Cars, Congress, and Clean Air for the Northeast: A Section of Powers Analysis of the Ozone Transport Commission

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High concentrations of ozone air pollution in Acadia National Park, Maine? Although perhaps difficult to believe and contradictory to the notions of pristine wilderness and fresh air that draw visitors to the park, it is true.1 The reason: Philadelphia, New York, Boston, and other densely populated urban centers that generate ozone air pollution and lie upwind of the park contribute to the air pollution problem in Acadia.2 Prevailing airflow currents carry smog caused by auto exhaust, utilities, and other air pollution generators from cities and industrial areas to Acadia and other northern New England areas.3 A typical flow of an ozone plume may start in New York City and travel downwind into New England. As the air mass moves northward, it continues to accumulate pollutants from other areas along the way and the pollutants have more time to react and form ozone.4 By afternoon, the plume may extend across central New England, Cape Cod, and western Massachusetts. By day’s end, the plume will have collected pollutants from all across New England as it spreads over the rural areas of northern New England.5

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2 Id.
3 Id.
4 Id.
5 Id.
Congress responded to this growing problem of interstate transport of ozone pollution in the 1990 Clean Air Act Amendments. The 1990 Amendments changed the nation's air pollution laws in a number of substantive areas, including the attainment and maintenance of air quality standards. This Comment focuses on the constitutionality of section 184 of the 1990 Clean Air Act Amendments, a significant measure designed to control interstate transport of ozone air pollution.

The Clean Air Act ranks among the most comprehensive pieces of legislation in our nation's history. It is also one of the most complex. The Clean Air Act is divided into six subchapters, with parts, subparts, and amendments that present a formidable mountain of statutory language. This Comment only begins to climb the mountain, by examining one aspect of a significant development included in the 1990 Clean Air Act Amendments: the creation of the Ozone Transport Commission (OTC). The OTC is a multi-state body granted authority by Congress to propose new air pollution control measures for the northeastern region of the United States.

The issue presented here is whether, as a body created by Congress and with duties to recommend rules to the Environmental Protection Agency (EPA), the OTC's formation and authority violate constitutional principles of separation of powers between the executive and legislative branches. Resolution of the issue implicates the Appointments Clause of the United States Constitution, which specifies the procedure for creating federal officers, and the nondelegation doctrine, which prevents Congress from delegating its authority outside the federal government without appropriate guidelines.
Section II of this Comment provides an introduction to the Clean Air Act and the establishment of the OTC in the 1990 Amendments. Section II includes discussion of the OTC recommendations for adoption of low emission vehicle (LEV) standards throughout the Northeast that have precipitated increased scrutiny of the Commission's authority. Section III addresses the separation of powers doctrine in the Appointments Clause and the nondelegation doctrine as developed through case law, with attention to situations involving regional advisory bodies. Section IV critically examines the OTC and assesses the OTC's validity in light of separation of powers principles. Finally, Section V offers conclusory comments about the need for the OTC and its sensible, regional approach to abating interstate air pollution that preserves state power to regulate sources of air pollution.

II. A BACKGROUND OF THE CLEAN AIR ACT AND THE 1990 AMENDMENTS

A. Introduction to the Clean Air Act

The general purpose of the Clean Air Act is to protect and enhance the quality of the nation's air resources and to encourage the development of regional air pollution prevention and control programs. The Clean Air Act combines state and federal legal authority to compel states to meet health-based uniform National Ambient Air Quality Standards (NAAQS) for a wide range of common pollutants, including goals for ground-level ozone. Since 1970, when national air quality standards were established, the Clean Air Act has controlled levels for such air pollutants as sulfur dioxide, nitrogen dioxide, carbon monoxide, lead, and ozone. The Act gives each state the legal discretion to choose the strategies that the state will employ to meet

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national air pollution goals, although some measures are federally mandated.\textsuperscript{21} Thus, the Clean Air Act incorporates significant participation by state pollution control authorities to determine which pollution sources to regulate within state borders, so long as adequate measures designed to bring the sum total within federal air pollution guidelines are enacted and enforced.\textsuperscript{22}

Under the Clean Air Act, each state is required to submit an individual State Implementation Plan (SIP), setting forth state regulations that provide for implementation, maintenance, and enforcement of laws and programs that will achieve the NAAQS.\textsuperscript{23} Additionally, each SIP must provide for adequate control of emissions within the state’s borders so that emissions generated in one state will not cause nonattainment or interfere with air quality programs in neighboring states.\textsuperscript{24} Under the Clean Air Act, state governors must submit to the EPA Administrator a list that designates all areas in their states as (i) nonattainment, for those areas that fail to meet NAAQS; (ii) attainment, for areas that do meet NAAQS; or (iii) unclassifiable, for areas that cannot be classified on the basis of available information.\textsuperscript{25} These designations are subject to EPA confirmation and possible redesignation.\textsuperscript{26}

Each state that contains an ozone “nonattainment” area must file a revised SIP for EPA approval, explaining the specific control programs and state laws the state will employ in order to meet the federal standards for ozone.\textsuperscript{27} Nonattainment plans must provide for the implementation of all reasonably available control measures necessary to bring the state into compliance with the national air quality standards.\textsuperscript{28} For states that fail to revise a deficient SIP in a timely manner, the EPA is required to impose sanctions, including loss of federal highway funds and an increase of the offset ratio which determines the stringency of requirements for new sources of air pollution.\textsuperscript{29} Additionally, the EPA must adopt a Federal Implementation

\textsuperscript{22} Id. § 7410(a).
\textsuperscript{23} Id.
\textsuperscript{24} Id. § 7410(a)(2)(D)(i)(I).
\textsuperscript{25} Id. § 7410(a)(2)(D)(i)(I).
\textsuperscript{26} Id. § 7410(a)(2)(D)(i)(I).
\textsuperscript{27} 42 U.S.C. §§ 7410(a)(2)(D)(i)(I).
Plan (FIP) governing sources of air pollution in a state that fails to submit a timely revised SIP, thus removing from the state the discretion to determine which sources of pollution to regulate.  

B. The Clean Air Act Amendments of 1990

Congress designed a new program to control the interstate transport of ozone air pollution in the Clean Air Act Amendments of 1990. Stratospheric ozone, found eighteen to thirty miles above the Earth, serves as a protective shield from the sun’s ultraviolet rays. Ground-level ozone, however, is dangerous to human health, and is a primary target of the 1990 Clean Air Act Amendments. Ground-level ozone, a major component of smog, forms when nitrogen oxides from automobile emissions and other internal combustion engines combine with volatile organic compounds in heat and sunlight. Each year ground-level ozone is responsible for several billion dollars worth of loss from crop yield, as well as noticeable damage to foliage in many crops and trees. The health effects of inhaled ozone include chest pains, shortness of breath, coughing, nausea, throat irritation, and increased susceptibility to respiratory infections. Long-term chronic exposure to summertime ozone concentrations may lead to biochemical and structural changes in the lungs and accelerated aging of the lungs analogous to that caused by smoking cigarettes.
Due to atmospheric conditions, an ozone plume may travel many miles, thus affecting the attainment status of areas that do not generate the pollution.\footnote{See S. Rep. No. 228, 101st Cong., 2d Sess. 49 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3435. Data for the summer of 1988, for example, listed high ozone levels (above the NAAQS of 0.12 parts per million (ppm)) in such areas as Stafford, Conn. (0.238 ppm), Bridgeport, Conn. (0.217 ppm), Cape Cod National Seashore, Mass. (0.18 ppm), Bennington, Vt. (0.125 ppm), Whiteface Mountain, N.Y. (0.135 ppm), Acadia National Park, Me. (0.202 ppm), Portland, Me. (0.168 ppm), Quabbin Reservoir, Mass. (0.21 ppm), and Rye, N.H. (0.184 ppm). New York City (0.206 ppm) and other Mid-Atlantic areas, such as Newark, N.J. (0.218 ppm) and Camden, N.J. (0.195 ppm) collect ozone from their neighbors to the south. 1990 U.S.C.C.A.N. at 3436.} Recognizing the need for regional cooperation to control the interstate transport of ozone air pollution, Congress established the Northeast Ozone Transport Region (NOTR) in the 1990 Amendments.\footnote{See 42 U.S.C. § 7511c(a).} The region is comprised of states in the Northeast Corridor, including Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont, as well as the Consolidated Metropolitan Statistical Area that includes the District of Columbia.\footnote{Id. Because the Consolidated Metropolitan Statistical Area includes significant portions of Virginia, that state is also represented on the OTC. See Daniel P. Jones, EPA Accepts Regional Plan to Require Cleaner-Burning Cars, THE HARTFORD COURANT, Sept. 15, 1994, at B11.} States may opt out of the NOTR by satisfying a two-part analysis that considers wind patterns to determine the impact of that area's emissions on downwind areas, as well as vehicle migration from the state or part of a state seeking to opt out to another area in the NOTR.\footnote{26 Env't Rep. (BNA) No. 5, at 274 (June 2, 1995).}

The 1990 Amendments permit the creation of additional interstate transport regions

\[\text{[w]henever, on the Administrator's own motion or by petition from the Governor of any State, the Administrator has reason to believe that the interstate transport of air pollutants from one or more States contributes significantly to a violation of a [NAAQS] in one or more other States . . . .}\footnote{42 U.S.C. § 7506a(a).} \]

Congress further required the formation of an Ozone Transport Commission for the NOTR, consisting of:

(A) The Governor of each State in the region or the designee of each such Governor.
(B) The [EPA] Administrator or the Administrator's designee.
(C) The Regional Administrator (or the Administrator's designee) for each Regional Office for each Environmental Protection Agency Region affected by the transport region concerned.
An air pollution control official representing each State in the region, appointed by the Governor.43

The OTC's job is "to assess the degree of interstate transport of [ozone]" and to "assess strategies for mitigating . . . interstate pollution" in the NOTR.44 The OTC then reports to the EPA Administrator its recommendations necessary to ensure that SIPs meet the NAAQS.45 The OTC may also recommend additional control measures that it determines are necessary to bring any area in the region, or selected parts of the region, into attainment.46 OTC recommendations may be made to the EPA only by a majority vote of the governors on the OTC or their designees.47

The EPA has a statutory obligation to decide on the OTC recommendations within nine months, with the option to approve or disapprove the recommendations, wholly or in part.48 If the OTC recommendations are disapproved, the EPA must explain why the additional control measures proposed by the OTC are not necessary to bring an area in the region into ozone attainment, and specify recommendations for equal or more effective actions that could be taken.49 If the EPA approves the OTC's plan, however, each state in the transport region is required to include the approved additional measures in its SIP.50 Upon approval or partial approval of OTC recommendations, the EPA Administrator must issue a "SIP call," which requires the areas affected by the plan to revise their SIPs to include the control measures recommended by the OTC.51

Though the OTC is a creation of Congress, the legislative history of the Clean Air Act reveals that state air quality directors in the Northeast had been cooperating for several years.52 Lack of authority to institute regional air pollution controls and lack of support from the EPA prevented these regional efforts from being more successful, although some meaningful control measures were promulgated.53 In

43 Id. § 7506a(b)(1).
44 Id. § 7506a(b)(2).
45 Id.
46 42 U.S.C. § 7511c(c)(1).
47 Id.
48 Id. § 7511c(c)(4).
49 Id.
50 Id. § 7511c(c)(5).
51 42 U.S.C. § 7511c(c)(1).
53 Id. In 1987, state environmental commissioners from states in the Northeast States for Coordinated Air Use Management (NESCAUM)(Connecticut, Maine, Massachusetts, New
1988, the EPA organized the Regional Ozone Transport Group (ROTG) to provide for discussion among federal and state environmental officials regarding interstate pollution transport in the Northeast.54 Spurred by state representatives from Connecticut, Massachusetts, New York, New Jersey, and Pennsylvania, the ROTG set forth in a policy statement strong support for a regional ozone strategy, recognizing that national, regional, and local control measures are needed for the abatement of ozone pollution.55

C. The Ozone Transport Commission Petition

In its first major action under the Clean Air Act, in February, 1994, the OTC issued recommendations for pollution control measures that would apply throughout the entire NOTR.56 The OTC voted nine to four to urge the EPA to adopt the OTC recommendation requiring that, beginning in Model Year 1999, only cars meeting the stringent Low Emissions Vehicle (LEV) standards be sold and registered in the OTR.57 Under the LEV standards, new vehicles would be required to be equipped with progressively cleaner-burning engines, which could add up to $130 to the cost of a new car.58 The plan further requires that two percent of the vehicles marketed in a state must be zero emissions electric cars.59 On January 24, 1995, the EPA published its decision to approve the OTC recommendation for LEV standards.60

The OTC member states had previously signed a Memorandum of Understanding individually pledging to adopt the LEV standards.61 Many of the bills submitted to state legislatures died, however, due to intense pressure from auto industry lobbyists.62 After two states—

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Hampshire, New Jersey, New York, Rhode Island and Vermont) signed a Memorandum of Understanding agreeing to propose similar gasoline volatility regulations. 1990 U.S.C.C.A.N. at 3435, 3437. By 1990 seven states had enacted regulations to limit gasoline volatility. Id. at 3437.

54 Id.
55 Id.
56 See 24 Env't Rep. (BNA) No. 40, at 1731 (Feb. 4, 1994).
57 Id.; Vicki Allen, Northeastern States Get Tough on Pollution, CHI. TRIB., Feb. 6, 1994, (Transportation), at 3.
Massachusetts and New York—adopted the LEV standards, the automobile industry promptly filed lawsuits in each state. Although both suits failed to remove the LEV standards in those states, the litigation and lobbying efforts have caused some states to wait until a significant number of other states pass similar legislation before adopting their own proposals. As of September, 1995, only three states—New York, Massachusetts, and Connecticut—have adopted rules mandating the emission standards proposed by the OTC.

In some states there is internal opposition to the LEV standards and even resistance to membership in the OTC. In Pennsylvania, for example, the legislature passed a resolution opposing the OTC’s LEV standards, even though the Pennsylvania representative on the OTC voted in favor of the OTC recommendation. In March, 1995, the state of Virginia filed a petition in the Court of Appeals for the District of Columbia for review of the final EPA rule requiring LEV standards.

The most vigorous opposition to the OTC recommendation, however, comes from the automobile industry. The American Automobile Manufacturers Association and the Association of International Automobile Manufacturers, two groups that together represent virtually all of the firms worldwide that manufacture automobiles for the United States market, claim that the relationship between the OTC and the EPA violates constitutional principles of federalism and separation of powers embodied in the Appointments Clause and the non-delegation doctrine.

In a show of support for the EPA, five northeastern states have filed to intervene and join in defending the EPA decision to implement

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66 Id.
67 Id.
LEV standards within the NOTR.70 The move pits Massachusetts, New York, Connecticut, Rhode Island, and Vermont against Virginia and the auto industry.

III. SEPARATION OF POWERS

As the United States Supreme Court has noted many times, the separation of government powers into three distinct branches is essential to the preservation of liberty.71 Each branch must remain "entirely free from the control or coercive influence, direct or indirect, of either of the others."72 The separation of powers scheme seeks to protect against the gradual concentration of the several powers in the same branch.73 Accordingly, the Supreme Court will strike down provisions that permit the exercise by one branch of powers that are more appropriately diffused among several branches or that undermine the authority or independence of another branch.74 Where there is no threat of aggrandizement or encroachment, however, statutory provisions that involve sharing or commingling functions have been upheld.75

The separation of powers doctrine does not require a hermetic division between the branches.76 Rather, the doctrine is intended to achieve a system of checks and balances and coordination among branches, with "separateness but interdependence, autonomy but reciprocity."77 Thus, overlapping responsibilities among branches imposes duties of independence and interdependence and allows a flexible, workable government.78

70 25 Env't Rep. (BNA) No. 50, at 2501 (Apr. 21, 1995).
74 Mistretta, 488 U.S. at 382; see, e.g., Bowsher, 478 U.S. at 732–34 (Congress may not encroach on authority of Executive Branch by exercising removal power over officer performing Executive Branch functions); Chadha, 462 U.S. at 951 (invalidating legislative veto provision).
75 See, e.g., Mistretta, 488 U.S. at 382, 397 (upholding congressional creation and placement of Sentencing Commission in judicial branch); Morrison, 487 U.S. at 671–73 (upholding statute providing for judicial appointment of independent counsel).
76 Mistretta, 488 U.S. at 380–81.
78 Mistretta, 488 U.S. at 381.
The separation of powers doctrine generally imposes two constraints on Congress: Congress may not, either directly or indirectly through its agents, exercise executive power, and Congress may not, either directly or indirectly or through its agents, exercise legislative power without complying with the requirements of bicameralism and presentment.80

A. The Appointments Clause

Although separation of powers principles among the three branches of government are generally inherent in the structure of the Constitution, the Appointments Clause specifically provides for separation between Congress and the Executive Branch.81 The primary role of the Appointments Clause is to ensure that Executive power remains independent and free from congressional encroachment.82 The Appointments Clause provides:

[The President], by and with the Advice and Consent of the Senate ... shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.83

Congress may establish federal agencies, while the President appoints federal officers to serve in those agencies.84 As the only affirmative power vested in the President in the domestic realm, the Appointments Clause serves as a check upon legislative authority in order to avoid an undue concentration of power in Congress.85 As the Supreme Court has confirmed, Congress may not control the law

81 See U.S. Const. art. II, § 2, cl. 2.
83 U.S. Const. art II, § 2, cl. 2.
85 Laurence H. Tribe, American Constitutional Law § 4–9, at 244 (2d ed. 1988).
enforcement process by appointing an individual who will execute its laws.86

The Constitution sets forth two distinct classes of officers: the principal class, which requires nomination by the President and confirmation by the Senate; and “inferior officers,” who are accountable to principal officers, and whose appointment Congress may vest in the President, in the courts of law, or in the heads of departments.87 All persons holding a federal government office were intended to be included in the Appointments Clause and appointed in one of the two methods that the provision specifies.88

The Supreme Court set forth a three-part Appointments Clause test in Buckley v. Valeo: the Appointments Clause applies to (1) all executive or administrative officers, (2) who serve pursuant to federal law, and (3) who exercise significant authority over federal government actions.89 Any appointee to whom these three factors apply must be selected by the President or by a department head answerable to the President.90 Individuals who are merely employees of the United States government do not trigger the Appointments Clause.91 The key is that Congress may not appoint members of any agency that exercises executive powers.92

In Buckley, the Supreme Court sustained on separation of powers grounds a constitutional challenge to various provisions of the 1974 Amendments to the Federal Election Campaign Act of 1971 (FECA).93 The statute established a Federal Election Commission

86 Springer v. Government of the Philippine Islands, 277 U.S. 189, 202-03 (1928) (invalidating statute that authorized three-person committee consisting of two legislators and one executive to perform executive functions).
87 Germaine, 99 U.S. at 509-10.
88 Id. The distinction between “principal” and “inferior” officers can play an important role in Appointments Clause analyses. See Morrison v. Olson, 487 U.S. 654, 670-73 (1988). The distinction is significant insofar as it demands that some officials (“principal” officers) may only be appointed by the President together with the Senate. As for “inferior” officers, the Appointments Clause is more permissive, allowing either the President alone, the judiciary, or the heads of departments to make appointments. In neither case, however, is Congress permitted to appoint officers of the United States. See Buckley v. Valeo, 424 U.S. 1, 127 (1976).
90 See Buckley, 424 U.S. at 126; Bowsher v. Synar, 478 U.S. at 714, 726 (1986).
91 Buckley, 424 U.S. at 126 n.162.
92 Bowsher, 478 U.S. at 732-33 (finding Comptroller General an agent of Congress, so congressional delegation of authority to Comptroller General to revise the federal budget was impermissible exercise of executive power); see Buckley, 424 U.S. at 139-41.
93 Buckley, 424 U.S. at 6, 126.
and vested in the Commission the primary responsibility for adminis­
tering and enforcing the FECA.\textsuperscript{94} The Commission's powers in­
cluded making rules for carrying out FECA's provisions, bringing
actions against violators, and authorizing convention expenditures in
excess of FECA's specified limits.\textsuperscript{95} Before a rule promulgated by the
Commission could take effect, FECA required that the rule be pre­
sented either to the Senate or the House of Representatives together
with a detailed explanation of the proposed rule.\textsuperscript{96} If the house to
which the rule was presented disapproved the proposed regulation
within the period of time specified under FECA, the rule could not be
promulgated by the Commission.\textsuperscript{97}

Although two members of the Federal Election Commission were
selected by the President, with confirmation by both Houses of Con­
gress, the remaining four voting members were appointed by the
President \textit{pro tempore} of the Senate and by the Speaker of the
House.\textsuperscript{98} Thus, the problem in \textit{Buckley} was that if Congress wanted
the Commission to exercise those powers conferred on the Commis­
sion, then the Commission's members constituted "Officers of the
United States," and had to be appointed according to the Appoint­
ments Clause. If Congress instead wished to retain the power to
appoint the Commission's members, then the Commission could
not undertake those functions that are not properly performed by
Congress.\textsuperscript{99

The Supreme Court held that the procedure for appointing mem­
bers of the Federal Election Commission by congressional leaders
violated the constitutional directive that the President, with the ad­
vice and consent of the Senate, shall appoint all "Officers of the United

\begin{itemize}
  \item \textsuperscript{94} \textit{Id.} at 109.
  \item \textsuperscript{95} \textit{Id.} at 109–12.
  \item \textsuperscript{96} \textit{Id.} at 140 n.176.
  \item \textsuperscript{97} \textit{Id.}
  \item \textsuperscript{98} \textit{Buckley}, 424 U.S. at 126.
  \item \textsuperscript{99} \textit{Id.} at 118–19. Likewise, \textit{Bowsher v. Synar} involved a delegation of authority to the Comptroller General to revise the federal budget. \textit{Bowsher}, 478 U.S. 714, 717–18 (1986). After concluding that the Comptroller was an agent of Congress, the Supreme Court held that he could not exercise Executive branch powers: "To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws." \textit{Id.} at 726. Characterizing the Comptroller's action as legislative does not solve the constitutional problem, because Congress may not delegate the power to legislate to its own agents. INS v. Chadha, 462 U.S. 919, 951 (1983). "If Congress were free to delegate its policy-making authority to one of its components, or to one of its agents, it would be able to evade 'the carefully crafted restraints spelled out in the Constitution.'" \textit{Bowsher}, 478 U.S. at 755 (Stevens, J., concurring in the judgment).
\end{itemize}
States.” Thus, under Buckley, “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed” by the President. Stated another way, if an agent is not appointed by either the President, the head of an Executive Branch department, or a court of law, he is not considered an “officer” for Appointments Clause purposes, and therefore may not exercise powers of a duly appointed “officer.”

Buckley limits application of the Appointments Clause to individuals who perform their duties “pursuant to the laws of the United States.” Where appointees are selected by Congress and empowered to carry out their duties by federal statute, receive federal salaries, or are otherwise beholden to Congress, they are serving pursuant to federal law and the Appointments Clause is implicated.

Under the second prong of the Buckley test, the Appointments Clause does not apply where members of a regional body perform their duties pursuant to state law, rather than federal law. In Seattle Master Builders Association v. Pacific Northwest Electric Power and Conservation Planning Council, a group of home builders filed a petition to strike down on Appointments Clause grounds a regional policy-making council (Council) created and designed by Congress in the Pacific Northwest Electric Power Planning and Conservation Act. Composed of members appointed by the governors of each member state and supported by legislation in each state authorizing

100 See Buckley, 424 U.S. at 126–27.
101 Id. at 126.
102 Id.; see United States v. Mouat, 124 U.S. 303, 307 (1888) (“Unless a person in the service of the Government . . . holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States”); United States v. Smith, 124 U.S. 525, 532 (1888) (“An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person in the service of the government who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution.”).
103 424 U.S. at 126.
104 See id. at 109–13 (executive duties performed by standing body with members appointed by Congress and drawing federal salary); see also Auffmordt v. Hedden, 137 U.S. 310, 327 (1890) (person whose position is without tenure, duration, or continuing emolument not subject to Appointments Clause); U.S. ex rel. Truong v. Northrop Corp., 728 F. Supp. 615, 623 (C.D. Cal. 1989) (no violation of Appointments Clause where qui tam plaintiff not appointed by Congress, receives no federal salary, and has no responsibility for enforcing federal statute).
106 Id. at 1362.
the appointment of Council members, the Act directed the Council to provide a regional plan for implementing conservation measures to an agency of the United States Department of Energy.\textsuperscript{107} In upholding the constitutionality of the Council, the United States Court of Appeals for the Ninth Circuit found dispositive the fact that the Council members performed their duties pursuant to an interstate compact, rather than federal law.\textsuperscript{108} The court emphasized that the Council members' appointments, salaries, and direction were made pursuant to the laws of the four individual member states, and that "[w]ithout substantive state legislation, there would be no Council and no Council members to appoint."\textsuperscript{109} There was no threat of Congress arrogating to itself powers that are to be exercised by the President because Congress could neither appoint nor remove members of the Council.\textsuperscript{110} The court stressed that "congressional consent did not result in the creation but only authorized the creation of the compact organization and the appointment of its officials."\textsuperscript{111} As the product of an interstate compact, the Council was immune to Appointments Clause scrutiny.\textsuperscript{112}

The third prong of the \textit{Buckley} test, whether or not a congressional agent is exercising significant authority over federal government actions, depends on the agent's specific powers.\textsuperscript{113} Although there is no bright-line test, authority or influence over federal government action becomes "significant" when Congress concentrates power in one branch or undermines the authority of another branch.\textsuperscript{114} Where Congress creates a regional body to perform investigative and informative functions, or to make recommendations that are not binding, there is no conflict with the Appointments Clause.\textsuperscript{115} Congress violates separation of powers principles, however, by investing authority in a

\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.} at 1365.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Seattle Master Builders}, 786 F.2d at 1365. Since the Council did not serve pursuant to federal law, the court found it immaterial whether the Council exercised significant executive authority over federal activity, or whether the Council's duties were classified as executive or legislative. \textit{Id.}
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} See \textit{Buckley} v. \textit{Valeo}, 424 U.S. 1, 137-43 (1976).
\textsuperscript{114} See \textit{id.} at 122; \textit{Mistretta} v. United States, 488 U.S. 361, 382 (1988).
\textsuperscript{115} \textit{Buckley}, 424 U.S. at 137; see \textit{Northwest Envtl. Defense Ctr.} v. \textit{Brennan}, 958 F.2d 930, 937 (9th Cir. 1992).
regional body to issue rules or promulgate regulations, or by exerting effective control over federal decisions.\textsuperscript{116}

Congressionally constructed regional bodies that merely propose rules, but lack the power to promulgate them, do not rise to the level of exercising "significant" federal authority. In \textit{Northwest Environmental Defense Center (NEDC) v. Evans}, for example, the United States District Court for the District of Oregon validated a regional body because it was not vested with the power to implement rules.\textsuperscript{117}

At issue was the Pacific Fishery Management Council (Fishery Council), a regional advisory body established by Congress in the Magnuson Act.\textsuperscript{118} The Fishery Council consisted of thirteen voting members: eight appointed by the Secretary of Commerce, one regional director of the National Marine Fisheries Service, and four members appointed by the governors of the states of California, Idaho, Oregon, and Washington.\textsuperscript{119}

The purpose of the Fishery Council was to prepare a fishery management plan for the federal fishery conservation zone, an area in the Pacific Ocean extending nearly 200 miles from the three-mile coastal zone.\textsuperscript{120} The statute charged the Fishery Council with proposing regulations for the plan's implementation and making reports and recommendations to the Secretary of Commerce.\textsuperscript{121} Among other things, the Fishery Council's management plan would determine the allowable catch of coho salmon for commercial and recreational fishermen.\textsuperscript{122}

Under the Magnuson Act, the Fishery Council was required to submit its plan to the Secretary of Commerce for review to determine whether the plan was consistent with the national standard.\textsuperscript{123} If the Fishery Council's plan was approved, the Secretary of Commerce would then promulgate regulations to implement the plan, which


\textsuperscript{118} \textit{Id.} at *3.

\textsuperscript{119} \textit{Id.} at *2.

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{Evans}, 1988 U.S. Dist. LEXIS 8977 at *3.

\textsuperscript{122} \textit{Id.} at *2.

\textsuperscript{123} \textit{Id.} at *3.
operates to prevent overfishing while achieving the maximum possible yield from each fishery. 124 If the Secretary were to fail to notify the Fishery Council in writing of his disapproval of the plan within ninety-five days, the proposed fishery management plan would automatically take effect. 125

The plaintiffs in NEDC v. Evans claimed that the Fishery Council was a federal agency and thus was barred under the Appointments Clause from having its members appointed by state governors. 126 The provision under which the Fishery Council's plan automatically takes effect unless disapproved in writing within ninety-five days, the plaintiffs maintained, effectively allows the Fishery Council to promulgate regulations; the Secretary of Commerce, the plaintiffs argued, acted only as a "straw man." 127 The court disagreed, however, finding that only the Secretary of Commerce had the power to promulgate regulations, and that no fishery management plan could be implemented without being acted upon by the Secretary of Commerce. 128 Although the Magnuson Act required the Secretary of Commerce to take action to disapprove the Fishery Council's proposed plan within ninety-five days, under the statute only the Secretary of Commerce had the power to promulgate regulations. 129 The court announced the rule that "[s]ignificant authority over federal government actions comes from the ability to promulgate, not propose, implementing regulations . . . ." 130 The Fishery Council was valid because it "[d]id not exercise significant authority over federal government actions," and thus did not meet the third element of the Buckley test. 131

Similarly, Congress acts within its legal boundaries by appointing officers that are subject to removal by a higher executive official. 132 In Morrison v. Olson, the Supreme Court considered a separation of powers challenge to the independent counsel provisions of the Ethics

124 Id.
125 Id. at *19.
126 Evans, 1988 U.S. Dist. LEXIS 8977 at *17.
127 Id.
128 Id. at *19; see NEDC v. Brennan, 958 F.2d 930, 937 (9th Cir. 1992) (affirming that Fishery Council is valid because it only proposed fishery regulations, which were then implemented by the Secretary of Commerce after review).
129 Id. at *19.
130 Id. at *20.
131 Id.
in Government Act of 1978. That statute created a "Special Division" of the United States Court of Appeals for the District of Columbia Circuit that had the authority to appoint an independent counsel and to define the counsel's prosecutorial jurisdiction. In finding that the Special Division was valid, the Court explained that the congressional grant of power "does not include any authority to formulate policy for the Government or the Executive Branch," and that with respect to policy matters, the special prosecutor must comply with the policies of the Department of Justice. Thus, because Congress retained no control or supervision over the counsel, there was no danger of Congress encroaching on or undermining the powers of the Executive Branch. There, the dispositive point was the fact that the statute still afforded the Executive Branch sufficient control to enable the President to perform his constitutional duties.

Recent separation of powers decisions, however, have constrained Congress from expanding its influence into the Executive Branch. Where a congressionally appointed body has coercive influence over federal decisionmaking, or where Congress retains control over a body to which Congress has granted executive authority to issue rules, Congress has encroached too far. For instance, in Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc. (CAAN), the Supreme Court invalidated a statute that transferred authority over National and Dulles Airports to a regional Board of Review. The statute stipulated that the Board be composed entirely of members of Congress, chosen from a list furnished by the Speaker of the House of Representatives and the President pro tempore of the Senate. The list system required appointments to the Board of Review to be chosen from members of

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133 487 U.S. at 660–61.
134 Id.
135 Id. at 671–72.
136 See id.
137 Id. at 685–93.
139 See CAAN, 501 U.S. at 269; Bowsher v. Synar, 478 U.S. 714, 726–27 (1986) (Congress may not retain removal power over officer performing executive functions); Confederated Tribes of Siletz Indians v. United States, 841 F. Supp. 1479, 1489 (D. Or. 1994) (Congress may not grant state governor veto power over discretionary decision made by agency of Executive branch).
140 CAAN, 501 U.S. at 255, 277.
141 Id. at 259.
congressional committees charged with authority over air transportation, and there was no requirement that the list contain more recommendations than the number of Board openings.\textsuperscript{142} The list provision guaranteed Congress effective control over the appointment and removal of Board members.\textsuperscript{143} Significantly, the statute also gave the Board of Review power to veto decisions made by the Metropolitan Washington Airports Authority (MWAA or Airports Authority), the entity that operates the two airports.\textsuperscript{144} Actions that had to be submitted for Board approval included adoption of a budget, authorization of bonds, promulgation of regulations, endorsement of a master plan, and appointment of the chief executive officer of the MWAA.\textsuperscript{145}

The Supreme Court struck down the congressional scheme as an impermissible extension of legislative power beyond the constitutionally confined role.\textsuperscript{146} That the Board of Review was established by the by-laws of the MWAA, which was created by legislation enacted by the State of Virginia and the District of Columbia, "[was] not enough to immunize it from separation-of-powers review."\textsuperscript{147} At the core of its ruling, the Supreme Court emphasized that the Board of Review was "an entity created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is to protect an acknowledged federal interest, and membership in which is restricted to congressional officials."\textsuperscript{148} If the Board's power was executive, then an agent of Congress could not exercise it; if the Board's power was legislative, then Congress had to exercise it in conformity with the bicameralism and presentment requirements of the Constitution.\textsuperscript{149}

As the Court observed, the congressional scheme at issue in CAAN provided a model for extensive congressional expansion.\textsuperscript{150} If the Board of Review were valid, the Court declared, "Congress could ... use similar expedients to enable its Members or its agents to retain control, outside the ordinary legislative process, of the activities of state grant recipients charged with executing virtually every aspect

\textsuperscript{142} Id. at 268–69.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 260–61.
\textsuperscript{145} CAAN, 501 U.S. at 260.
\textsuperscript{146} Id. at 276.
\textsuperscript{147} Id. at 266.
\textsuperscript{148} Id. at 269.
\textsuperscript{149} Id. at 276.
\textsuperscript{150} CAAN, 501 U.S. at 277.
of national policy." Thus, when Congress retains too much control over one of its agents exercising executive authority—as with congressional review or veto provisions—Congress has violated the separation of powers set forth in the Constitution.

An amended version of the same statute at issue in CAAN appeared in *Hechinger v. Metropolitan Washington Airports Authority*. There, the United States Court of Appeals for the District of Columbia Circuit invalidated the statutory arrangement on the grounds that Congress still exercised significant authority over the function of the Airports Authority via the Board of Review. Although Congress eliminated the Board’s veto power, Board members remained congressionally dominated, and the amended statute actually expanded the Board’s powers in a number of other ways. Critical to the court’s determination that the Board exercised federal power was the Board’s potential impact on the decisionmaking of the Airports Authority.

The court objected to the Board’s power under two main provisions of the amendments that (1) allowed the Board to decide whether action by the Authority would be taken immediately, or be delayed and subjected to a sixty-day review by Congress, and (2) permitted the Board to request the Airports Authority to consider and vote on any matter related to the two airports, and to do so “as promptly as feasible.” Thus, the Board could force any issue onto the Authority’s agenda for priority consideration. This agenda-setting power, combined with the Board’s power to determine which Authority actions could be implemented immediately and which could be delayed for congressional review, permitted the Board to compel the Authority to “trim their sails to accommodate the [Board’s] wishes.” The fact that the Authority was running airports exacerbated the problem because decisions such as adopting a budget, letting contracts, and issuing bonds are time-sensitive, and delay could result in the loss of

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151 *Id.*
152 *See id.; Bowsher v. Synar, 478 U.S. 717, 726–27 (1986).*
154 *Id.*
155 *Id. at 99.*
156 *Id. at 102.*
157 *Id. at 99.*
158 *Hechinger, 36 F.3d at 99.*
159 *Id. at 102.*
160 *Id. at 105.*
millions of dollars. Thus, the arrangement pressured the Authority to avoid crossing the Board and incurring delay.

The Hechinger court noted that Congress may exert enormous influence over agency decisions through its ability to “advise, coordinate, and even directly influence an executive agency . . . through oversight hearings, appropriation and authorization legislation, or direct communication with the [agency].” The court warned, however, that “[a]dvice . . . surely implies influence, and Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role.” The determinative factor for the court was that the amended statute maintained a structural relationship between Congress, through the Board, and the Authority that went beyond persuasion to coercion. The Board of Review’s delay power effectively forced the Authority to tailor decisions to the Board’s pleasure, and gave the Board power to suspend an important Authority decision in order to compel the Authority to agree to an unrelated matter. This arrangement, the court held, was an encroachment beyond the legislative sphere because the Board could impermissibly interfere with the Authority’s performance of its independent responsibilities. Ultimately, the Authority was left with two options: it could “either bow to the will of the Board of Review, or risk the time and uncertainty of congressional action.” Far more than merely “advisory,” the Board of Review had the power to coerce the Authority into adopting any “recommendation” that the Board might make.

161 Id. at 104.
162 Id.
163 Hechinger, 36 F.3d at 104.
164 Id. at 102.
165 Id. at 104; see Ameron, Inc. v. United States Army Corps of Eng’rs, 809 F.2d 979, 997 (3d Cir. 1986) (Comptroller General’s ability to stay the award of contracts under a federal statute upheld because “any potential disruption of the executive function [was] minimal”); Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1110 (9th Cir. 1988) (“proper inquiry is not whether a legislative agent can temporarily ‘bind’ or ‘directly affect’ parties outside the legislative branch, but rather whether the legislative agent exercises control or ultimate authority in the disposition of a particular issue”). Unlike Ameron and Lear, Hechinger stressed that the statute at issue did not allow the Authority to override the Board of Review’s power to delay, a safeguard vital to upholding the stay provisions in both Ameron and Lear. Hechinger, 36 F.3d at 103.
166 Hechinger, 36 F.3d at 105.
167 Id. at 104.
168 Id. at 105.
169 Id.
As this line of cases illustrates, failure to meet any one of the three prongs in *Buckley* clears a congressional agent from Appointments Clause scrutiny.\(^{170}\) Courts look both to the overall relationship of the agent to Congress and to the agent's impact or potential impact on federal lawmaking in applying the Appointments Clause.\(^{171}\) To determine when a congressional agent exercises significant authority over federal actions, courts examine the degree of legislative expansion and disruption of the functions of another branch.\(^{172}\)

### B. The Nondelegation Doctrine

Apart from the constraint in the Appointments Clause against Congress's usurping the power given to the Executive Branch, separation of powers principles also require that when exercising legislative power, Congress must follow the “single, finely wrought and exhaustively considered, procedure” specified in Article I of the Constitution.\(^{173}\) The broad theory underlying the limitation on congressional capacity to delegate authority is “that every act taken under color of federal authority, whether undertaken by Congress itself or by one of its agents, must be meaningfully traceable to a specific exercise of constitutionally granted legislative or executive power.”\(^{174}\) Thus, the primary limitation of the nondelegation doctrine is that Congress may not delegate its law-making authority unless it has conformed with the bicameralism and presentment requirements in the Constitution.\(^{175}\)

Courts approach the nondelegation doctrine with a practical understanding that in our complex society, Congress cannot perform its function without the ability to delegate power under broad directives.\(^{176}\) It is sufficient, therefore, for Congress to state a general


\(^{171}\) See CAAN, 501 U.S. 252, 266–70 (1991); Hechinger, 36 F.3d at 100–05; Seattle Master Builders, 786 F.2d at 1365.

\(^{172}\) See CAAN, 501 U.S. at 276–77; Hechinger, 36 F.3d at 102–04.

\(^{173}\) INS v. Chadha, 462 U.S. 919, 951 (1983); see Bowsher v. Synar, 478 U.S. 714, 758–59 (1986) (Stevens, J., concurring) (“when Congress legislates, when it makes binding policy, it must follow the procedures prescribed in Article I . . . enactment by both Houses and presentment to the President”).


\(^{175}\) CAAN, 501 U.S. at 274; Chadha, 462 U.S. at 951.

policy, the public agency which is to apply the policy, and the limits of the delegated authority.\textsuperscript{177}

As the Supreme Court noted in \textit{Buckley v. Valeo}, Congress may, under the Constitution's Necessary and Proper Clause,\textsuperscript{178} create generic offices and even provide methods for appointment to those offices.\textsuperscript{179} The operating premise is that any constitutional grant of power implies the power to delegate authority sufficient to effect the grant's purposes.\textsuperscript{180} Any "Officers" who serve in congressionally created offices or agencies, however, must be appointed in conformity with the Appointments Clause.\textsuperscript{181} Officers created outside the Appointments Clause may only perform duties in keeping with "those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not 'Officers of the United States.'"\textsuperscript{182} In other words, Congress cannot delegate authority to execute laws, because such a delegation requires authority that Congress does not possess.\textsuperscript{183}

The determinative factor for nondelegation doctrine purposes is that when Congress delegates its authority, Congress must provide intelligible principles to guide those exercising the delegated authority.\textsuperscript{184} In \textit{Mistretta v. United States}, for example, the Supreme Court examined the statute in which Congress created the United States Sentencing Commission, placed the Commission in the Judicial Branch, and delegated authority to the Commission to issue sentencing guidelines binding on federal courts.\textsuperscript{185} The Court held that Congress did not violate the nondelegation doctrine, because Congress set forth specific policies and principles to govern the formulation of

\textsuperscript{177} Id. at 372-73.
\textsuperscript{178} U.S. Const. art I, § 8, cl. 18 provides that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."
\textsuperscript{180} Lichter v. United States, 334 U.S. 742, 778 (1948).
\textsuperscript{181} Buckley, 424 U.S. at 138-39.
\textsuperscript{182} Id. at 139.
\textsuperscript{183} Bowsher v. Synar, 478 U.S. 714, 726 (1986).
\textsuperscript{185} Mistretta, 488 U.S. at 362-69.
the sentencing guidelines. Although Congress delegated significant discretion to the Commission to draw judgments from its analyses, Congress easily satisfied the intelligible principle standard by stating in the statute specific goals, purposes, and factors for the Commission to consider in its formulation of offense categories. As the Court explained:

[only if we could say that there is an absence of standards for the guidance of the [delegatee's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose.]

On this standard, the Supreme Court in *Yakus v. United States* upheld a delegation to the Price Administrator to fix commodity prices with the mere statutory guidance that he exercise "his judgment" to ensure that prices are "generally fair and equitable and will effectuate the purposes of [the statute]." As our modern administrative state suggests, the Supreme Court has regularly upheld Congress's ability to delegate power under broad standards. The existence of intelligible standards governing the actions of the agent exercising delegated authority satisfies the nondelegation doctrine. Having properly delegated its authority with guiding principles, however, Congress remains subject to the general separation of powers constraint that Congress not retain improper control over the agent exercising the delegated executive authority.

In sum, the Constitution imposes upon Congress two fundamental constraints on the exercise of its power. Under the Appointments Clause, Congress may not appoint officials that exercise executive

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186 Id. at 379.
187 Id. at 374–75.
188 Id. at 379 (citing *Yakus v. United States*, 321 U.S. 414, 425–26 (1944)).
189 *Yakus*, 321 U.S. at 420.
193 CAAN, 501 U.S. at 274.
functions. Additionally, the nondelegation doctrine prevents Congress from delegating its authority to make laws without providing adequate guidelines. Through these two constraints, the separation of powers doctrine aims to forestall the danger of congressional encroachment beyond its constitutional role at the expense of another branch.

IV. THE VALIDITY OF THE OTC UNDER SEPARATION OF POWERS PRINCIPLES

Applying the overarching principle that Congress may not unduly concentrate power in itself or extend its power into the realm of another branch, the OTC would likely withstand separation of powers scrutiny. Although the OTC arrangement may begin to approach the limit of congressional action, Congress has not usurped significant power from the Executive Branch nor prevented the Executive Branch from performing its function. Because the OTC falls outside the scope of the Appointments Clause, and Congress did not impermissibly delegate authority to the OTC, the OTC should pass constitutional muster.

Following the Buckley test, the Appointments Clause would not likely operate to invalidate the OTC. For the Appointments Clause to apply, all three factors in the Buckley test must be met. As a body derived from a combination of federal and state power, and with no executive functions, the OTC should fall outside the scope of the Appointments Clause.

The members of the OTC should not be considered "officers of the United States" under the Appointments Clause. Since the OTC was not appointed by the President, the head of a department, or a court of law, the members of the OTC cannot be considered "officers."

195 Mistretta, 488 U.S. at 373.
196 CAAN, 501 U.S. at 274; Buckley, 424 U.S. at 129 ("[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches").
197 See Buckley, 424 U.S. at 123-27.
198 Id. at 126; Seattle Master Builders, 786 F.2d 1359, 1365 (9th Cir. 1986), cert. denied, 479 U.S. 1059 (1987).
199 See Buckley, 424 U.S. at 126.
200 See id.
Even more, it does not appear that the OTC members are ultimately appointed by Congress. The 1990 Clean Air Act Amendments established the OTC and its offices, but indicated that the OTC positions be filled by the governors of the individual states in the NOTR or their designees, regional EPA officials, and state air pollution control officials.\textsuperscript{201} Since both the state governors and the state air pollution control officials serve pursuant to internal elective and appointive processes within the NOTR states, it is the states, not Congress, who fill the positions on the OTC.

This state involvement clearly distinguishes the situation at hand from \textit{Buckley}, where four members of the Federal Election Commission were directly selected by the President \textit{pro tempore} of the Senate and by the Speaker of the House of Representatives.\textsuperscript{202} Neither has Congress significantly limited the pool of potential members who may serve on the OTC, as was the case with the congressional control over appointment under the list system in \textit{CAAN}.\textsuperscript{203} Congress has given state governors power to decide whether to sit on the OTC themselves or to designate OTC members.\textsuperscript{204} Moreover, it is entirely conceivable that a state may decline to participate in the OTC by failing to send delegates to sit on the OTC.\textsuperscript{205} It would be difficult to find, therefore, that the OTC members hold an office under the federal government.\textsuperscript{206}

The second prong of the \textit{Buckley} test further suggests that members of the OTC are not "officers," and not subject to the Appointments Clause, since the OTC does not serve "pursuant to the laws of the United States."\textsuperscript{207} Admittedly, Congress established the OTC by statute and defined the members' duties and responsibilities.\textsuperscript{208} Congressional creation of a regional body does not, however, lead to the conclusion that officers of that body serve pursuant to federal law.\textsuperscript{209} Like the Council members in \textit{Seattle Master Builders},\textsuperscript{210} the OTC

\textsuperscript{201} 42 U.S.C. § 7506a(b)(1).
\textsuperscript{202} \textit{Buckley}, 424 U.S. at 126.
\textsuperscript{204} 42 U.S.C. § 7506a(b)(1).
\textsuperscript{205} The 1990 Clean Air Act Amendments make no provision for failure to participate in the OTC arrangement. \textit{See} 42 U.S.C. §§ 7506a, 7511c.
\textsuperscript{206} \textit{See Buckley}, 424 U.S. at 126.
\textsuperscript{207} \textit{See id.; Seattle Master Builders}, 786 F.2d 1359, 1365 (9th Cir. 1986), \textit{cert. denied}, 479 U.S. 1059 (1987).
\textsuperscript{208} 42 U.S.C. §§ 7506a(b), 7511c.
\textsuperscript{209} \textit{See Seattle Master Builders}, 786 F.2d at 1365.
\textsuperscript{210} Id.
members are appointed by the governors of each member state and charged by statute with devising a regional plan to be submitted to an Executive Branch agency. Dispositive in *Seattle Master Builders*, however, was the fact that the Council members' appointments and salaries were state-derived. Therefore, the Council in that case was immune from Appointments Clause scrutiny because the Council's members did not serve "pursuant to federal law." Likewise, OTC members are state officials and gubernatorial designees and are paid by their respective states. State governors may choose to sit on the OTC, or the governor may select a designee—regardless, Congress has not made appointments to the OTC, but merely shifted the appointment decision to state governors, who are responsible to their respective electorates. Although Congress created the positions that comprise the OTC, the final decision as to who fills those positions lies with the states and the balance of power between Congress and the Executive Branch thereby remains unaffected.

The instant situation is not as clearly defined as *Seattle Master Builders*, which involved an interstate compact, an element not present with respect to the OTC. Nonetheless, the operative premise of *Seattle Master Builders* based on state participation applies to the OTC: without state-level action by the members of the NOTR, there would be no OTC. State officials are the only members who may exercise effective power on the OTC, because recommendations, such as the LEV standards proposed by the OTC, can only be made upon a majority vote of the sitting governors or their designees on the OTC. Additionally, the NOTR states have conferred authority on their state officials to participate on interstate agencies, such as the OTC, and state legislatures are free to direct how their air pollution officials should vote. The fact that OTC members are accountable to their respective states confirms that the OTC operates pursuant to state law, not federal law.

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211 Id.
212 Id.
214 See *Seattle Master Builders*, 786 F.2d at 1365.
216 See, e.g., CONN. GEN. STAT. § 22a–171(5) (1985) (state Department of Environmental Protection Commissioner shall "advise and consult with agencies of the United States, agencies of the state, political subdivisions and industries and any other affected groups [regarding air
The issue of the degree of authority the OTC exercises over federal actions would likely form the heart of a court's separation of powers analysis. Under this third Buckley prong, the OTC is likely to stand valid because the OTC has no power to implement or promulgate rules.217 Thus, the OTC does not perform executive functions. Even if a court were to find that the OTC does exert influence over EPA decisions, the OTC still may be valid, because Congress does not retain control or supervision over the OTC.218

As a body with no effective power to enforce or implement its plans, the OTC merely offers proposals to the EPA, and therefore does not exercise executive or administrative power.219 The OTC's statutory role is to propose to the EPA “recommendations” for measures the OTC determines are necessary to meet NAAQS.220 Such recommendations are not binding on the EPA, which may approve or reject, in full or in part, any OTC proposal.221 The OTC thus possesses none of the veto power over executive decisions given to the Board of Review in CAAN.222 The OTC arrangement more closely resembles that presented in Evans, a decision that validated a regional Fishery Management Council on the grounds that “[s]ignificant authority over federal government actions comes from the ability to promulgate, not propose, implementing regulations.”223 Like the Fishery Council in

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220 42 U.S.C. § 7506a(b)(2).
221 Id. § 7511c(c)(4).
Evans, which was comprised in part of gubernatorial appointees from member states and which proposed regulations and made reports and recommendations to the Secretary of Commerce, the OTC may recommend additional control measures to the EPA, which ultimately has the power to implement rules. The Clean Air Act does not require the OTC to issue any recommendations for additional control measures, nor does the Clean Air Act permit an additional recommendation to become a federal rule unless acted upon by the EPA, even if the EPA takes longer than the statutory limit of nine months to decide on an OTC proposal. Such provisions imply even less power to promulgate rules than was present in Evans, where the Magnuson Act required the Fishery Council to submit a plan to the Secretary of Commerce, and stated that if the Council's fishery plan was not acted upon within ninety-five days, the plan would automatically take effect. The OTC's function is arguably more than merely investigative or informative, since the OTC offers proposals which, if accepted, require the EPA to declare current SIPs deficient and the NOTR states to incorporate the new measures into their SIPs. Under the reasoning of Evans, however, the OTC's inability to promulgate rules is highly indicative of a lack of authority over federal actions.

The OTC may nevertheless be struck down if, short of actually implementing rules, the OTC has a coercive influence over the EPA's action. The OTC has the power to determine additional control measures for EPA consideration. In addition, the EPA may only reject an OTC recommendation if the EPA can show that the measure is not necessary to bring any area into attainment or is otherwise inconsistent with the Clean Air Act. If the EPA disapproves an OTC recommendation, the EPA must suggest equal or more effective actions that could be taken by the OTC. A court could reasonably find from these requirements that the OTC has the ability to set an agenda

224 Id. at *2-3.
226 See id. In fact, the EPA took approximately eleven months to rule on the OTC proposal.
228 See 42 U.S.C. § 7511c(c)(5).
231 42 U.S.C. § 7511c(c)(1).
232 Id. § 7511c(c)(4)(i).
233 Id. § 7511c(c)(4)(ii).
for the EPA.\textsuperscript{234} Even though the EPA is not confined to consideration of only OTC recommendations, the OTC has greater influence because the EPA would have to evaluate an OTC plan and construct an equal or better alternative before it could disapprove an OTC proposal.\textsuperscript{235} The criteria for EPA review of OTC proposals make approval easier than disapproval.

The OTC’s agenda-setting influence is less than that displayed in \textit{Hechinger}, where the Board of Review had the power to review time-sensitive Airports Authority decisions and subject them to the delay of congressional review.\textsuperscript{236} The OTC has no effective means at its disposal to exert pressure over the EPA’s decision, such as review of EPA decisions or delay tactics.\textsuperscript{237} Unlike the Board of Review in \textit{Hechinger}, the OTC cannot delay an EPA decision by subjecting it to congressional review.\textsuperscript{238} Congress did make it more difficult for the EPA to disapprove an OTC recommendation by selecting somewhat narrow criteria for EPA review, requiring EPA to show that OTC recommendations are not necessary within all or part of the NOTR.\textsuperscript{239} This requirement falls far short, however, of the coercive power of the Board of Review in \textit{Hechinger}, which could compel the Airports Authority to follow Board policy through veto and delay powers.\textsuperscript{240} The OTC recommendations at issue are not particularly time-sensitive, and showing that an OTC recommendation is not necessary to bring an area into attainment does not force the EPA to “trim its sails” to accommodate OTC wishes, as was true in \textit{Hechinger}.\textsuperscript{241} The fact that the EPA received the OTC recommendation for the LEV program in February, 1994, yet spent until January, 1995, to decide—two months longer than the statutory nine months specified for the review process—indicates that the EPA proceeded independently on its own timetable.\textsuperscript{242}

Congress has given the OTC something more than advisory power, but it is unlikely that a court would find that the OTC’s influence on the EPA amounts to coercion, or that Congress has reserved effective

\textsuperscript{234} See \textit{Hechinger}, 36 F.3d at 102.
\textsuperscript{235} See 42 U.S.C. § 7511c(c)(4).
\textsuperscript{236} See \textit{Hechinger}, 36 F.3d at 104–05.
\textsuperscript{237} See id. at 102–03, 105.
\textsuperscript{238} See id.
\textsuperscript{239} 42 U.S.C. § 7511c(c)(4)(i).
\textsuperscript{240} 36 F.3d at 104–05.
\textsuperscript{241} See id. at 105.
control over the OTC.\textsuperscript{243} As opposed to the congressionally dominated Board of Review wielding executive power in \textit{CAAN}, membership in the OTC is not limited to a list of Congressmen, and Congress has neither appointment nor removal power over OTC members.\textsuperscript{244} Congress can only assert control over the OTC by eliminating the OTC and its offices altogether in subsequent legislation. This ability may afford Congress some persuasive effect over the OTC, but it falls short of the congressional dominance and extension beyond the legislative sphere found in \textit{CAAN}.\textsuperscript{245} Most significantly, whatever influence the OTC may have over the EPA, it does not significantly impede the EPA from performing its independent function.\textsuperscript{246} The EPA may adopt or reject any OTC recommendation, and the EPA, not the OTC, has the power to implement rules. It is unlikely, therefore, that a court would find an impermissible encroachment into the Executive Branch sphere.

Although there is room for a court to find that the OTC exercises some degree of influence over the EPA, it is not likely to prove significant. Moreover, the connection between Congress and the OTC is sufficiently remote to permit OTC members to act independent of congressional control. Established by Congress, but with members appointed by the states, no power to promulgate rules, and little effective power to coerce the EPA, the OTC fails to meet the criteria set forth in \textit{Buckley} and therefore falls outside the scope of the Appointments Clause.\textsuperscript{247}

Given the deference that modern courts grant to Congress, allowing substantial leeway to delegate its power under broad principles, it is further unlikely that a court would employ the nondelegation doctrine to strike down the OTC.\textsuperscript{248} Under the Necessary and Proper Clause of the Constitution,\textsuperscript{249} Congress has properly distanced the OTC from administration or enforcement of public law, while permitting the OTC to aid in Congress's legislative function.\textsuperscript{250}

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\textsuperscript{243} See \textit{Hechinger}, 36 F.3d at 104–05.
\textsuperscript{245} See id. at 269–70.
\textsuperscript{247} \textit{Buckley v. Valeo}, 424 U.S. 1, 126 (1976).
\textsuperscript{249} U.S. CONST. art. I, § 8, cl. 18.
\textsuperscript{250} See \textit{Buckley}, 424 U.S. at 138–39.
body that studies interstate ozone pollution and proposes mitigation strategies to the EPA, the OTC exercises no power that Congress could not exercise itself. If the OTC is considered to be empowered with legislative authority, following the principle underlying the non-delegation doctrine, Congress has correctly set forth intelligible principles to guide the OTC in its operation. The Clean Air Act states that the OTC shall “assess the degree of interstate transport of the pollutant or precursors to the pollutant throughout the transport region, assess strategies for mitigating the interstate pollution, and recommend to the [EPA] such measures as the Commission determines to be necessary” to meet the NAAQS. Thus, if the OTC exercises legislative power, Congress has provided intelligible standards for guidance. The OTC guidelines are more replete than those upheld as valid in Yakus v. United States, which left much more discretion to the Price Administrator to act “in his judgment” to attain fairness and equity. Far from being overly vague, the narrowly tailored provisions for EPA review further suggest that Congress has provided adequate guidelines and has not unconstitutionally transferred federal authority to the OTC.

V. CONCLUSION

Under the ultimate concern of the separation of powers doctrine, the OTC should be valid because it does not usurp the function of the EPA or unduly concentrate power in Congress. The OTC does not offend the Constitution’s separation and balance of powers among the branches under either the Appointments Clause or the nondelegation doctrine. As an innovative creation springing from both state and federal power, the OTC allows for regional state cooperation without impermissibly extending the arm of Congress outside its constitutionally confined role. In the end, the OTC may have the effect of expanding the power of the states, but it does not impermissibly aggrandize congressional power.

That the OTC and the EPA’s implementation of the OTC’s LEV standards are valid comports not only with constitutional law, but also

252 Mistretta, 488 U.S. at 372–73.
253 42 U.S.C. § 7506a(b)(2).
254 See Mistretta, 488 U.S. at 372.
256 See 42 U.S.C. §§ 7511c(c)(2),(4).
with common sense. It does not make sense for our country to address pollution problems only on a local, county-by-county, or state-by-state level. Ozone air pollution does not obey state boundaries. Combating ozone air pollution requires regional, potentially even national, cooperation. Devising solutions to ozone pollution problems on individual state bases fails to combat the problems caused by interstate transport of ozone and forces downwind states to shoulder the burden for their upwind neighbors. As the situation in the Northeast has proven, states have been unable to work together to enact significant reciprocal air pollution abatement plans throughout the region. Congress needed to aid the process. The OTC-recommended LEV standards are an important part of northeastern states’ plans to meet the requirements of the Clean Air Act.

Admittedly, Congress could have mandated the LEV program on its own. The difficulty in establishing such standards, however, derives from two factors. First, the political process, with powerful and wealthy interest groups such as the automobile industry, can stall legislation or prevent laws that target automobiles as sources of air pollution. Second, Congress does not possess the technical knowledge or resources to gather and assess information about ozone air pollution. It therefore makes sense for Congress to remove the issue to a body with more expertise. With its state and federal air pollution officials, the OTC is much better equipped to gather and assess interstate air pollution in a timely fashion. Furthermore, to place the determination of regional control measures in the hands of a regional body comprised of state representatives preserves the basic structure of the Clean Air Act. The EPA could have imposed the LEV standards unilaterally, without the OTC, but state participation on the OTC allows states to have a voice in meeting national goals.