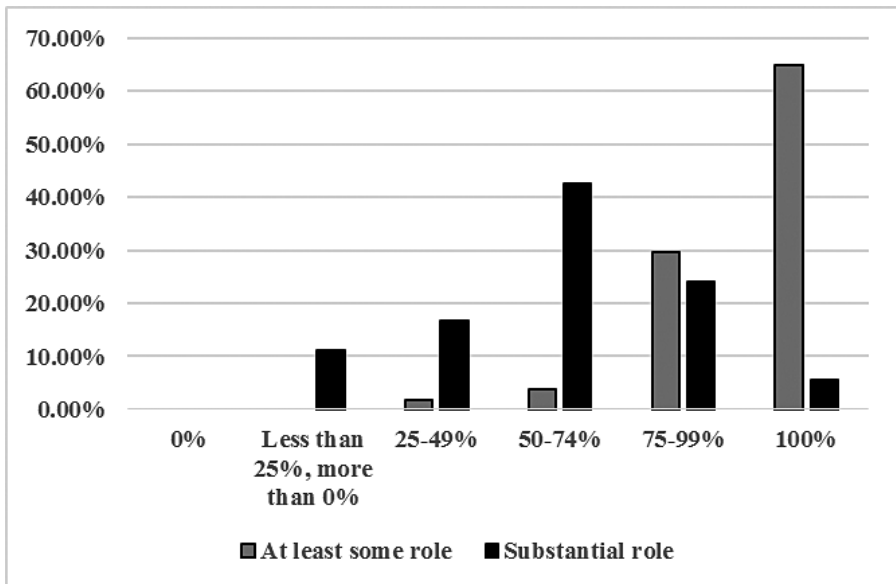
¹¹² Gluck & Bressman, *Part I, supra* note 2, at 1003–04.

¹¹³ Q31. As one respondent said: “We used to be a non-political agency and that was because Democrats and Republicans supported the principles this agency works on. Today there is more picking around the edges to show separation based on political parties.” Q31code1; Q31code3.

harder for us to be involved.”¹¹⁴ The takeaway from this is that agencies clearly have significant opportunities to review legislation, and their comments can result in significant modifications to legislation. These modifications, however, are more likely to occur in technical areas than substantive areas or legislation with major political significance.

5. *How Often Are Agencies Involved?*

FIGURE 8. PERCENT OF BILLS AGENCIES PLAY A ROLE IN DRAFTING?



The next two questions explored how often agencies have some involvement in creating legislation (as either primary drafter or reviewer), and how often their involvement is substantial.¹¹⁵ As Figure 8 demonstrates, nearly two-thirds of respondents said that their agency plays at least some role in drafting one-hundred percent of the legislation that is enacted in the areas covered by their agency, with most of the remaining respondents indicating at least some role in seventy-five to ninety-nine percent of such legislation.¹¹⁶ A smaller, although still high, number reported substantial involvement, with the largest number of respondents reporting substantial involvement in fifty to seventy-four percent (twenty-three respondents, or 43%) or seventy-five

¹¹⁴ Q31code1.

¹¹⁵ Q17; Q18.

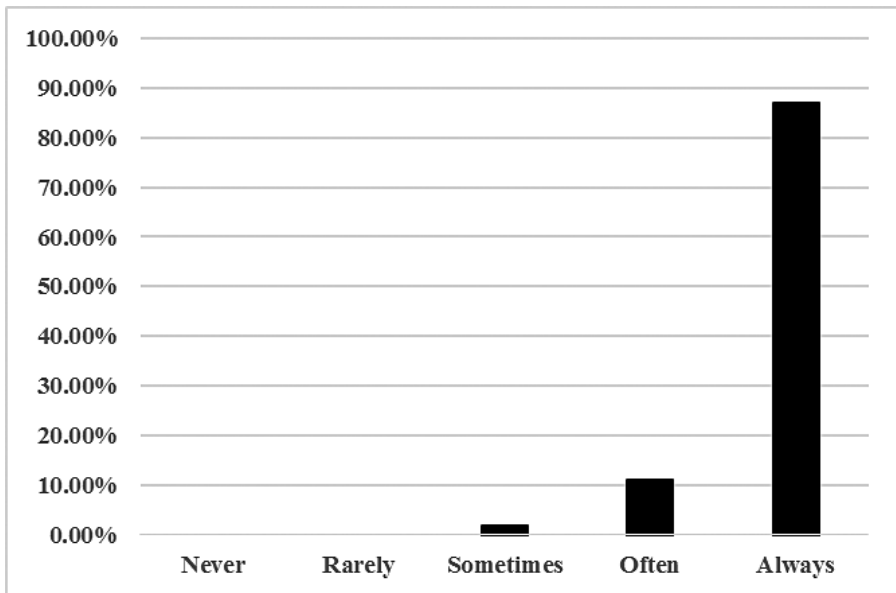
¹¹⁶ Q17; Q18.

to ninety-nine percent of enacted legislation (thirteen respondents, or 24%).¹¹⁷

C. Internal Agency Processes

This Part has focused so far on whether, how often, and to what extent agencies are involved in the legislative process, leaving open the question of who within agencies are involved. This study asked a number of questions aimed at shedding light on the internal processes agencies use to review legislation. Forty-eight respondents (89%) said that they always notify affected parties within their agency of potential legislation.¹¹⁸ As Figure 9 below demonstrates, people within agencies who are tasked with day-to-day implementation and administration of agency statutes are also involved in the review process.

FIGURE 9. DO IMPLEMENTERS HAVE A CHANCE TO REVIEW AND COMMENT ON LEGISLATION?



¹¹⁷ Q17; Q18.

¹¹⁸ Q22.

FIGURE 10. DO YOU DISCUSS INTERPRETATION AND IMPLEMENTATION ISSUES WITH IMPLEMENTERS?

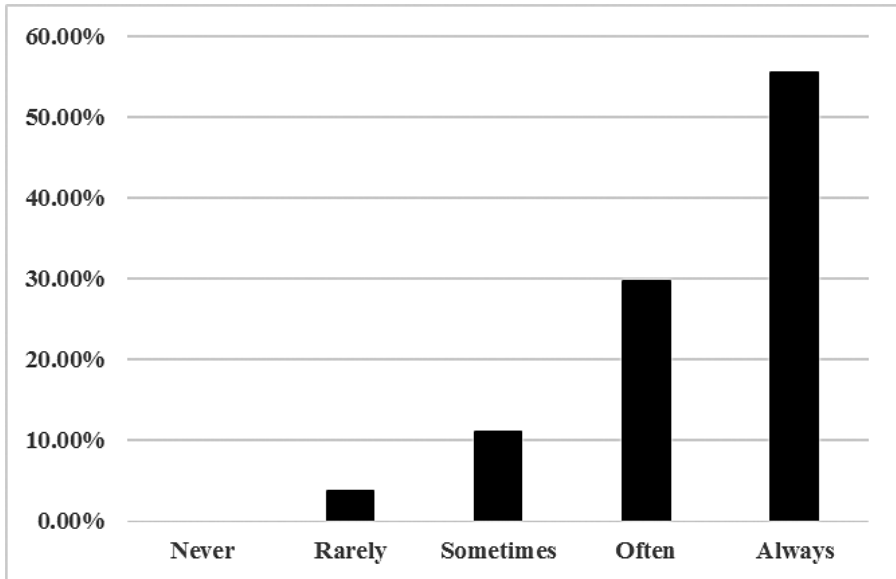


Figure 10 shows that although the legislation and implementation functions of agencies are generally bifurcated, those tasked with implementing legislation at the program level within agencies usually have a chance to review and comment on legislation relevant to their work before it is enacted.¹¹⁹ The offices that run agencies' day-to-day programs generally have their own attorneys with unique on-the-ground expertise that they can use to improve legislation. The following comment was typical:

We work with the legal offices of each of the program offices, which have their own counsel. Their counsel are the legal experts in their area, much more so than Congress, so we ask them if it is drafted correctly or if they see issues and then we work with them to draft changes.¹²⁰

The following was also representative: "We are the technical drafters, but the program clients drive the policy. They are the ones carrying out the policy so they know it much better than we do."¹²¹

Comments generally flow up first from an agency's program offices to the legislative affairs and legislative counsel offices within each bureau and then on to the department level.¹²² Respondents gave

¹¹⁹ Q23; Q24.

¹²⁰ Q24code2; Q27code1.

¹²¹ Ucode5; Q24code2.

¹²² Q23. The following comment was typical for a person working at the department level:

similar accounts of the process of internal agency review of legislation. As one respondent described it:

We have a distribution list that hits every office in the department. We'll forward whatever incoming documents we get to those contacts. If it is specific to one office then we have additional contacts in that program office. We aren't necessarily the subject matter experts in each thing, so we coordinate with the experts to make coherent comments.¹²³

At each level, the comments are checked for consistency, legal issues, and policy issues.¹²⁴ For example, a program office or bureau may want to make comments that might create problems for other parts of the agency or would cost political capital the agency does not want to spend. As one respondent working at the department level said: "There is some tension between us and some of the bureaus. Each of the bureaus is its own world and we have to fight to make sure they aren't doing something that negatively affects the department's interests as a whole."¹²⁵ Any comments or proposals to Congress then go through an agency-wide clearance to make sure there are no objections from other parts of the agency.¹²⁶ To avoid conflicting messages, only agency staff working in legislative affairs are supposed to communicate with Congress, and only after internal agency processes are followed.¹²⁷ Respondents did mention that when congressional staff want to speak directly with substantive experts the

"All 9 bureaus have their own legislative people, but we play a coordinating role and take the lead on important or controversial issues or where more than one bureau is going to be affected." Q23code1. A legislative affairs staffer in a bureau described their process like this:

We then aggregate the comments and clear them with our legislative counsel and then send to the department . . . for their clearance. The people at the department level there don't know the substance anywhere near as well as we do, so they serve a coordinating role more than a substantive role. They just make sure that everyone in the agency is okay with it.

Q23code1; Q22code1. A few respondents did report communicating directly with congressional staffers without going through the department level. For example, one respondent said, "We report to the department but on certain issues we work directly with Congress." Q23code1.

¹²³ Q22; Q24code2; Q22code1.

¹²⁴ Q24. To quote one respondent: "Our job [in legislative affairs] is really to pull together information though, and to coordinate within the agency. Our job is to communicate the message of the agency, and we work with everyone within the agency to put together a coherent message." Q23code1.

¹²⁵ Q23code1.

¹²⁶ Q23.

¹²⁷ Q32. As one respondent said: "Our role in legislative affairs to is make sure we communicate properly with the Hill. We have to take comments and translate them so they are politically appropriate and the tone is right for the Hill. We don't just compile and send comments." Ucode1; Q32code1.

agency will facilitate meetings, but that the legislative affairs staff always attend these meetings with the substantive experts.¹²⁸

D. OMB as Executive Branch Coordinator for Legislation

This Article's findings also provide new insight into the legal literature examining review and oversight of agency actions by the OMB. An important and extensive scholarly discussion exists around the role that OMB plays in overseeing and clearing agencies' regulatory processes through its Office of Information and Regulatory Affairs.¹²⁹ Very little attention has been paid, however, to a similar role OMB plays in coordinating the review and clearance of agencies' legislative work. This Section discusses the role of OMB as described both by respondents and various publicly-available sources.

Although the study did not specifically ask about the role of OMB (instead asking about interactions with the White House more generally), forty-three respondents (80%) discussed OMB's coordinating role a total of 108 different times throughout the interviews.¹³⁰ OMB Circular No. A-19 governs the coordination and clearance of legislative communications made to Congress including legislative proposals, testimony, views letters, substantive comments, and similar communications.¹³¹ Respondents explained that the OMB clearance process is generally collaborative.¹³² It requires agencies to submit substantive legislative communications to OMB for clearance and also involves OMB reaching out to agencies with relevant subject-matter expertise for review of proposed legislation.¹³³ The purpose of the clearance process is "to give agencies an opportunity to recommend specific proposals for Presidential endorsement," and "to aid OMB and other staff of the Executive Office of the President in developing the President's legislative program, budget, and annual and special messages."¹³⁴

¹²⁸ Ucode1; Q24code2.

¹²⁹ See, e.g., Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1337 (2013); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1791 (2013); Cass R. Sunstein, *Commentary, The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1841 (2013).

¹³⁰ Q20.

¹³¹ An electronic version of Circular No. A-19 is available on OMB's website. See *Circular No. A-19*, OFF. MGMT. & BUDGET (Sept. 20, 1979), https://obamawhitehouse.archives.gov/omb/circulars_a019.

¹³² Q20code1.

¹³³ See *Circular No. A-19*, *supra* note 131, §§ 7(a), 8(a)(1).

¹³⁴ *Id.* § 6(b).

The OMB clearance process requires agencies to send proposed legislation and other legislative documents specifically to OMB's Legislative Reference Division, which is the body within OMB that coordinates with the relevant agencies and OMB to resolve any differences on the document.¹³⁵ With respect to draft legislation, the Legislative Reference Division uses OMB's legislation tracking system, called the Legislative Information System, to generate a Legislative Referral Memorandum that is sent to each agency with an interest in the legislation.¹³⁶ This memorandum asks agencies to provide input or signoff on the legislation.¹³⁷ To facilitate this process, every agency document submitted for clearance must specify other agencies that have an interest in the proposal.¹³⁸ Once the review process is completed and any interagency disputes have been resolved, the agency that submitted the legislative document gets clearance to submit the document to Congress, either as originally proposed or with the requisite revisions.¹³⁹

The Legislative Reference Division of OMB forwards agency legislative documents to other interested agencies and to the relevant contacts within the Executive Office of the President for their review.¹⁴⁰ While OMB generally coordinates this process among agen-

¹³⁵ See *The Mission and Structure of the Office of Management and Budget*, OFF. MGMT. & BUDGET (Jan. 18, 2016), [https://web.archive.org/web/20160118161149/https://www.whitehouse.gov/omb/organization_mission/] (“The Legislative Reference Division coordinates the articulation of the Administration’s position on legislation by overseeing the review and clearance of the Administration’s legislative proposals, testimony, and statements on bills progressing through Congress.”). OMB also has its own Office of Legislative Affairs that works with its counterparts within each agency. See *id.* (“OMB’s Office of Legislative Affairs works closely with White House Office of Legislative Affairs, Federal Agency Legislative Affairs offices, and congressional offices on current legislative issues.”). The White House also has its own comparable Office of Legislative Affairs. See *Executive Office of the President*, WHITE HOUSE (Jan. 20, 2017), [<https://web.archive.org/web/20170120080202/https://www.whitehouse.gov/administration/eop/>]. The Author did not interview individuals in either OMB’s Office of Legislative Affairs or the White House’s Office of Legislative Affairs, and respondents generally indicated little interaction with the White House and instead indicated interaction with OMB generally. Respondents did indicate that the White House only gets involved in major legislative initiatives, so it is unlikely that these offices are involved in most legislation, and that their involvement is likely more political than substantively editing or drafting language.

¹³⁶ See *OMB’s Legislative Information System*, OFF. OF MGMT. & BUDGET (Dec. 1, 2016), [https://web.archive.org/web/20161201182330/https://www.whitehouse.gov/omb/gils_lrd-gils/].

¹³⁷ See *id.* (“The [Legislative Information] System is used to create Legislative Referral Memoranda (LRMs) and to monitor Congressional activity related to Administration-sponsored legislation and other legislation being considered by the Congress.”).

¹³⁸ See *Circular No. A-19*, *supra* note 131, § 7(f)(1)(e).

¹³⁹ See, e.g., DEP’T OF DEF., OFFICE OF LEGISLATIVE COUNSEL, *supra* note 54, at 12–13.

¹⁴⁰ TOBIAS A. DORSEY, LEGISLATIVE DRAFTER’S DESKBOOK: A PRACTICAL GUIDE 290 (2006).

cies, Circular No. A-19 also encourages agencies to collaborate before the OMB process begins.¹⁴¹ Respondents stated that direct inter-agency communication about legislation is a common occurrence, with twenty-four respondents (44%) saying they often or always work directly with other agencies and with another eighteen (33%) saying they sometimes do.¹⁴²

OMB conducts its own analysis of these legislative documents to ensure fidelity to the President's agenda; however, a number of respondents said that OMB serves more of a coordinating rather than a substantive role for all except the most politically significant legislation.¹⁴³ This is unsurprising given the small number of OMB staff as compared to the size of the administrative state. OMB has only around 500 employees for all of its budget and clearance work, which covers both agency regulations and legislation.¹⁴⁴ Agencies have millions of employees, and while most of them play no role in legislation, the total number who play some role is certainly many times larger than OMB.¹⁴⁵ Respondents also noted that the expertise of agencies far exceeds the expertise of the relatively small group of staff in OMB that oversees agency involvement in legislation.¹⁴⁶ Serious and sus-

¹⁴¹ See *Circular No. A-19*, *supra* note 131, § 9 ("In carrying out their legislative functions, agencies are encouraged to consult with each other in order that all relevant interests and points of view may be considered and accommodated, where appropriate, in the formulation of their positions. Such consultation is particularly important in cases of overlapping interest, and intensive efforts should be made to reach interagency agreement before proposed legislation or reports are sent to OMB.").

¹⁴² Q40. As one respondent described their relationship with staff at other agencies: "I talk with my counterparts in other agencies on an ongoing basis. We go to lunch together and discuss issues. We have personal relationships. It is a small and tight world." Q40code1.

¹⁴³ Twelve respondents (22%) made unsolicited comments that OMB serves primarily a coordinating role. Sixteen respondents (30%) made unsolicited comments that the President and OMB only get involved in major political issues. For example, one respondent said:

OMB only does a bit of coordination. They don't have the resources to do the substantive work that I do. I spent 6 months at OMB recently so I saw the work they do. They play a coordinating role. They aren't as involved in the substance. They do get involved in substance sometimes but only if it is a major issue. Otherwise they leave it to us.

Q20code1; Q20code2; Q20code3.

¹⁴⁴ See *Employment and Trends—March 2013*, U.S. OFF. PERS. MGMT., <http://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/employment-trends-data/2013/march/table-2/> (last visited Jan. 28, 2017) (indicating that OMB had a total of 516 employees as of March 2013). For a brief discussion of the various roles of OMB, see *The Mission and Structure of the Office of Management and Budget*, *supra* note 135.

¹⁴⁵ See *Employment and Trends—March 2013*, *supra* note 144 (indicating that Executive Departments had 1,910,006 employees and Independent Departments had 765,878 employees as of March 2013).

¹⁴⁶ See *infra* Section III.A.

tained presidential review of agency legislative action is therefore only feasible in cases of politically-sensitive legislation that catches OMB's attention.

Respondents also provided interesting insights into ways in which presidential oversight is limited. Respondents explained that informal agency action generally escapes OMB clearance and that "technical" assistance to Congress is not required to go through OMB.¹⁴⁷ Much of agency review of bills is considered "technical," meaning that it is not meant to serve as a statement by the agency of its policy position on the bill, but rather as a mechanical assessment of the impact of the bill and issues likely to be raised by it.¹⁴⁸ This distinction is important because it means that the comments do not have to be cleared through OMB, as they are not a statement of policy. As a number of respondents noted, however, there is a blurry line between technical and substantive comments, especially because many of the "technical" comments materially affect the substance of the policy and how it is carried out.¹⁴⁹ In addition, informal communication with Congress is also generally able to avoid the clearance process.¹⁵⁰ As one respondent put it: "The more policy oriented it gets the more levels of bureaucracy it has to be cleared through If I want to provide policy input but don't want to go through a bunch of layers of bureaucracy then I pick up the phone."¹⁵¹ Respondents also noted that bills drafted for Congress at Congress's request are not considered a statement of agency or administration policy; therefore, agencies are able to avoid the OMB clearance process for this type of draft legislation.¹⁵²

This Article's findings uncover a new way in which the President controls the executive branch and offer new reasons to question the efficacy of this control. Scholars have frequently discussed and debated the President's ability to control and shape agency action, generally in the context of the budget process and OMB review of agency

¹⁴⁷ See *infra* Section III.A.

¹⁴⁸ Q13.

¹⁴⁹ Q16.

¹⁵⁰ DORSEY, *supra* note 140, at 277.

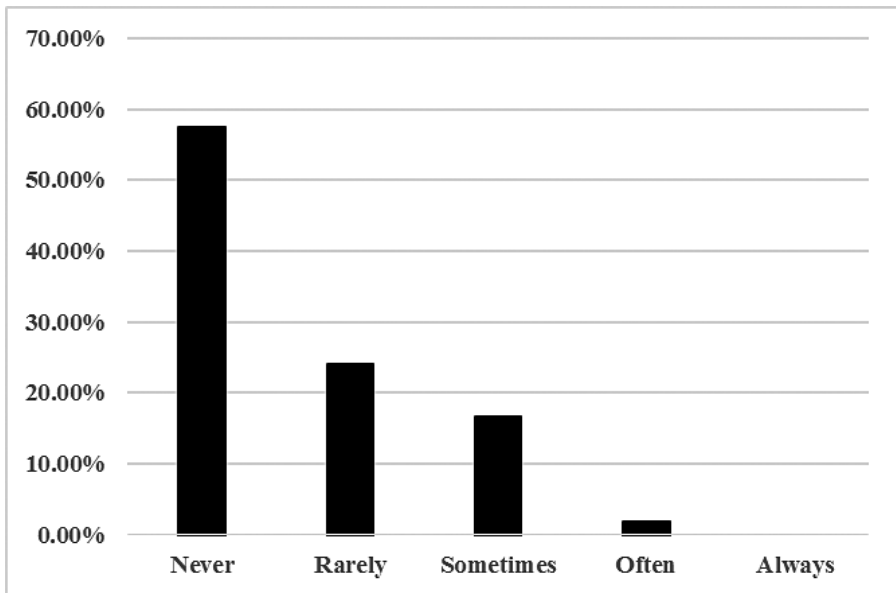
¹⁵¹ Ucode3; Q16code2.

¹⁵² See *Circular No. A-19*, *supra* note 131, § 7(i) ("Agencies need not submit for clearance bills that they prepare as a drafting service for a congressional committee or a Member of Congress, provided that they state in their transmittal letters that the drafting service does not constitute a commitment with respect to the position of the Administration or the agency. Agencies shall advise OMB of these drafting service requests while the requests are being complied with, and supply a copy of the request, if in writing. A copy of each such draft bill and the accompanying letter should be furnished to OMB at the time of transmittal, together with an explanatory statement of what the bill would accomplish if that is not contained in the transmittal letter.").

regulations.¹⁵³ Very little attention has been given to how the President controls the executive branch's involvement in the legislative process. This Article provides a starting point for discussing the President's control of agencies in the legislative process and makes clear that scholars need to go beyond OMB when considering presidential control of the regulatory state. More work needs to be done, however, to understand how this control works on the legislative side.

E. Legislative History

FIGURE 11. ARE AGENCIES INVOLVED IN DRAFTING OR REVIEWING LEGISLATIVE HISTORY (E.G., COMMITTEE REPORTS AND CONFERENCE REPORTS)?



While the focus of this Article is on agency involvement in legislative drafting, the study also asked respondents whether their agency is involved in drafting or reviewing legislative history such as committee reports and conference reports.¹⁵⁴ As Figure 11 demonstrates, respondents overwhelmingly said that their agencies have little to no involvement in drafting or reviewing legislative history. Forty-three

¹⁵³ See, e.g., MICHAEL E. MILAKOVICH & GEORGE J. GORDON, PUBLIC ADMINISTRATION IN AMERICA 373 (10th ed. 2009) (discussing presidential control of agencies through the budget); Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1061–62 (1986); Peter L. Strauss, Foreword, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 701–02 (2007).

¹⁵⁴ Q35.

respondents (81%) said that their agency rarely or never drafts or reviews legislative history, and only one respondent (2%) said that they often do.¹⁵⁵ A number of respondents, however, did indicate that portions of agency-drafted documents may end up being inserted as part of the legislative history by congressional staff, even if that was not the intended purpose of the document.¹⁵⁶

The fact that agency and congressional legislative counsel are generally not involved in drafting legislative history, but are involved in drafting statutory language, complicates arguments for and against the use of legislative history. Professors Gluck and Bressman argued in favor of the use of legislative history based on their claim that committee staff are predominantly responsible for drafting the most important legislative history, including committee reports and conference reports, while Congress's legislative counsel are primarily responsible for legislative text.¹⁵⁷ They argued that compared to Congress's legislative counsel, committee staff are more politically accountable and have greater subject-matter expertise and that this strengthens the case in favor of legislative history.¹⁵⁸ This Article's findings comport with their political accountability argument but cast doubt on their subject-matter expertise argument. Congressional staff are clearly more accountable to members of Congress than are agency staff. If we use political accountability as the measure of whether to give preference to legislative history or statutory text, then legislative history has the advantage because it is more closely connected to members of Congress.

¹⁵⁵ Q35. These findings are somewhat different from Professor Walker's findings. For example, 24% of Professor Walker's respondents said that their agency always or often participates in legislative history drafting, although a much smaller percentage said that they are personally involved in this. Walker, *supra* note 19, at 1037–38. The differences in responses are likely due to the nature of his question, which included hearing testimony and questions as part of the question. This survey's question only specifically mentioned committee reports and conference reports. If this survey had mentioned hearing testimony, then the positive responses would likely have been much higher, given the responses to the separate question about agency involvement in drafting testimony.

¹⁵⁶ For example, a few respondents said that agencies offer section-by-section analysis of bills drafted in an agency and supply other documents and studies to Congress, and respondents reported that these types of agency-produced documents can end up in a committee or conference report. Q35. The survey did not ask about this so it is impossible to say whether this is a common phenomenon.

¹⁵⁷ Professors Gluck and Bressman's claim about legislative counsel's influence on the ultimate content of statutory language is debatable in its own right. See Shobe, *supra* note 18, at 863–65.

¹⁵⁸ See Gluck & Bressman, *Part I*, *supra* note 2, at 967–68.

Based on this Article's findings, arguments in favor of texts written by those with greater subject-matter expertise cuts against the use of legislative history. This Article's respondents agreed with Professors Gluck and Bressman's respondents that Congress's legislative counsel are not subject-matter experts, but emphasized that agency staff, even more than committee staff, are the true subject-matter experts in the statutes relevant to them.¹⁵⁹ Because agencies are involved in drafting statutory text, but not the most important legislative history, such as committee reports, the subject-matter expertise of those drafting statutory text certainly exceeds that of those drafting legislative history.¹⁶⁰ Statutory language also undergoes a significantly deeper drafting, review, and revision process than legislative history. Additionally, because agencies closely monitor statutory language, but do not monitor legislative history, it is also easier for a congressional staffer to add language to legislative history that has not been fully vetted by all of the actors in the legislative process or that is incoherent or inconsistent with what the legislative process generated.¹⁶¹ If we use the subject-matter expertise of drafters as the measure of whether to give preference to legislative history or statutory text, it seems clear that statutory text wins.

This Article's findings can plausibly strengthen arguments both for and against the use of legislative history. Either way, it is important for scholars and judges to acknowledge the role of agencies when they make these arguments. The role of legislative history in light of agency involvement in the legislative process is certainly a subject that merits deeper inquiry.

F. Lobbyists

Although lobbyists are not the focus of this Article, respondents provided some insight into agency interactions with lobbyists. Only five respondents (9%) previously worked as a lobbyist.¹⁶² This indicates that the revolving door between agencies and lobbying firms may be smaller than between Congress and lobbying firms.¹⁶³ This is consistent with the fact that agencies have many more career staff than Congress and with respondents' statements that agencies have little interaction on legislation with lobbyists or other private interest

¹⁵⁹ See *infra* Section III.A.

¹⁶⁰ See *infra* Section III.A.

¹⁶¹ See *supra* Section II.B.

¹⁶² Q3a.

¹⁶³ See *infra* Section III.B.

groups. Nearly half of respondents (twenty-six, or 48%) said that their offices never have interactions with lobbyists, with another fifteen respondents (28%) saying that they rarely have interactions with lobbyists.¹⁶⁴ The following comments were typical: “We have no interactions with lobbyists. We tell them to go to Congress, not us. We won’t even talk to former [agency staff]”; “We don’t really interact with lobbyists because they go to Congress if they want something legislatively.”¹⁶⁵ Unsurprisingly, a number of respondents said that although lobbyists go straight to Congress on legislative issues, their agency does have interactions with lobbyists at the regulatory level.¹⁶⁶

Even though most respondents do not interact with lobbyists, they did report an awareness of lobbyists’ role in the legislative process. Forty-five respondents (83%) said that lobbyists always or often play a significant role in drafting bills relevant to their agency.¹⁶⁷ A number of respondents said that congressional staff keep them apprised of what lobbyists want legislatively.¹⁶⁸ And once a bill has been drafted by a lobbyist, agencies generally have a chance to review and comment on the bill. As one respondent working in an area with many lobbyists said, “Lobbyists and other constituents draft most bills in our area. . . . These bills are usually not drafted very well because they are targeting a specific person and don’t account for the effects on our programs and on others. We have to help them understand the issues they are creating.”¹⁶⁹

When asked whether lobbyists are helpful to the process of creating legislation, respondents provided mixed and qualified responses. Thirty-three respondents (61%) said sometimes, thirteen (28%) said often or always, and three (6%) said rarely or never.¹⁷⁰ While many respondents said that lobbyists are helpful for the knowledge of the issues their clients face, some also said that they have a tendency to sneak things into bills and that agencies therefore have to watch their work closely.¹⁷¹ As one respondent said, “[We have] to raise issues that the industry doesn’t point out. Lobbyists try to add in provisions

¹⁶⁴ Q37.

¹⁶⁵ Q37.

¹⁶⁶ Q37. Eight respondents (15%) made a statement to this effect even though this question was not specifically asked.

¹⁶⁷ Q38.

¹⁶⁸ Q38. As one respondent put it: “We know when [lobbyists] are involved because we speak with people on the Hill and they tell us what the lobbyists are asking for.” Q38.

¹⁶⁹ Q38.

¹⁷⁰ Q39.

¹⁷¹ Q39.

that Congress doesn't understand and we have to raise the issues and push for changes."¹⁷²

G. Agencies as Lobbyists

A number of respondents made comments regarding how agencies act as their own strong lobbyists in the legislative process.¹⁷³ Agencies are more broadly involved in legislative work than other lobbyists, who are generally interested only in specific, narrow issues. Agencies are also repeat players in the legislative process and have close relationships with Congress. These repeated interactions give them credibility and establish a reputation that allows agencies to wield significant influence.¹⁷⁴ And agencies appear to use this influence. According to a number of respondents, agencies essentially serve as a previously unrecognized vetogate through which a bill must pass on the road to becoming law.¹⁷⁵ A number of respondents said that a primary role of their work is to stop legislation that would be harmful to their agency.¹⁷⁶ Agencies can indicate opposition through formal documents, like a Statement of Administration Policy or views letter (both of which allow an agency to publicly state that it is opposed to a bill and why), and through informal means such as phone calls and technical edits.¹⁷⁷ If an agency opposes a bill, it can exert its influence through one of these means to make it much more difficult for a bill to pass.¹⁷⁸ To quote one respondent: "The last thing that a member of Congress wants to hear is that the agency opposes the bill. That makes it much more difficult for them on the Hill."¹⁷⁹ In these situations, unless Congress has enough political willpower to overcome agency influence, Congress must negotiate with agencies, like it does with other lobbyists, and make certain concessions to keep them from using their political power to oppose the bill.¹⁸⁰ Some respondents also said that even if an agency is not necessarily opposed to a

¹⁷² Q39.

¹⁷³ Q51; *see also* Daniels, *supra* note 1, at 404 (describing ways in which agencies sometimes behave like lobbyists).

¹⁷⁴ *See* Maggie McKinley & Thomas Groll, *The Relationship Market: How Modern Lobbying Gets Done*, EDMOND J. SAFRA CTR. FOR ETHICS (Feb. 13, 2015), <http://ethics.harvard.edu/blog/relationship-market-how-modern-lobbying-gets-done>.

¹⁷⁵ For a helpful discussion of the traditionally discussed vetogates, *see* William N. Eskridge, Jr., *Vetogates*, *Chevron*, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–48 (2008).

¹⁷⁶ Q25.

¹⁷⁷ Q25.

¹⁷⁸ Q25.

¹⁷⁹ Q25code3.

¹⁸⁰ Q25.

bill, it will not pass unless the agency has had a chance to review and comment.¹⁸¹

It appears that at times agencies have a strong enough influence to “capture” Congress, especially with respect to technical issues. The literature on agency capture is relevant here. Agency capture is a commonly acknowledged phenomenon whereby well-organized, regulated entities are able to influence decisions of their regulator.¹⁸² The concern is that the regulated entities are able to use their influence to persuade the regulator to act in the interest of the regulated entities and against the public interest.¹⁸³ Based on the way respondents described agency interactions with Congress, the agency-Congress relationship is often similar to the agency-regulated entity relationship: although Congress is supposed to be in charge of regulating agencies, agencies maintain significant influence over the legislative process and can use that influence to push their agenda and influence legislative outcomes. Similar to a regulated entity, an agency has its own strongly held institutional interests that are not necessarily the same as those of the public at large and is able to influence congressional behavior to, at times, “capture” Congress.¹⁸⁴

H. Agency Preference for Open-Ended Statutes

The study asked whether respondents’ agencies prefer that legislative language be left open-ended, allowing the agency more flexibility in implementing the statute.¹⁸⁵ Unsurprisingly, most respondents said that their agency prefers open-ended legislation. Thirty-six respondents (67%) said that their agency always or often prefers open-ended language, while only eight respondents (15%) said rarely or never.¹⁸⁶ One representative comment on this point was: “We usually

¹⁸¹ Q25. As one respondent put it: “A bill affecting us will not pass if they haven’t received agency input. They have to talk with us.” Q25code3.

¹⁸² See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371, 372 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 336 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971).

¹⁸³ See Nicholas Bagley, *Agency Hygiene*, 89 TEX. L. REV. SEE ALSO 1, 2 (2010); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 178 (1990).

¹⁸⁴ See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1713 (1975) (“It has become widely accepted . . . that the comparative over-representation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.”).

¹⁸⁵ Q41.

¹⁸⁶ Q41.

want the broadest authority we can get. We don't know when we will get another chance to get a bill passed."¹⁸⁷ A few respondents stated that they work specifically to ensure that statutes allow for as much agency discretion as possible.¹⁸⁸ It is worth noting that those who expressed a preference for open-ended statutes said that statutory language should be clear enough to give at least a broad indication of what Congress intends the agency to do. As one respondent said,

We prefer a happy medium of specificity—not micromanaged but not left so open ended that there is a battle to figure out rulemaking or litigation. Sometimes Congress gives us so much authority it is difficult to deal with. Ideally, Congress doesn't sweat the small details but provides enough of a framework.¹⁸⁹

While agencies generally prefer more discretion, a number of respondents did indicate that when an issue is highly political they prefer statutory language to be clear and unambiguous so that the agency is not stuck in the middle of the political fight.¹⁹⁰ To quote one respondent: "We like broad statutory authority, but it is a double-edged sword when we have more authority. More authority subjects us to more political pressure. For politically sensitive issues we want less broad authority and more specificity instead."¹⁹¹

III. FACTORS AFFECTING AGENCY INVOLVEMENT IN THE LEGISLATIVE PROCESS

The previous Part described how agency involvement in the legislative process works. This Part builds on that description by explaining a number of external and structural factors that affect whether and to what extent agencies provide input in the legislative process. Nearly all respondents emphasized that agencies have much more subject-matter expertise than Congress relating to their own statutes and programs. Because of this, Congress is generally unable to draft legislation that is both detailed and effective without receiving significant

¹⁸⁷ Q41.

¹⁸⁸ Q41. To quote two respondents: "Congress sometimes tries to be more prescriptive and we work with them to make it more open-ended"; "How specific the legislation is makes a huge difference in how the programs will be implemented. We know that and account for that in the drafting process. We want language broad enough to make things implementable for us." Q41.

¹⁸⁹ Q41.

¹⁹⁰ Q41. Eight respondents (15%) made an unprompted statement to this effect.

¹⁹¹ Q41; Q41code1. Another respondent working at a politically sensitive agency said the following: "Our work is very political so we want statutes that are definitive. Open-ended language is an invitation to open-ended interpretation, which is bad for us because 75–80% of our regulations get sued. The more specific the better." Q41code1.

agency input. Although agencies are more expert, there are still times when Congress is less likely to rely on agency expertise. There are also times that agency involvement turns on certain factors that would be difficult for outsiders to detect, such as the personal relationships between agency and congressional staff. Respondents explained, however, that the political parties of the President and Congress, as well as whether the agency is an executive agency or independent agency, are readily discernable factors that often influence how deeply an agency is involved in the legislative process. This Part shows how these factors could be incorporated into statutory interpretation doctrine to improve assumptions about congressional intent to delegate.

A. *Agency Expertise*

The study asked for the respondents' impressions of whether committee and individual member staff are experienced and knowledgeable in the areas relevant to their agency.¹⁹² Fifteen respondents (28%) said that committee staff are always experienced and knowledgeable and another twenty-six respondents (48%) said that they are often experienced and knowledgeable.¹⁹³ Unsurprisingly, respondents viewed individual member staff as significantly less experienced and knowledgeable, with no respondents saying they are always experienced and knowledgeable and only four respondents (7%) saying they are often experienced and knowledgeable.¹⁹⁴

While respondents generally reported some confidence in the expertise of committee staff, many respondents emphasized that agencies have greater expertise in their own areas. Forty different respondents (74%) made unsolicited comments about agencies' superior expertise compared to that of Congress.¹⁹⁵ To quote one respondent: "Lack of expertise in Congress is the biggest issue with most statutes, which is why we have such an important role to play. We have expertise that Congress can't have given the relatively small number of staff they have and the broader areas they work in."¹⁹⁶ Seventeen respondents (31%) made unsolicited comments that Congress's legislative counsel are not subject-matter experts to the degree that those within agencies are.¹⁹⁷ As an example of a representative

¹⁹² Q27.

¹⁹³ Q27.

¹⁹⁴ Q28. A number of respondents attributed this to the relative youth of individual member staff, many of which only recently graduated from college. Q27; Q28.

¹⁹⁵ Q27code1.

¹⁹⁶ Q27code1.

¹⁹⁷ Q26code1.

comment: “We have been around longer and have experience in the details of our statutes and what they mean on the ground. We know what works and what doesn’t. All of this makes us much better drafters than congressional staff and legislative counsel.”¹⁹⁸ An example mentioned by various respondents that perhaps illustrates Congress’s relative lack of expertise was the frequency with which Congress drafts bills that duplicate something an agency already does.¹⁹⁹ As one respondent said: “We sometimes have to tell Congress that their bill is a solution to a problem that doesn’t exist or that there is already a program in existence to solve that problem.”²⁰⁰ The fact that Congress frequently asks agencies to draft bills for them, even though Congress has many other drafting resources at its disposal (including Congress’s legislative counsel, congressional staff, and lobbyists), shows that some congressional staff agree that agencies have superior subject-matter expertise.²⁰¹

1. *Agency Stability and Specialization*

Agencies have more staff and greater subject-matter expertise than congressional staff, which they can apply to issues that are important to the agency.²⁰² Legislators and congressional staff—and even committee staff—are less expert because they work in many policy

¹⁹⁸ Q13code1; Q27code1; Q26code1. While most respondents believed that legislative counsel in Congress were good drafters (even if not experts in substance), others felt more strongly that legislative counsel’s drafting was affected by their lack of substantive knowledge. To quote one respondent:

We send up language and it is redrafted by Congress’s legislative counsel. They mangle it because they don’t understand what the agency is trying to do. Our work is very technical and legislative counsel have no real understanding of it. So they mess up our bills with their technical changes and we have to go back and forth to get them fixed.

Q26code1.

¹⁹⁹ Nine respondents (17%) made an unsolicited comment to this effect. Ucode8.

²⁰⁰ Q26; Ucode8.

²⁰¹ See *supra* Section II.A.2.

²⁰² See, e.g., David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 *CARDOZO L. REV.* 947, 967 (1999) (“[T]he executive branch is filled (or can be filled) with policy experts who can run tests and experiments, gather data, and otherwise determine the wisest course of policy, much more so than can 535 members of Congress and their staff.”). The Department of Defense, for example, has “[h]undreds of . . . employees [who] participate in conceiving, drafting, and reviewing a myriad of legislative initiatives covering every aspect of DoD operations.” *DEP’T OF DEF., OFFICE OF LEGISLATIVE COUNSEL*, *supra* note 54, at 6; see also *Employment and Trends—March 2013*, *supra* note 144 (indicating that the Legislative Branch had 29,739 employees as of March 2013, compared to 1,910,006 employees in Executive Departments and 765,878 in Independent Advisory Agencies).

areas simultaneously, while agency staff focus on relatively few. No matter how knowledgeable congressional staff may be, they do not have the on-the-ground experience of agency staff. Congressional staff also have notoriously high turnover rates for a number of reasons. Congressional staff are generally tied to a member of Congress, so if their member loses an election a staffer no longer is guaranteed a job.²⁰³ Also, when the majority in a house of Congress switches, committee staffing for the new majority party increases while staffing for the old majority party decreases.²⁰⁴ Many committee staff also view their jobs as stepping stones to other jobs rather than a place to make a career.

While agencies have some political appointees who are also subject to turnover for the same reasons, the vast majority of agency staffers are career employees who spend the bulk of their career working for one agency. As one respondent explained, “We have a lot less turnover than committee or other congressional staff. People like it here and have an interest in the agency’s mission, so they tend to stick around.”²⁰⁵ Agency employees also have strong employment protections that make them difficult to remove.²⁰⁶ Because of all of these factors, agencies have an institutional knowledge about their governing legislation that Congress is less likely to have.²⁰⁷

²⁰³ Shobe, *supra* note 18, at 846–47.

²⁰⁴ See *id.* at 846 (“For example, all except for two House committees had staff retention rates below 60% in the period between 2009 and 2011, a period in which control of the House passed from Democrats to Republicans.”).

²⁰⁵ Q27code2. Eight respondents (15%) made unprompted comments about Congress’s comparatively high turnover of staff.

²⁰⁶ Federal agency employees are represented by the Merit Systems Protection Board (“MSPB”) with respect to any efforts to suspend or terminate employment. The MSPB is known to aggressively protect agency employees, even those whose conduct is particularly egregious. See, e.g., *Red Tape Keeps Some Bad Gov’t Workers from Being Fired*, CBS NEWS (Mar. 2, 2015, 7:54 AM), <http://www.cbsnews.com/news/civil-servant-protection-system-could-keep-problematic-government-employees-from-being-fired/>.

²⁰⁷ Q27code1 (“[W]e also go back and talk to the people in the agency who were involved in drafting/reviewing the bill to see if they have insight on what the bill means and what the intention was. Our institutional knowledge matters more than legislative history.”); cf. Daniels, *supra* note 1, at 377 (“[T]he fact that those in agencies have the potential to mine the agency’s files, databases, and employee memories can prove quite helpful when those within the agency play principal in attempting to tinker with the elected branches.”); Gluck & Bressman, *Part I*, *supra* note 2, at 973 (“To quote two respondents: ‘[It’s] one of the things that worried me most about high turnover of staff. We need the history to know how to understand the past’”)(alteration in original).

2. *Agency Expertise and Lack of Congressional Control*

Because congressional staff are outnumbered and are not involved in agencies' day-to-day operations, it is often difficult for congressional staff to understand the legislative text agencies propose. This is problematic because congressional staff have to determine whether agency legislative language comports with Congress's intentions (in a case where an agency is reviewing or drafting at Congress's request) or with what the agency says the legislation is intended to do (in the case where an agency is originating its own proposal). Gluck and Bressman's congressional respondents confirmed as much about committee staff in the context of discussing Congress's Legislative Counsel: "Our ordinary counsels reported that the difficulties of understanding technical statutory language and of tracking the numerous statutory cross-references and amendments to preexisting legislation make penetrating the language that Legislative Counsel generates challenging even for staffers who are lawyers."²⁰⁸ This is more concerning with language drafted by agency legislative counsel than language drafted by Congress's legislative counsel because Congress's legislative counsel ultimately work for the same institution as the elected members and generally have no incentive to do anything other than accurately execute the wishes of members and their staff.²⁰⁹ Agency staff, on the other hand, do not work for Congress, so there is reason to question whether they are always fully transparent with Congress. And even if there is no issue with agency staff being sneaky or disingenuous, sometimes there is simply too much complexity for congressional staff to fully understand the implications of agency drafting.²¹⁰

It is also unlikely that Congress's legislative counsel are able to police agency-originated statutory language. Although they are experts in technical drafting, they do not always have the requisite subject-matter expertise to sufficiently understand agency-created text.²¹¹ Agency respondents repeatedly noted that Congress's legislative counsel frequently do not understand the details of agency operations

²⁰⁸ Gluck & Bressman, *Part II*, *supra* note 1, at 743.

²⁰⁹ See Shobe, *supra* note 18, at 864–65 (describing ways in which Congress's legislative counsel are accountable to Congress).

²¹⁰ Congressional staff noted that ambiguities exist in statutes because of complexity, which further confirms the difficulties congressional staff face when confronted with complex and detailed statutory language. See Gluck & Bressman, *Part I*, *supra* note 2, at 997.

²¹¹ *Id.* at 968 (noting that congressional staff said that legislative counsel are not subject-matter experts).

and legislative proposals as well as those within the agency do.²¹² This lack of expertise is understandable given the nature of legislative counsel's job. Even if Congress's legislative counsel had the expertise to serve as the guardian of Congress's legislative interests, congressional staff report that Congress's legislative counsel have less opportunity to revise statutory language written by agencies. When an agency is the initial drafter, it has more control of the statutory text.²¹³ Unlike agencies, Congress's legislative counsel are unable to intervene in politics and are instead left in the background while much of the political dealmaking is happening.²¹⁴ It appears the various types of congressional staff may not be adequately equipped to supervise agencies in the legislative arena.

This Article's findings thus call into question the way that the Supreme Court views the agency-Congress relationship. In the recent case of *City of Arlington v. FCC*,²¹⁵ the Court, in ruling for expansive *Chevron* deference to agencies when determining the scope of their own jurisdiction, said that "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion."²¹⁶ Scholars have also said that Congress can simply draft detailed statutes to reduce agency discretion.²¹⁷ The assumption is that it is simply a matter of Congress deciding whether to put in the effort after having calculated the costs and benefits of doing so. According to this study's respondents, however, it would seem that Congress may not understand agencies' work well enough to be able to draft bills that effectively circumscribe agencies' discretion.²¹⁸ Drafting detailed and specific statutes is not simply a matter of desire and effort, it is a matter of capacity and expertise. Respondents indicated Congress often does not have this capacity, and it seems un-

²¹² See *supra* notes 202–07 and accompanying text.

²¹³ Gluck & Bressman, *Part II*, *supra* note 1, at 747 (noting that seventy-five percent of Legislative Counsel respondents said that they have less ability to modify texts prepared by outside groups like agencies).

²¹⁴ *Id.* ("Politics also often trumps Legislative Counsel's advice. Legislative Counsel . . . is not permitted to intervene in political disputes.")

²¹⁵ 133 S. Ct. 1863 (2013).

²¹⁶ *Id.* at 1868.

²¹⁷ David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 699 (1994) (stating that Congress can circumscribe agency behavior by "explicitly limiting the discretion of an agency to move outcomes from the status quo"); Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON & ORG. 213, 228 (1990) ("The most direct way is for today's authorities to specify, in excruciating detail, precisely what the agency is to do and how it is to do it, leaving as little as possible to the discretionary judgment of bureaucrats . . .").

²¹⁸ See *supra* Section III.A.1.

likely Congress would be able to procure it without substantial institutional changes.²¹⁹ Agency staff not only have access to more information than Congress but they also have higher quality information.²²⁰ This informational asymmetry inherent in the relationship between agencies and Congress makes it difficult for Congress to control agencies. The ability to draft something that provides the level of detail needed to circumscribe an agency's discretion would require the agency to be closely involved in the drafting to make sure it limits the agency. However, Congress is less likely to rely on agency drafting assistance when it is looking to limit agency discretion, and an agency has an incentive to avoid helping Congress draft language that will effectively circumscribe the agency's discretion. So there is good reason to question the Court's assumptions about Congress's ability to clearly circumscribe agency discretion.

Respondents' comments about comparative agency expertise, if true, exacerbate the control problem that political scientists have noted exists between agencies and Congress.²²¹ There is a tendency in the political science and legal literature to focus on whether Congress is able to conduct *ex post* oversight of agencies without considering whether Congress has the capacity to draft circumscribing legislation *ex ante*.²²² To the extent scholars do address this as an *ex ante* problem, they predominantly look to the administrative procedures that Congress can institute to subject agencies to greater scrutiny.²²³ These methods of congressional control are costly to employ, difficult to po-

²¹⁹ See *supra* Section III.A.1.

²²⁰ See, e.g., SEAN GAILMARD & JOHN W. PATTY, *LEARNING WHILE GOVERNING: EXPERTISE AND ACCOUNTABILITY IN THE EXECUTIVE BRANCH* 2–3 (Benjamin I. Page et al. eds., 2013) (describing information asymmetries between the executive branch and Congress).

²²¹ See, e.g., J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1444 (2003); Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432 (1989) [hereinafter McCubbins et al., *Structure and Process*]; Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165 (1984); Terry M. Moe, *Political Control and the Power of the Agent*, 22 J.L. ECON. & ORG. 1, 1 (2006); see also *INS v. Chadha*, 462 U.S. 919, 955 n.19 (1983) (“Beyond the obvious fact that Congress ultimately controls administrative agencies in the legislation that creates them, other means of control, such as durational limits on authorizations and formal reporting requirements, lie well within Congress’ constitutional power.”).

²²² See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 54–100 (Donald R. Harris et al. eds., 1992); Jonathan Bendor & Terry M. Moe, *Agenda Control, Committee Capture, and the Dynamics of Institutional Politics*, 80 AM. POL. SCI. REV. 1187, 1187 (1986); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 765 (1983).

²²³ See McCubbins et al., *Structure and Process*, *supra* note 221, at 440–44; Mathew D.

lice, and more likely to entail substantial bureaucratic shirking as compared to drafting substantive statutory language that binds the agency in the first instance. This Article argues that Congress frequently lacks the expertise to draft and police this type of specific and detailed language, and that Congress's difficulties in controlling agencies therefore are more pronounced than scholars and courts realize.

3. *Improving Congressional Coordination to Leverage Agency Expertise*

Although agencies are frequently more expert than Congress, agencies' substantial expertise is sometimes underutilized by Congress. Respondents revealed that two of the primary drafters of legislative language, Congress's legislative counsel and agencies' legislative counsel, almost never communicate with each other.²²⁴ Agency legislative counsel also rarely communicate with lobbyists involved in drafting statutory language.²²⁵ Lobbyists take their legislative proposals directly to Congress. Agencies have a chance to review lobbyists' legislative language only if Congress allows them to, and even then it is not always clear to an agency where statutory language originated.

Respondents seemed to indicate that Congress could be a more effective legislative coordinator than it is currently. A number of respondents expressed a desire for Congress to allow a more direct relationship between Congress's and agencies' legislative counsel.²²⁶ As one respondent said: "We only communicate with [Congress's legislative counsel] through committee staff. I wish we could have more direct interaction since they are so involved in drafting. It is a bit like a game of telephone where things get lost as they are passed back and forth."²²⁷ Given these responses, Congress should consider fostering a more integrated drafting process that allows for more direct contact among the various important actors rather than keeping each group walled off. This would improve interbranch communication in the legislative process and allow for more consistent drafting practices, which would result in more coherent legislative language. Different groups have different resources and expertise, and the process would benefit from utilizing those resources and expertise in a more coordinated,

McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 246 (1987).

²²⁴ Q26. Only two respondents (4%) said that they interact with Congress's Offices of Legislative Counsel in the legislative process.

²²⁵ See *supra* Section II.F.

²²⁶ Q26.

²²⁷ Q26; Q26code4.

efficient way. This would not require Congress to cede control of the process, but would require a more direct and close oversight role.

B. Agency Relationships with Congress

Many respondents raised the relationship between agencies and Congress as an important factor in how much influence an agency has on the legislative process.²²⁸ As one respondent noted: “Relationships are very important. Our agency has more opportunities to influence Congress when we have good relationships on the Hill.”²²⁹ Another similarly explained: “We have a close relationship with the committees we work with. . . . We have built up a lot of trust and have a big role to play. This facilitates our ability to promote compromises.”²³⁰ It is also common for agencies to have a significant number of political appointees and career employees who previously worked on the Hill.²³¹ For example, twenty-six respondents (48%) previously worked as congressional staff.²³² A number of respondents also mentioned that political appointees maintain relationships with congressional staff and know how and when to intervene in the political process.²³³ The following comment was typical: “We hire political appointees who recently worked on the Hill to manage our Hill interactions. They have connections that allow the agency to be heard and more involved.”²³⁴ One former congressional staffer described her role this way: “People I worked with on the Hill are still working in the area, in Congress or as a lobbyist or at an agency. So I am not cold calling people. I know everyone in the relevant area and have good working relationships with them.”²³⁵ Respondents viewed these connections as helpful to both Congress and agencies because they provide political expertise and contacts to agencies and substantive expertise to Congress.²³⁶ The

²²⁸ Thirty respondents (56%) made a comment to this effect a total of forty-six times. Q26.

²²⁹ Q26code2.

²³⁰ Q26code2.

²³¹ Q26. To quote one respondent:

We have people on our staff who used to work in Congress and there are congressional staff who used to work in our agency. The legislative affairs people all used to work on the Hill so they have a very different perspective from us. They have connections on the Hill and can get people’s attention.

Ucode6; Q26code3.

²³² Q3a.

²³³ Q26.

²³⁴ Ucode6; Q25code3; Q26code3.

²³⁵ Q26code3; Ucode6.

²³⁶ Ucode6. As one respondent remarked: “There is a lot of movement back and forth between the agency and Congress too on the staff level. It is really wonderful for us to be able to speak with someone who understands our statutes.” Ucode6.

movement of staff between agencies and Congress appears to be similar to the revolving door between Congress and lobbyists that commentators commonly acknowledge, although according to respondents the movement does tend to be more one directional, with staff more commonly leaving Congress for career positions in agencies.²³⁷

Another way in which agencies and Congress are connected is through detailing programs in which agency staff are temporarily placed with a congressional committee or member of Congress to assist in legislative work.²³⁸ This is especially common when Congress is working on a significant piece of legislation that will affect an agency.²³⁹ Detailing programs allow Congress to have a person on staff who can provide real-time comments and suggestions about legislation without having to go through the agency's clearance process. Even members of Congress themselves have acknowledged that real-time input allows the agency to influence the drafting of bills relevant to the detailing agency.²⁴⁰ These staff generally continue to be paid by the agency but technically work for Congress.²⁴¹ Although the agency

²³⁷ Ucode6. Sixteen respondents (30%) made a statement to this effect. For a discussion of the "revolving door," see Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 223 (2012) ("Another key means of securing legislative access is for clients to hire former legislators and staffers as lobbyists (through the so-called 'revolving door')."); see also T.W. Farnam, *Study Shows Revolving Door of Employment Between Congress, Lobbying Firms*, WASH. POST (Sept. 13, 2011), http://www.washingtonpost.com/politics/study-shows-revolving-door-of-employment-between-congress-lobbying-firms/2011/09/12/gIQAxPYROK_story.html ("Nearly 5,400 former congressional staffers have left Capitol Hill to become federal lobbyists in the past 10 years . . ."). The Center for Responsive Politics maintains an online database to track the revolving door. See Ctr. for Responsive Politics, *Revolving Door*, OPEN-SECRETS.ORG, <http://www.opensecrets.org/revolving> (last visited Jan. 28, 2017).

²³⁸ Ucode7. Six respondents (11%) made an unprompted comment about their agency detailing to Congress. Various publicly-available sources describe the detailing of staff from agencies to Congress. See, e.g., OFFICE OF THE INSPECTOR GEN., AUDIT OF LEGISLATIVE AND PUBLIC AFFAIRS EXPENSES IN THE DEPARTMENT OF JUSTICE: AUDIT REPORT 08-25 (2008), <https://oig.justice.gov/reports/plus/a0825/exec.htm> (noting that twenty-four staff "involved in legislative and public affairs activities" were detailed from the Department of Justice to Congress in 2007); 142 CONG. REC. H12256 (daily ed. Oct. 2, 1996) (statement of Rep. Schroeder, *reprinted from the Armed Forces Journal*, Oct. 1996) ("In August, Rep. Pat. Schroeder (D-CO) inserted a statement in the Congressional Record noting that there were numerous military servicepeople working in congressional offices. Schroeder attributed the Pentagon's willingness to provide detailees to its thirst for increased appropriations.").

²³⁹ Ucode7.

²⁴⁰ See *The Financial Stability Oversight Council Annual Report to Congress: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 112th Cong. 4 (2012) (statement of Sen. Richard C. Shelby) ("[S]taff from the very same agencies that failed us were detailed to Congress to help write the bill.").

²⁴¹ See, e.g., OFFICE OF INSPECTOR GEN., U.S. DEP'T OF LABOR OFFICE OF AUDIT, HUMAN

temporarily loses the staff member, a number of respondents viewed the loss as worth the cost for the agency to have someone with expertise representing their viewpoints.²⁴²

C. *The Effect of the President's Political Party*

One of the most interesting observations made by many respondents was that the political party of the President affects the interactions between Congress and agencies. Because courts and commentators largely have not focused on the relationship between agencies and Congress in connection with the process of creating legislation, they have missed how politics influence agencies' relationships with Congress in the context of creating legislation. This, in turn, affects assumptions about whether *Chevron*-type deference is Congress's intent, which is a subject that this Section addresses.

1. *Political Party as a Determinant of Agency-Congress Relationships*

Respondents generally reported that interactions between agencies and Congress are affected by the political party of the person with whom they are interacting. As Figure 12 demonstrates, many respondents reported different interactions with congressional staff that are not from the same party as the President. Twenty-eight respondents (52%) said their interactions are often or always different, and another fourteen respondents (26%) said their interactions are sometimes different. This is despite the fact that many respondents said that they try to offer assistance to both parties.²⁴³

RESOURCE MANAGEMENT IN THE SOLICITOR'S OFFICE: FINAL LETTER REPORT NO. 17-98-002-08-001, at 4 (May 29, 1998), <http://www.oig.dol.gov/public/reports/oa/1998/17-98-002-08-001r.htm> ("SOL is paying for the three employees detailed to the U.S. Congress and one person detailed to the U.S. Attorney."). Those who are detailed can become so valuable that Congress hires them away from the agency. Ucode7 ("Those who are detailed are really valuable and sometimes Congress poaches them.").

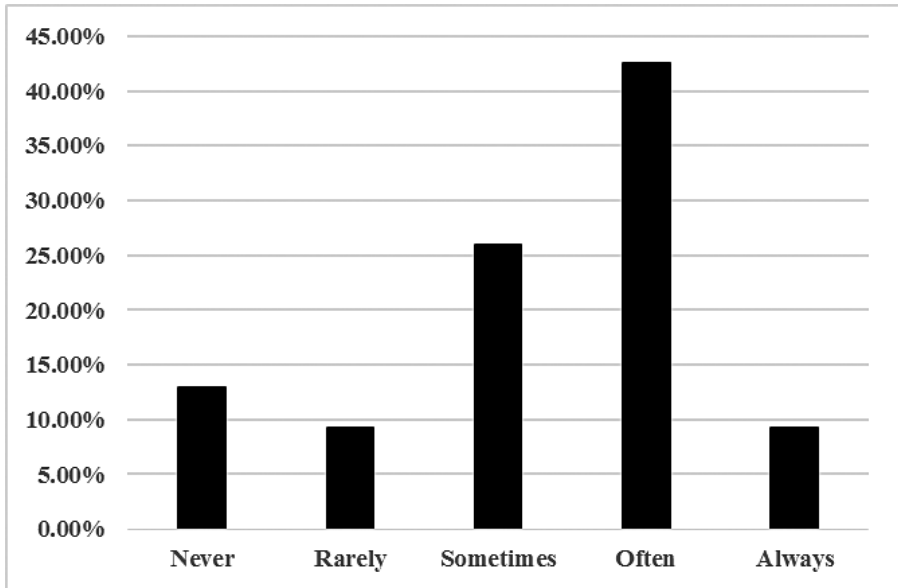
²⁴² Ucode7.

²⁴³ Thirty-three respondents (61%) made a comment to this effect. Q31. To quote one respondent:

We try to be as helpful as possible and transparent and open to Congress. We try to get their questions answered whether big or small and we really want to participate and be heard in the legislative process. This is true whether it is [R]epublicans or [D]emocrats we are working with. When we go into career roles we try to shut down our previously political side and be bipartisan.

Q31code2. Another respondent explained that this approach comes from the top of their agency: "Our current leadership says that you must treat everyone the same in Congress whether they are a Republican or Democrat and that we must always try to be as helpful as we can and avoid being political." Q31code2.

FIGURE 12. ARE THE AGENCY'S INTERACTIONS DIFFERENT WITH CONGRESSIONAL STAFF FROM A DIFFERENT PARTY AS THE PRESIDENT?



Based on respondents' comments, it appears that interbranch competition fades where Congress and the President are of the same political party and that intraparty cooperation causes the line between agencies and Congress to blur. For example, because this study was conducted in the middle of President Obama's second term, a number of respondents mentioned that their agency has closer communications with Democrats in Congress²⁴⁴ and that Democrats keep them informed of what is going on legislatively, including bills being drafted by Republicans.²⁴⁵ To quote two respondents: "We definitely have closer interactions with Democrats. When the same party controls Congress and the presidency we communicate more"; "[n]ow, before a bill is introduced we are probably going to get less intel because the Democrats are no longer controlling the Senate."²⁴⁶ Respondents also reported that when a different party from the President controls Congress, they are more likely to shut agencies out of the markup process; whereas when the same party as the President controls Congress, they frequently ask agencies to draft and review amendments in real time.²⁴⁷

²⁴⁴ Q31code3.

²⁴⁵ Q31code2.

²⁴⁶ Q31code3.

²⁴⁷ Q33; Q31code3.

Respondents also noted that congressional staff from the same party as the President are more likely to accept agency comments to draft legislation²⁴⁸ and to use agency-originated language as the starting point rather than their own draft.²⁴⁹ For example, when the President is a Democrat, Democratic staff are generally more willing to consider agencies' substantive comments on the underlying policy.²⁵⁰ Republicans, on the other hand, may ask for agency review of legislation, but primarily to check for major technical or operational issues. Any resulting agency revisions or suggestions are often received with skepticism by those of the other political party.²⁵¹ To quote one respondent: "Republican committee staff think the President is more involved than he really is. . . . Republicans are generally more skeptical of us, but if something is important to them and they want it to pass, they know they have to come to the agency for our review."²⁵²

Respondents also explained that in times of divided government, interbranch competition increases and agencies are more likely to try to stop legislation than promote it because Congress is more likely to want to constrain agencies in an effort to contain the power of the opposing party.²⁵³ As one respondent remarked: "When there is a Democratic President and Republican [H]ouse, Congress is not looking to expand the agency's authority."²⁵⁴ Another explained: "When the opposing party has power our goal is less to create statutes and more to stop statutes and to stop implementation that goes against our policy goals."²⁵⁵

2. *Deference in Unified and Divided Government*

This Article argues that courts should consider how separation of political parties at the time a statute was enacted may affect how

²⁴⁸ Q31. The following comments were typical: "If the person we send comments to is of a different party from the President then they are less likely to accept our comments"; "When Congress and the President are the same party Congress is more likely to take the agency's language." Q31code3.

²⁴⁹ Q31. As one respondent put it: "When Congress is controlled by the same party as the President a significant portion of our bills have started in our agency. Other times when the government is divided it is much less likely that we will be drafting those bills in the first instance." Q31code3; Q10.

²⁵⁰ Q31code3.

²⁵¹ Q31code2.

²⁵² Q13code2.

²⁵³ Q31.

²⁵⁴ Q31code3.

²⁵⁵ Q25code3; Q31code3.

much Congress intended to delegate to agencies.²⁵⁶ The emergence of strong and polarized parties in recent years has heightened cooperation in times of unified government and conflict in times of divided government, and agencies' relationships with Congress seem to have followed this trend.²⁵⁷ Political scientists have empirically shown that Congress explicitly delegates less authority to the executive branch and adds procedural constraints to attempt to limit agency discretion in times of divided government.²⁵⁸ The idea that a principal is more likely to delegate to an agent the closer the principal's preferences are to the agent's preferences is commonly known as the "ally principle."²⁵⁹ Applying the ally principle to unified government, we should expect Congress to want to delegate more to the executive branch because they are more likely to be in policy agreement with the President and agencies. When they are in policy agreement, it is easy for Congress to draft legislation in a way that reflects its desired level of delegation. Doing so only requires relatively open-ended legislation, and, even if Congress wants to draft more specifically, it can rely on agencies, as "allies," to provide any assistance Congress may need. Therefore, in times of unified government, a presumption of congressional intent to delegate to agencies under the customary *Chevron* framework seems likely to capture congressional intent, absent other indications to the contrary.

The political science and legal literature implicitly assume that Congress is able to limit agencies' discretion to the degree that it prefers in times of divided government. One method Congress can use to limit agency discretion is to include oversight and reporting requirements in legislation. These *ex post* procedural barriers are easier to include in legislation than substantive mandates because they do not require as much expertise. *Ex post* monitoring is subject to substantial slippage, however, and it is both costly and time-consuming for Congress to continuously monitor agency actions. Congress typically focuses intently on an issue when legislation is being developed, but after enactment it moves its focus to other issues. *Ex post* monitoring is at best an incomplete substitute for specific and detailed statutory

²⁵⁶ See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2314–15 (2006).

²⁵⁷ See *id.* at 2315.

²⁵⁸ See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 128 (1999).

²⁵⁹ See, e.g., Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1440 (2011).

text, which is why Congress generally tries to rely on both to reduce agency discretion.²⁶⁰

If Congress wants to effectively delegate less to agencies, then it must draft more complicated and specific legislation. While the evidence shows that Congress wants to limit delegation in times of divided government, and is able to do so with some degree of success,²⁶¹ this Article's findings indicate that Congress is unlikely to have the expertise and resources necessary to draft the complicated and specific legislation needed to limit agencies' discretion to the degree Congress wants.²⁶² Congress could do so with agency assistance, but because Congress is less willing to involve agencies in drafting statutes when there is conflict between the President and Congress, and agencies also have less interest in helping Congress in this circumstance (and instead are more likely to be working to stop legislation), agencies are unable (or unwilling) to provide the assistance necessary to create detailed and specific statutory language that would effectively circumscribe agency action.²⁶³ For these reasons, when interbranch conflict exists between the President and Congress, statutes governing executive agencies are likely to be more ambiguous than Congress would prefer, which under current doctrine courts would incorrectly interpret as a sign of a congressional intent to delegate to the agency.

This Article's argument that Congress is unable to constrain agencies to the degree it would prefer in times of divided government shows that there is reason to question *Chevron's* presumption that all ambiguities indicate a congressional intent to delegate to the agency. Based on this Article's findings, if courts are attempting to follow congressional intent, then they should be more skeptical of agency actions in times of divided government because of Congress's inability to constrain agencies through narrowly-drafted legislative text. Courts should therefore be more willing to move away from *Chevron* deference, absent other indicators, in situations where the body of Congress responsible for the legislation was from a political party different than the party of the President that Congress expects to be implementing the legislation.²⁶⁴ This would allow courts to conduct a more open-ended and searching judicial inquiry into congressional intent,

²⁶⁰ See EPSTEIN & O'HALLORAN, *supra* note 258, at 162.

²⁶¹ See *id.*

²⁶² See *supra* Sections III.A.2, III.C.1.

²⁶³ See *supra* Section III.C.1; see also *supra* note 251 and accompanying text.

²⁶⁴ Congress may pass a bill when government is divided, but when Congress knows that the President will soon change, for example, in the time between when a new President is elected and when he or she actually takes office, it may also be apparent to Congress that the Presidency

agency procedures, and reasoning to ensure that the agency followed its congressional mandate.²⁶⁵

Although these arguments require courts to rely on assumptions about congressional intent, this Article's findings indicate that these assumptions would be more accurate than the existing judicially created assumptions, which are less empirically grounded. Courts frequently assume that open-ended or ambiguous language is an indication of congressional intent to defer to the agency, but a statute can be ambiguous for many reasons.²⁶⁶ To use the terminology the Author has used elsewhere, in times of divided government a statutory ambiguity is more likely to be an "avoidable unintentional ambiguity," meaning an ambiguity that results from an inattention to detail or lack of expertise or resources rather than from an intentional desire to delegate.²⁶⁷ As the Author has argued elsewhere, when this type of avoidable unintentional ambiguity exists is when "the risk of political maneuvering is at its lowest and the value of legislative history is at its highest."²⁶⁸ Assuming an intent to defer leaves an agency more interpretive space at a time when it has an incentive, due to the nature of the relationship between the agency and Congress, to use that space in subversive ways.²⁶⁹ In this circumstance, courts should not allow an

is likely to change parties in the near future, in which case Congress may intend more or less deference.

²⁶⁵ Under the *Mead/Chevron/Skidmore* rubric that courts apply—albeit inconsistently—the idea would be that courts should presume that Congress did not intend to delegate and should therefore not give *Chevron* deference because the inquiry stops, under *Mead*, before the inquiry reaches *Chevron*. Courts would therefore apply the less deferential *Skidmore* standard. See generally *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

²⁶⁶ See Shobe, *supra* note 18, at 866–67.

²⁶⁷ *Id.* at 871.

²⁶⁸ *Id.* at 872.

²⁶⁹ See William N. Eskridge, Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 433–40 (discussing various types of agency shirking). Of course, the President and majorities in Congress change, and so a statute drafted under divided government could be interpreted and implemented by an agency operating under unified government. In this case, the statute would still be ambiguous, but the agency's preferences are much more likely to be in line with the current Congress's preferences. It could also be that parties flip both in Congress and the Presidency, such that the current President is of the same party as the enacting Congress. There are many possible permutations and a discussion of them is beyond the scope of this Article, but the point here is that if the intent of the enacting Congress is what a judge is seeking, which is generally the line of inquiry that judges pursue in statutory interpretation cases, then the description here of the enacting Congress's intentions should hold true. Although Congress realizes that a bill may be interpreted by a different agency in the future, presidential terms are long and Congress is much more concerned about the short term, specifically their next election, than the long term. See DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 11–15 (2d ed. 2004). Agencies are also able to entrench their interpretations before a change of Presi-

ambiguous text to defeat their ability to independently judge the quality of an agency's interpretation.

To summarize, Congress cannot always draft as specifically as it would prefer to, and courts should step in and vary their deference depending on why an ambiguity exists. The assumptions provided in this Article about the effect of political parties are not perfect, but they are less crude than the existing judicial assumptions courts apply to agency deference. They also have the benefit of being relatively formal and accessible to courts, so these proposals would not add a substantial burden to courts. It may require courts to conduct a more searching and purposivist judicial inquiry in many circumstances, but that is the only way to account for the variety of relationships between agencies and Congress. The takeaway is that courts should consider the relationship between agencies and Congress at the time a bill is passed because it allows them to better tailor the amount of deference they give to the variety of Congress-agency relationships.

D. Independent Agencies and the Legislative Process

Throughout this Article, the data has been reported with respect to all respondents, but it is important to note a few differences raised by those respondents who work in independent agencies and what those differences mean for assumptions about deference. One important distinction raised by respondents is that independent agencies do not have to receive OMB clearance to make legislative proposals or communicate policy positions to Congress.²⁷⁰ These agencies have what is referred to as “bypass” authority, which allows them, either by statute or by custom, to communicate directly with Congress without OMB oversight.²⁷¹ As one respondent said, “We have no involvement

dent, so Congress is right to be concerned primarily with the current political arrangement. See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 560–61 (2003). This entrenchment, and reliance on prior interpretations, makes it difficult and costly for agencies to change prior interpretations. Although the Supreme Court has gone both ways on the issues, it is also possible that changes in agency interpretations will be subject to enhanced judicial scrutiny, which provides an incentive for agencies to moderate any changes to prior interpretations. See, e.g., Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 114 (2011).

²⁷⁰ Independent agencies are also exempted from the Office of Information and Regulatory Affairs review of agency rulemakings, though President Barack Obama did issue an executive order asking these agencies to follow many of the same principles that govern executive agencies. See Exec. Order No. 13,579 § 1, 3 C.F.R. §§ 256–57 (2012), reprinted in 5 U.S.C. § 601 app. at 817 (2012).

²⁷¹ Altogether, forty-four agencies have some kind of authority allowing them to avoid the OMB clearance process. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR OMB POLICY OFFICERS AND DADs FROM JIM DUKES, ASSISTANT DIREC-

with OMB. Nothing we do has to be cleared by OMB. We answer to Congress, not the President. Because we are more responsible to Congress than the President we are more bipartisan.”²⁷² Some respondents believed that because independent agencies are viewed as less wedded to the President, they are better able to work with both political parties.²⁷³ This is supported by other responses: for example, six out of the thirteen respondents working in independent agencies said that their agencies’ interactions with congressional staff are the same no matter the political party of those involved, while only one out of the forty-one respondents working in executive agencies said the same.²⁷⁴ Independent agencies are not entirely outside of the President’s influence because their commissioners are appointed by the President and the President has other means of influence.²⁷⁵ Most independent agencies, however, are required to have commissioners from both political parties who are appointed on a rolling basis and can generally only be removed by the President in extraordinary circumstances.²⁷⁶ The Pres-

TOR FOR LEGISLATIVE REFERENCE (Feb. 20, 2001), <https://www.citizen.org/documents/OMBDocument1.pdf> [hereinafter Dukes Memorandum]. Agencies with statutory bypass authority include the Federal Energy Regulatory Commission, the Small Business Administration, the National Transportation Safety Board, and the Commodity Futures Trading Commission. See Department of Energy Organization Act, Pub. L. No. 95-91, § 401(j), 91 Stat. 582, 583 (1977); Small Business Act and Small Business Investment Act of 1958, Amendments, Pub. L. No. 94-305, § 206, 90 Stat. 663, 670 (1976); Independent Safety Board Act of 1974, Pub. L. No. 93-633, § 304(b)(7), 88 Stat. 2166, 2170–71 (1975); Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 101(a)(9), 88 Stat. 1389, 1390–91 (1974). Several other agencies claim status as an independent regulatory agency to justify bypassing OMB review even though they lack express statutory authority to do so. See *Reviewing the Performance of the Social Security Administration as an Independent Agency: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means*, 104th Cong. 14 (1996) (statement of Rogelio Garcia, Specialist in American National Government, Congressional Research Service). OMB has generally acquiesced to these agencies’ claims. See Dukes Memorandum, *supra*, at 19. This does not, however, prohibit OMB from reaching out to these agencies for their input on legislation. *Id.* (“OMB does refer legislative materials to the FTC on a case-by-case basis, however, particularly with respect to matters likely to have a direct impact on that agency . . .”).

²⁷² Q20code4; Q31code2. Independent agencies are not precluded from coordinating with OMB and in some instances may find it politically advantageous to do so. As one respondent who works in an independent agency said: “When you have the White House and an agency on the same page you usually get better results, but we don’t have to work with OMB.” Q20code4; Q20code1.

²⁷³ Q31. As one respondent said: “Because we are an independent agency our relationships are basically the same with Republicans and Democrats. We work well with both.” Q26code2; Q31code2.

²⁷⁴ Q31.

²⁷⁵ See JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS* 177 (6th ed. 2009).

²⁷⁶ Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 608–09 (1989) (“Although these ‘independent’ adminis-

ident therefore exerts much less influence over independent agencies than executive agencies, and this lack of influence appears to extend to independent agencies' involvement in the legislative process.

Some scholars argue that because independent agencies are less subject to presidential direction, courts should not give *Chevron* deference to independent agency interpretations.²⁷⁷ Agency respondents, however, provided a reason to believe that Congress does intend to defer to independent agencies—and in fact, under some circumstances, may intend to defer more to independent agencies than executive agencies. The fact that independent agencies are freed from presidential oversight appears to allow independent agencies to be viewed as more neutral and less political than executive agencies, thus making communication and collaboration with Congress easier for them.²⁷⁸ Therefore, the arguments stated above in favor of reduced deference to executive agencies in times of divided government are less likely to apply to independent agencies,²⁷⁹ and courts should therefore be more willing to give *Chevron* deference to independent agencies than to executive agencies when government is divided.

E. Agency Assistance as Legislative Subsidy

Based on this Article's findings, it seems that the best way to theorize much of the interactions between agencies and Congress in the creation of legislation is as a legislative subsidy. A major obstacle to Congress's ability to create legislation is acquiring and assimilating the necessary information. An agency is able to lower this obstacle to meet the agency's policy objectives by providing prepackaged information about policy options and their effects, as well as potential legislative routes to solve outstanding issues.²⁸⁰ When an agency disagrees with legislation, it is also able to increase the cost to Congress of creating legislation by providing less information or by providing information that counteracts the legislative actions of their opponents.²⁸¹ Respondents reported many ways in which agencies

trators are apparently removable 'for cause,' it is conventionally understood that it would not be cause for removal that such an administrator declined to follow the President's policy preferences in favor of policy initiatives that the administrator prefers and which are also within the administrator's lawful discretion.").

²⁷⁷ See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376–77 (2001); Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 432 (2006).

²⁷⁸ See *supra* notes 273–76 and accompanying text.

²⁷⁹ See *supra* Section III.C.

²⁸⁰ See WALKER, *supra* note 21, at 8.

²⁸¹ See, e.g., Daniels, *supra* note 1, at 407.

provide a legislative subsidy. In some cases, as when an agency details staff from the agency to Congress for a period while the agency continues to pay the staff members' salary, the agency's subsidy is salient and direct. Agencies can also originate their own proposals, draft proposals at Congress's request, provide comments on or draft amendments to improve existing bills, answer questions informally about existing bills, or provide testimony or briefings on relevant issues to educate Congress.²⁸² Agencies are also acutely aware of regulated parties' concerns and of potential political pitfalls, and can thus provide information to Congress about how to most effectively approach legislative drafting in light of those issues.

According to respondents, agencies' provision of information and legislative labor primarily benefits those in Congress who already share similar policy positions.²⁸³ In other words, an agency is more likely to subsidize the creation of legislation with which it agrees. Agencies are more likely to draft statutory language that they support, either in the form of legislative proposals or in drafting assistance for like-minded persons in Congress. This legislative assistance is unlikely to change the minds of those in Congress, especially on politically salient issues. Rather, the purpose of this assistance is to allow those in Congress with whom the agency is aligned to be less constrained in their ability to act quickly and accurately in achieving their shared policy goals.

IV. AGENCIES' UNDERAPPRECIATED INFLUENCES ON LEGISLATION AND INTERBRANCH COMMUNICATION

Respondents described a few important ways in which agencies influence interbranch communications and the structure of legislation. Respondents explained connections between agencies and courts that allow a form of dialogue between courts and Congress to occur, although in an indirect way.²⁸⁴ Respondents also frequently noted that their agency has its own unique terminology and drafting style.²⁸⁵ This calls into question claims that presumptions of consistent usage should apply to each bill or according to committee jurisdiction and complicates appeals for standardization of the legislative process. This Part

²⁸² See WALKER, *supra* note 21, at 1, 7, 9; Daniels, *supra* note 1, at 404–05.

²⁸³ This is similar to an argument made by two political scientists, Richard L. Hall and Alan V. Deardorff, about the role of private lobbyists in the legislative process. See Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 76 (2006).

²⁸⁴ Q49.

²⁸⁵ Q51.

discusses dynamics with which we must contend when discussing statutory interpretation and interbranch communication.

A. *Agencies as a Conduit Between Congress and Courts*

Scholars and judges have mostly failed to notice the role that agencies play as a conduit between courts and Congress. A common claim among legislation scholars is that Congress does not have the means or desire to coordinate with courts.²⁸⁶ A number of scholars and judges have suggested ways that Congress could improve court-Congress communication.²⁸⁷ They have gone so far as to propose establishing an office in charge of notifying Congress of judicial decisions dealing with apparent statutory ambiguities or errors.²⁸⁸ These suggestions have gone unheeded. This is unsurprising given the lack of a direct feedback loop between Congress and courts. In contrast, agencies are uniquely situated within the structure of the federal government and have frequent and deep interactions with both Congress and the courts, giving agencies the ability to convey messages from courts to Congress.²⁸⁹

The Author asked whether agencies review judicial decisions for issues relevant to their agency, and forty-six respondents (85%) said that their agency does.²⁹⁰ This is unsurprising because agencies are directly involved in litigation relating to their jurisdiction²⁹¹ and are

²⁸⁶ See Nourse & Schacter, *supra* note 17, at 604–07.

²⁸⁷ See Robert A. Katzmann, *Madison Lecture: Statutes*, 87 N.Y.U. L. REV. 637, 686–93 (2012) (describing a project to notify the House of Representatives of D.C. Circuit statutory interpretation decisions); Nourse & Schacter, *supra* note 17, at 621–22.

²⁸⁸ See, e.g., FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 89–93 (1990); Ruth Bader Ginsburg & Peter W. Huber, Commentary, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1431–32 (1987); Katzmann, *supra* note 287, at 686–87. These types of offices have been created in a number of states. See Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1059–64 (1991).

²⁸⁹ Professor Eskridge and Matthew Christiansen make a similar point in the context of congressional overrides of Supreme Court statutory interpretation decisions. See Christiansen & Eskridge, *supra* note 24, at 1441 (noting that agencies play a role in judicial cases and Congress’s override process, creating a feedback loop).

²⁹⁰ Q50.

²⁹¹ The Department of Justice (“DOJ”) takes the lead role in much agency litigation. See 28 U.S.C. § 516 (2012) (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General.”); see also 5 U.S.C. § 3106 (2012) (“Except as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party . . . but shall refer the matter to the Department of Justice.”). There are numerous exceptions to this rule, especially in the case of

charged with complying with the resulting judicial decisions. Most respondents said that their agency is aware of and tracks judicial decisions.²⁹² A number of respondents, especially those working in legislative affairs, gave unprompted responses to the effect that they are not necessarily the ones who monitor judicial decisions and that monitoring of judicial activity is done by the general counsel's office or solicitor's office of the agency.²⁹³ Some respondents also said that if a judicial decision adversely affects their work they will be notified and will coordinate the drafting of a legislative solution to propose to Congress.²⁹⁴ The following comments were typical: "If a judicial decision comes down that affects our authority, my office will determine whether we need to do something statutorily to limit the impact of the decision or to fix a hole in the statute"; and "We also work with the solicitor's office, where they litigate the cases relevant to us. We hear about every case that is relevant to us and if any issues arise we can go straight to Congress."²⁹⁵

Agencies' role as a conduit between courts and Congress means that, contrary to what many scholars believe, Congress does have the ability to oversee and monitor judicial actions, albeit in an indirect manner. Because agencies have direct feedback loops with both courts and Congress, they can notify Congress of judicial decisions that cause issues or errors in statutes that become apparent in litigation and, in many instances, will be the ones to draft legislation for Congress to overturn a judicial decision causing issues for the agency.²⁹⁶ This is consistent with Eskridge and Christiansen's findings that Congress is more likely to override the Supreme Court when a federal agency is

independent agencies. See Neal Devins & Michael Herz, *The Battle that Never Was: Congress, the White House, and Agency Litigation Authority*, 61 *LAW CONTEMP. PROBS.* 205, 208 (1998). Even when DOJ takes the lead in litigation it does not mean that the agency has no involvement or is totally locked out. The agency is still involved, and the agency is aware of what comes out of judicial proceedings.

²⁹² Q50. Forty-six respondents (85%) answered yes to this question.

²⁹³ Q50code1. A total of six respondents made a statement to this effect. To quote one respondent: "The solicitor's office is aware of judicial decisions and will bring them to our attention." Q24code1; Q50code1.

²⁹⁴ Q50.

²⁹⁵ Q50code1; Q24code1; Q50.

²⁹⁶ See *supra* note 24 and accompanying text. Of course, agencies will only bring a judicial decision to Congress's attention when it causes an issue for the agency, which may serve as another way for agencies to influence Congress by controlling the flow of information to them. There are also other outside groups like lobbyists closely involved in the judicial process, however, so it seems unlikely that Congress would not be made aware of both sides of a significant issues.

involved.²⁹⁷ Agencies can also help Congress draft legislation in ways that account for expectations about how courts will interpret statutes.²⁹⁸ It is highly likely that other outside groups like lobbyists play a similar role and may raise issues that agencies do not raise.

Rather than using congressional staff to actively monitor judicial activity—a costly form of monitoring that Professors McCubbins and Schwartz call “police-patrol oversight”—Congress appears to have chosen to engage in a more passive, and less costly, form of “fire-alarm oversight” by letting agencies and private interest groups raise issues with judicial decisions for congressional consideration.²⁹⁹ Although Professors McCubbins and Schwartz were writing about congressional oversight of agency action through private parties, the insight here is essentially the same in the context of congressional oversight of judicial action through agencies. To quote them, “[w]hat has appeared to scholars to be a neglect of oversight, we argue, really is a preference for one form of oversight over another, less-effective form.”³⁰⁰ Any serious proposal to more closely coordinate the practices of Congress and courts would need to account for the role that agencies and other groups already play as intermediaries.

B. *Agency Jurisdiction as an Organizing Principle for Legislation*

Many respondents emphasized the importance of each agency’s own legislative drafting practices and statutory vocabulary. The fact that agencies generally operate in their own legislative worlds is rarely discussed by scholars or judges. This Section discusses the centrality of agency jurisdiction in legislative drafting.

1. *Agency Terminology*

Twenty-four respondents (44%) mentioned the importance of agency-specific terminology and drafting processes even though the question was not specifically asked.³⁰¹ These respondents emphasized that each agency has its own terms of art that have very specific meanings to the agency and which the agency uses consistently throughout its statutes. As one respondent put it, “We have a whole language relevant to our agency’s statutes that takes a new attorney a full year

²⁹⁷ Christiansen & Eskridge, *supra* note 24 at 1323, 1377.

²⁹⁸ Q49. Thirty-three respondents (61%) said that expectations about how courts would interpret a statute often or always play a role in how they draft and review statutes. Another eleven respondents (20%) said they sometimes play a role.

²⁹⁹ McCubbins & Schwartz, *supra* note 221, at 165–66.

³⁰⁰ *Id.* at 165.

³⁰¹ Q51code2; Q51code1.

to understand. We use those terms consistently across time. We are very concerned about that and monitor it closely.”³⁰² The same terms frequently have very different meanings across agencies. For example, the term “homelessness” is used in statutory contexts for various agencies, including the Departments of Education, Health and Human Services, and Housing and Urban Development, and in each case the term has a different meaning.³⁰³ Also, many terms are specific to a bureau of a larger department, not the department itself, or are specific to a particular program.³⁰⁴ Because terms are generally agency-specific, agencies play an important role in assuring the consistent use of terminology, but only within the statutes governing each agency, and not across agencies.³⁰⁵ One respondent gave the example of the Affordable Care Act as an obvious example of why bills should not be expected to be internally coherent across agency jurisdiction:

When you piece together bills like the Affordable Care Act, you are looking at 10 or more pieces of draft legislation that were thrown together because they couldn’t be passed separately. In that case no one is looking for coherency across those. We are only looking for coherency on things that are relevant to us.³⁰⁶

A common complaint that respondents raised was that Congress frequently uses incorrect terminology because they do not know the specific terms each agency uses.³⁰⁷ As one respondent complained: “Congress may draft bills in a way that uses casual phraseology but they don’t know the proper medical terms, so we have to rewrite to make it clinically accurate and to ensure that the correct terms for our agency are used.”³⁰⁸ Congress also may take terminology governing one agency and use it in a bill relating to a different agency even though those terms do not make sense for the other agency.³⁰⁹ As one respondent said,

Recently someone in Congress had cut and pasted from regulations of [a different agency] into a bill that related to us. It

³⁰² Q51code1; Q51code2.

³⁰³ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-702, HOMELESSNESS: A COMMON VOCABULARY COULD HELP AGENCIES COLLABORATE AND COLLECT MORE CONSISTENT DATA 1 (2010); see also Q51code1.

³⁰⁴ Q51code1.

³⁰⁵ Q51code1.

³⁰⁶ Q52; Q51code2.

³⁰⁷ Q51.

³⁰⁸ Q27code1; Q51code1; Q51code2.

³⁰⁹ Q51.

didn't make sense to use the [other agency's] language, so we pointed that out. They had just dropped the language in without realizing that those terms don't make sense in our context.³¹⁰

2. *Agencies as Drafting "Silos"*

Respondents' comments about the primacy of agency jurisdiction calls into question Professors Gluck and Bressman's claim that Congress's committee structure creates committee drafting "silos" that use consistent drafting and terminology within each committee but not across committees.³¹¹ According to this Article's respondents, consistency of drafting and terminology usage is agency-specific, not committee-specific. The structures and jurisdiction of committees seem to support the agency drafters' perspective. Congress has twenty-one standing committees in the House and sixteen in the Senate, along with various special committees.³¹² Each agency is commonly overseen by a number of congressional committees. For example, the Environmental Protection Agency is overseen on the House side alone by seven different committees, not including appropriations.³¹³ Appropriations for each agency are overseen by separate congressional committees.³¹⁴ As explored above, according to respondents, agency terminology is supposed to be used consistently across statutory language relevant to their agency, regardless of Congress's oversight structure. This makes sense because it would be odd for agencies to have internally inconsistent drafting conventions and terms just because they are overseen by multiple committees.

Congressional committees also generally have jurisdiction over multiple agencies, or at least parts of multiple agencies. For example, the Senate Committee on Banking, Housing & Urban Affairs has jurisdiction over a diverse set of areas covering the work of many agencies including "banking, insurance, financial markets, securities, housing, urban development and mass transit, international trade and

³¹⁰ Q51code1; Q51code2.

³¹¹ Gluck & Bressman, *Part II*, *supra* note 1, at 747–50.

³¹² See *Committees*, U.S. HOUSE OF REPRESENTATIVES, <http://www.house.gov/committees/> (last visited Jan. 28, 2017); *Committees*, U.S. SENATE, http://www.senate.gov/committees/committees_home.htm (last visited Jan. 28, 2017) (listing standing, special, selection, joint, and other committees).

³¹³ See *Major Congressional Committees with Jurisdiction Over EPA Issues*, U.S. ENVTL. PROT. AGENCY, <https://archive.epa.gov/ocir/leglibrary/pdf/112housejuris.pdf> (last updated Feb. 9, 2011).

³¹⁴ See, e.g., *id.*

finance, and economic policy.”³¹⁵ This diversity of jurisdiction is common, and the fact that a single congressional committee can work in so many unrelated areas explains why congressional committees should not be expected to draft consistently.³¹⁶

This Article shows that a presumption of consistent usage should apply based on agency jurisdiction and that presumptions of consistent usage currently applied by federal courts are therefore generally incorrect.³¹⁷ Some, including Justice Scalia, have argued that applying a presumption of consistent usage for a single bill can serve a teaching function and induce Congress to use terms consistently.³¹⁸ Based on their claim about the internal consistency of each committee’s drafting process, Professors Gluck and Bressman propose that Courts reject a presumption of consistent-usage where statutory language was drafted by multiple committees and accept it where language was drafted by a single committee.³¹⁹ This Article’s respondents show why these presumptions could at the same time be too narrow and too broad. They would be too narrow where multiple committees work together on legislation governing a single agency because in that case the agency was likely involved in drafting to ensure the statutory language was used consistently, despite the presence of multiple committees. These presumptions would be too broad where committees oversee more than one agency. A single committee can draft bills that govern multiple agencies, and in that case each agency would review the language to ensure that the terms relevant to that agency are properly used, but not whether those terms are properly used with respect to other agen-

³¹⁵ *About*, U.S. SENATE COMMITTEE ON BANKING, HOUS., & URBAN AFFAIRS, <http://www.banking.senate.gov/public/index.cfm/about> (last visited Jan. 28, 2017).

³¹⁶ For example, the Department of Interior is overseen by only one committee on the House side, but three different committees on the Senate side. See *Congressional Committees of Jurisdiction*, U.S. DEP’T INTERIOR, OFF. CONG. AND LEGIS. AFF., <http://www.doi.gov/oc/committees/index.cfm> (last visited Jan. 28, 2017). The House Armed Service Committee primarily oversees the Department of Defense, however, it also oversees a portion of the Department of Energy’s work. See *Rules of the Committee on Armed Services: 114th Congress*, HOUSE COMMITTEE ON ARMED SERVS., https://armedservices.house.gov/sites/republicans.armedservices.house.gov/files/wysiwyg_uploaded/HMTG-114-AS00-20150114-SD001_0.pdf (last visited Jan. 28, 2017).

³¹⁷ ESKRIDGE, JR. ET AL., *supra* note 4, at 866. Justice Scalia indicated his strong belief in this rule. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 167 (2012) (“Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.”).

³¹⁸ SCALIA & GARNER, *supra* note 317, at 51 (“When it is widely understood in the legal community that, for example, a word used repeatedly in a document will be taken to have the same meaning throughout . . . you can expect those who prepare legal documents competently to draft accordingly.”).

³¹⁹ Gluck & Bressman, *Part II*, *supra* note 1, at 781.

cies. Take, for example, the Senate Committee on Banking, Housing & Urban Affairs, discussed above. If this committee produced a bill with one section covering housing issues and another section covering banking issues, according to respondents it would be unlikely that terms used in those two sections would be consistent because the laws governing housing and banking are administered by different agencies, each with different terminologies.

Agency respondents also made clear that the whole code rule, which applies a presumption of consistent usage across the entire U.S. Code, is, as many have argued, unrealistic, but that a presumption of consistent usage within each agency's jurisdiction would be more realistic.³²⁰ A modified version of the whole code rule applied on a much smaller scale, and which considers each agency separately, would more accurately reflect the way terms are used in statutes across time.

3. *Difficulties of Standardization in Light of Agencies' Role*

Agency involvement in drafting means that there is more fragmentation in drafting than has been acknowledged, and arguments in favor of standardizing drafting practices need to account for this fragmentation. Scholars have noted that Congress relies on various manuals including separate House and Senate Legislative Counsel manuals and other committee specific manuals.³²¹ Commentators have endorsed the use of standardized manuals that would allow courts to know the rules by which Congress is drafting.³²² However, commentators have not noticed that many agencies rely on their own drafting materials, which may or may not be the same as what Congress uses. For example, the Department of Defense has various documents created by its Office of Legislative Counsel that guide the Department's drafting practices,³²³ and a few respondents said that they primarily use a book written by the current head of the House Office of Legislative Counsel as a guide to their drafting practice, even though it is not an official government publication or manual.³²⁴

³²⁰ Scalia and Garner, for example, are skeptical about the presumption of consistent usage across unrelated statutes. See SCALIA & GARNER, *supra* note 317, at 172–73.

³²¹ See, e.g., BJ Ard, Comment, *Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation*, 120 YALE L.J. 185, 185–86 (2010).

³²² ROBERT A. KATZMANN, COURTS AND CONGRESS 65–66, 138 n.93 (1997).

³²³ See DEP'T OF DEF., OFFICE OF LEGISLATIVE COUNSEL, *supra* note 54, at 4; OFFICE OF LEGISLATIVE COUNSEL, OLC DETAILED GUIDELINES FOR PREPARATION OF LEGISLATIVE PROPOSALS FOR THE FISCAL YEAR 2016 DoD LEGISLATIVE PROGRAM 1, <http://www.dod.mil/dodgc/olc/docs/DetailedGuidelinesforPreparingProposalsFY16.pdf> (last visited Jan. 28, 2017).

³²⁴ As two respondents said: “We use the book written by Sandy Strokoff in House legisla-

Scholars have also proposed creating offices of the congressional leadership that could coordinate and standardize drafting practices.³²⁵ Their proposals, however, are unrealistic without significant agency involvement. Such an office would be ineffective without requiring every agency to also standardize its processes to conform to Congress, which would be difficult in light of the size of the administrative state and fragmentation of practices and substance of statutes across agencies. Congress would have to become much more expert and coordinated to be able to effectively understand and coordinate agency drafting with congressional drafting.

4. *Agency-Specific Interpretation*

Theories of interpretation generally rely on a fixed set of assumptions and rules that would apply in all circumstances,³²⁶ yet this Article makes clear that interpretation should be more contextual. Scholars have only recently begun to examine how interpretation could be context-specific.³²⁷ As Professors Gluck and Bressman noted, as we gain a greater understanding of the complexity of the legislative process it appears that “legislation” as a field of study fades and the differences between substantive fields, which this Article shows is generally delineated by agency jurisdiction, become sharper than the similarities.³²⁸ This Article’s account accords with this characterization and emphasizes that each agency exists in its own legislative world. Because of the anonymous nature of this study, it is not possible to break out the differences between agencies in any level of detail. Certainly some agencies are more expert than others, have better relationships with congressional committees, and are more involved in shaping legislation. While this Article is unable to articulate these differences between specific agencies, it provides helpful guidance for how courts and scholars can begin to explore these differences and establishes a research agenda for more firmly establishing how statutory interpretation in different substantive areas should be approached, with a much stronger emphasis on the role of agencies.

tive counsel. We hand it out to new people here”; “The Strokoff and Filson book is the Bible and is the book that everyone uses.”

³²⁵ See Gluck & Bressman, *Part II*, *supra* note 1, at 793.

³²⁶ See, e.g., SCALIA & GARNER, *supra* note 317, at 243.

³²⁷ See Gluck & Bressman, *Part II*, *supra* note 1, at 798 (noting various examples of tailoring interpretive doctrine).

³²⁸ *Id.* at 800.

CONCLUSION

The scope and power of the administrative state in making law is a common theme in academic discussions and judicial decisions, but the important role that agencies play in creating primary sources of law has gone mostly unexplored. Instead, commentators and courts rely on the largely unquestioned notion of Congress as lawmaker and agencies as law implementers. Based on interviews with agency staff working in the legislative process, this Article provides an unprecedented empirical account of the role of agencies in the legislative drafting process. It shows that agencies are intimately involved in originating and reviewing the statutes they are tasked with implementing, and that there are many factors that determine whether, how, and to what degree agencies are involved. This Article shows that existing theories and doctrines of statutory interpretation and of agency deference are undertheorized and overly simplistic, and in some cases misguided, because they ignore the role that agencies play as legislators. This Article's findings provide a more complete account of the complexity of legislative process and an initial framework that judges and scholars can use when approaching foundational questions raised by agency involvement in creating legislation.

APPENDIX

Background

1. How many years have you worked in your current office?
 - a. 0-3
 - b. 4-8
 - c. 9+

2. Are you a political appointee or career employee?
 - a. Political appointee
 - b. Career employee

3. Where have you worked before coming to this job?
 - a. Congress
 - b. Other agencies
 - c. Lobbying firm
 - d. Private sector in area relevant to the agency
 - e. Other

4. In any of these previous jobs, were you involved in drafting statutes?
 - a. Yes
 - b. No

5. Did you attend law school?
 - a. Yes
 - b. No

6. How many within your office work in drafting and reviewing bills?

7. How many of those who work in your office are lawyers?

8. Do those within your office specialize within certain substantive areas covered by your agency?
 - a. Yes
 - b. No

Role in Drafting Statutes

9. Does your agency draft legislative proposals without a request from Congress?
 - a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

10. Does your agency draft bills for Congress at Congress's request?
 - a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

11. What percentage of statutory language enacted within the areas covered by your agency originates in your agency?
 - a. 0%
 - b. Less than 25% but more than 0%
 - c. 25–49%
 - d. 50–74%
 - e. 75–99%
 - f. 100%

12. When statutory language that your agency originally drafted is enacted, how different is the final statutory language from what your agency originally proposed? (Circle all that apply.)
 - a. Very different
 - b. Moderately different
 - c. Somewhat different
 - d. Nearly identical
 - e. Identical

13. Does Congress solicit comments from your agency on draft bills relevant to your agency?
 - a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

14. Does your agency review and comment on bills relevant to your agency even when your input is not solicited?
 - a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

15. Does Congress accept technical comments given by your agency?
 - a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

16. Does Congress accept policy or other substantive comments given by your agency?
 - a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

17. What percentage of bills enacted within the substantive areas covered by your agency does your agency play at least some role in drafting?
 - a. 0%
 - b. Less than 25% but more than 0%

- c. 25–49%
 - d. 50–74%
 - e. 75–99%
 - f. 100%
18. What percentage of bills enacted within the substantive areas covered by your agency does your agency play a substantial role in drafting?
- a. 0%
 - b. Less than 25% but more than 0%
 - c. 25–49%
 - d. 50–74%
 - e. 75–99%
 - f. 100%
19. What are the primary issues that you look for when reviewing a bill?
20. Does your agency have interactions with the White House during the legislative process?
- a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other
21. Does the threat of presidential veto affect your agency's interactions with Congress?
- a. Yes
 - b. No

Role Within the Agency

22. Does your office notify affected parties within your agency of potential legislation?
- a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

23. Do those within your agency who are tasked with implementation have a chance to review and provide comments on potential legislation?
 - a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

24. Do you talk with those within your agency who are tasked with implementation about how potential legislation would be interpreted or implemented?
 - a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

Interactions with Congress

25. Besides participating in drafting legislation, how does your agency influence the legislative process?
 - a. Drafting letters to Congress
 - b. Drafting testimony for congressional hearings
 - c. Policy briefings
 - d. Informal conversations with congressional staff
 - e. Other (explain)

26. Which of the following do you interact with in the legislative process?
 - a. Members of Congress
 - b. Committee staff
 - c. Individual member staff
 - d. Congress's Offices of Legislative Counsel
 - e. Congressional Research Service

27. Are committee staff generally experienced and knowledgeable in the areas relevant to your agency?
 - a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

28. Are individual member staff generally experienced and knowledgeable in the areas relevant to your agency?
 - a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

29. Does Congress use legislation to attempt to overturn agency interpretation or implementation of prior legislation?
 - a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

30. Does change of President affect your agency's role in the legislative process?
 - a. Yes
 - b. No
 - c. Other

31. Are your agency's interactions with congressional staff from the same political party as the President different from your agency's interactions with congressional staff from a different political party from the President?
 - a. Never
 - b. Rarely
 - c. Sometimes (please explain)
 - d. Often (please explain)

- e. Always (please explain)
 - f. Other
32. Are there any other relevant issues relating to your interactions with Congress that we have not discussed here?

Involvement in Stages of the Legislative Process

33. Is your agency involved in the legislative process immediately before and after markups (for example, reviewing and commenting on proposed amendments)?
- a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other
34. Does your agency have an opportunity to provide input during floor debates, conference committees, and other last minute changes to bills?
- a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

Legislative History

35. Does your agency have any role in drafting or reviewing legislative history (for example, committee reports and conference reports)?
- a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

36. Do you believe legislative history is useful for your agency?
- a. Yes
 - b. No
 - c. Other

Lobbyists

37. Does your office have interactions with lobbyists?
- a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other
38. To your knowledge, do lobbyists play a significant role in drafting bills that are relevant to your agency?
- a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other
39. Are lobbyists helpful to the process of drafting and revising bills relevant to your agency?
- a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

Multiple Agencies

40. When a bill affects multiple agencies, do you communicate directly with other agencies about the bill while it is being drafted?
- a. Never
 - b. Rarely
 - c. Sometimes

- d. Often
- e. Always
- f. Other

Ambiguity in Statutes

- 41. Does your agency prefer for legislative language to be left open-ended so that your agency has more flexibility in implementing the statute?
 - a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

- 42. Do congressional staff attempt to influence the way ambiguous provisions are interpreted by your agency?
 - a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

- 43. Do you believe Congress is signaling its intent to delegate authority to your agency when it leaves ambiguities or gaps in statutes?
 - a. Never
 - b. Rarely
 - c. Sometimes
 - d. Often
 - e. Always
 - f. Other

- 44. Which of the following kinds of statutory ambiguities or gaps do you think Congress intends for your agency to fill?
 - a. Those implicating major policy questions
 - b. Those relating to details of how the agency implements the statute
 - c. Those relating to the agency's area of expertise

45. Do you attempt to ensure that Congress provides explicit statutory authority for your agency to act in a statute?
- Never
 - Rarely
 - Sometimes
 - Often
 - Always
 - Other

Courts

46. Are you familiar with any of the following judicial doctrines that relate to how much deference courts give to agency interpretation of federal statutes?
- Chevron*
 - Mead*
 - Skidmore*

If none, skip the following question.

47. Do any of these judicial doctrines affect how your agency approaches how statutes are drafted? (If yes, how?)
- Chevron*
 - Mead*
 - Skidmore*
48. Courts use a number of interpretive principles, sometimes called canons of construction, to interpret statutes. Are these something you consider in your drafting?
- Yes (please list)
 - No
49. Do expectations about how courts will interpret a statute play a role in how your agency approaches drafting or reviewing bills?
- Never
 - Rarely
 - Sometimes
 - Often
 - Always
 - Other

50. Does your agency review judicial decisions for issues relevant to your agency?
- Yes
 - No

Consistent Use of Terms

51. When a particular term is used in multiple places in a bill relevant to your agency, is that term intended to mean the same thing throughout the bill?
- Never
 - Rarely
 - Sometimes
 - Often
 - Always
 - Other
52. When a particular term is used in a bill relevant to your agency, is that term intended to mean the same thing as the same term used in bills that were previously drafted that are relevant to your agency?
- Never
 - Rarely
 - Sometimes
 - Often
 - Always
 - Other

Concluding Questions

53. In your time working in the legislative process, has the role of agencies changed or evolved?
- Yes
 - No
54. Is there anything you would change about your agency's role in the legislative process?
55. Is there anything you would like to add regarding your work, the legislative process, legislative drafting, or the relationship between agencies and Congress?