

Constitutional Considerations in Member Involvement in Executive Agency Actions

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Members of Congress and their staffs interact with executive branch agencies for a number of purposes, including carrying out Congress's functions of [overseeing](#), [investigating](#), and [influencing](#) the implementation of public policy by the executive branch and handling requests from [constituents](#) and other persons for [assistance](#). Members' interactions with agencies on behalf of constituents may be limited by [statutory constraints](#) and ethical considerations. Both the [House](#) and the [Senate](#) provide guidance to Members on these potential limitations. Apart from those considerations, however, constitutional principles also shape courts' views of Members' interaction with executive agencies. In some circumstances, a Member's interaction with or attempt to influence an agency may not be otherwise prohibited but may nonetheless provide grounds on which to challenge that agency's action or decision in federal court. Though the Supreme Court has not addressed this issue, lower federal courts have addressed situations involving Member attempts to influence the outcome of an agency action through various means—from letters, in-person discussion, and hearings regarding pending agency decisions to statements threatening to base certain funding decisions on the outcome of a decision that is pending with the agency. While affirming Congress's legitimate oversight role, these judicial opinions suggest an outer bound on Member involvement in agency actions beyond which such intervention may render an agency action illegitimate.

This Legal Sidebar begins with a brief discussion of two constitutional principles relevant to interaction between Members and executive branch agencies: the separation of powers and the guarantee of due process. It then reviews the ways in which courts faced with these questions have categorized different agency actions. It concludes with a discussion of selected federal judicial decisions relevant to Member involvement in different types of agency actions. For a discussion of principles governing communications during the agency rulemaking process, see CRS In Focus IF12368, *Communications Between Congress and Federal Agencies During the Rulemaking Process*, by Maeve P. Carey and Todd Garvey.

Relevant Constitutional Principles

Two constitutional principles are important for understanding the case law on Member involvement in executive agency actions. First, the [separation of powers](#) is an element of the governmental framework

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established under the Constitution. It arises from the [Legislative](#), [Executive](#), and [Judicial](#) Vesting Clauses, which allocate legislative, executive, and judicial powers to [separate branches](#) of government. Put simply, the legislative branch makes law, the executive branch carries out the law established by the legislative branch, and the judicial branch decides how the law applies in particular cases and controversies. The three branches, however, do not operate in isolation. The executive branch also informs and advises the legislative, the legislative also oversees the executive, and the judicial decides cases and controversies in which plaintiffs allege the executive or legislative branch acted contrary to the law.

Second, the right to [due process](#), guaranteed by the [Fifth Amendment](#), protects citizens against arbitrary governmental actions. Among other things, due process guarantees certain [procedural protections](#). Procedural due process, as described in the Supreme Court's decision in [Goldberg v. Kelly](#), mandates that individuals facing deprivation of life, liberty, or property by the government be accorded notice and a meaningful opportunity to be heard. In [Mathews v. Eldridge](#), the Court provided further guidance on determining the procedural opportunities the government must provide in a particular situation, introducing a flexible balancing test that considers the government's interest, the individual's interest, and the risk of erroneous deprivation. Federal executive branch agency actions, including those in which a Member might intervene, must follow procedures that satisfy this constitutional requirement.

Types of Agency Actions

When considering allegedly improper Member involvement in agency actions, courts typically apply different analytical frameworks depending on the nature of the agency action. The [Administrative Procedure Act](#) (APA) defines two primary types of agency action: (1) adjudications (also called quasi-judicial actions) and (2) rulemakings.

[Adjudicatory](#) or quasi-judicial actions typically involve agencies resolving individual cases, applications, or disputes and may function in a manner analogous to the judicial process. This kind of agency action typically affects a single entity or group of entities rather than the public generally. For example, an agency decision to grant a license or to revoke a license for failure to abide by its terms would be an adjudicatory action. In these actions, affected parties may be afforded a hearing, the ability to submit evidence, and the right to be included on all communications with the decisionmaker—that is, a [ban on *ex parte* communications](#). Courts' concerns for due process considerations are at their highest in [adjudicatory actions](#).

Rulemakings are quasi-legislative actions that establish regulations with future effect having the force of law. In contrast to adjudications, these actions most often result in regulations that apply equally to all. Rules required to be made "[on the record](#)," often called formal rulemakings, involve [hearing procedures](#) that share much in common with adjudicatory procedures. For rules not required to be made "on the record," often called informal rulemakings, the APA generally [requires](#) an agency to publish notice of its proposed rule in the *Federal Register*, invite and consider comments from the public, and publish its final rule in the *Federal Register*.

Courts reviewing congressional involvement in agency actions have [sometimes](#) treated adjudications and rulemakings not as distinct categories but rather as two ends of a spectrum on which a given agency action may fall. Outside of decisions that are clearly adjudicatory, courts have primarily expressed [concerns](#) appearing to arise from the constitutional separation of powers rather than due process concerns.

Adjudicatory and Mixed Actions

Pillsbury Co. v. FTC

Courts have expressed concern about Member intervention in the context of adjudicatory actions, often citing language stating that the mere appearance of impropriety is sufficient to invalidate an agency proceeding on due process grounds. One of the earliest decisions to consider such an instance was the U.S. Court of Appeals for the Fifth Circuit's 1966 ruling in *Pillsbury Co. v. FTC*. In that case, the Federal Trade Commission (FTC) found that the defendant's acquisition of certain assets violated the [Clayton Antitrust Act](#) and ordered it to divest those assets. In its petition to the Fifth Circuit for review, the defendant [alleged](#) that two congressional subcommittees had impermissibly interfered with the FTC's process. Specifically, while the FTC proceedings were ongoing, each subcommittee held hearings and questioned the chairman of the FTC, members of the chairman's staff, and the general counsel of the FTC. Notably, that [general counsel](#) went on to become FTC chairman and ultimately wrote the opinion requiring divestment. The defendant did not allege any form of interference by Congress outside the context of these subcommittee hearings.

The Fifth Circuit invalidated the FTC's order, holding that "[common justice](#)" required it to do so where Congress pressured the FTC, acting as a quasi-judicial tribunal, to arrive at the conclusion that it ultimately reached. Focusing on the Senate subcommittee, the Fifth Circuit cited numerous instances from the hearings in which Members appeared to "[importune](#)" FTC witnesses to explain the FTC's reasoning in the ongoing matter and also criticized the FTC for reaching a "[wrong](#)" decision. The court noted that it was bound to invalidate the FTC's order even if Congress intended its action to be "innocent." The court rested its decision on due process concerns, holding that the right to the appearance of impartiality must be maintained where an agency is exercising quasi-judicial powers.

Koniag v. Kleppe

Nine years after *Pillsbury*, in *Koniag v. Kleppe*, the U.S. District Court for the District of Columbia set aside decisions of the Secretary of the Interior deciding eligibility for benefits under the [Alaska Native Claims Settlement Act](#) (ANCSA). In this case, a congressional subcommittee held [hearings](#) on the administration of ANCSA while proceedings before the Secretary to determine eligibility for benefits were pending. The district court characterized these subcommittee hearings as "[prob\[ing\] deeply into details of contested cases under consideration](#)." The district court called the hearings "[an impermissible congressional interference with the administrative process](#)" and a "[disturbing conflict between the Congress and the Executive Branch](#)." Quoting *Pillsbury*, the district court also highlighted due process concerns, holding that the hearings constituted a "[powerful external influence](#)" that stripped plaintiffs of the "[right to the appearance of impartiality](#)" in the Secretary's decision.

On appeal, the U.S. Court of Appeals for the [D.C. Circuit](#) disagreed with the district court in part, holding that the subcommittee hearings did not require invalidation of the Secretary's decision because none of the witnesses before the subcommittee had actual [decisionmaking power](#). However, citing *Pillsbury*, the [D.C. Circuit](#) held that a letter the chairman of the subcommittee sent prior to the Secretary's determination did "[compromise\[\] the appearance of the Secretary's impartiality](#)." That letter [argued](#) that certain statutory provisions of ANCSA were not correctly implemented by regulation and urged the Secretary to delay his decision pending a review by the comptroller general. According to the [D.C. Circuit](#), the letter required the court to invalidate the Secretary's decision. Observing that a new Secretary had taken office under a new presidential Administration and that the letter did not render the new Secretary "[incapable of . . . fair and dispassionate treatment](#)," the [D.C. Circuit](#) remanded the matter to the Secretary for further proceedings.

D.C. Federation of Civic Associations v. Volpe

Another foundational congressional intervention case, *D.C. Federation of Civic Associations v. Volpe*, involved an agency decision the court could not categorize as either adjudication or rulemaking. In that case, plaintiffs challenged the Secretary of Transportation's decision to build a bridge connecting Virginia and the District of Columbia as part of the interstate highway system. Opponents of the bridge alleged, among other things, that threats by the chairman of the House Appropriations subcommittee to deny funding for D.C.'s subway system unless the bridge was built "tainted" the Secretary's decision.

After deciding on other grounds that the Secretary's decision was invalid, the D.C. Circuit went on to discuss the question of congressional interference. The court rejected the lower court's assessment that because the Secretary was not acting "[in a judicial or quasi-judicial capacity](#)," the chairman's threats could render the Secretary's decision invalid only if the threats were the sole basis for that decision. While the court agreed that the Secretary's decision was not judicial or quasi-judicial, the court observed that the decision was also not "[purely legislative](#)," because Congress had defined factors the Secretary was required to consider when exercising his discretion.

The court acknowledged that with respect to judicial or quasi-judicial decisions, an appearance of bias or pressure could serve as a basis to invalidate an agency action even without requiring a showing of actual influence. Because the Secretary of Transportation's decision was not judicial or quasi-judicial, however, the court found that reasoning—which mirrored the court's analysis in *Pillsbury*—[irrelevant](#).

The court also explained that while pressures from Congress might not invalidate an agency's action that was "purely legislative," an action that did not cleanly fall within either category must be limited to the considerations with which Congress bound the decisionmaker's authority. Reliance on factors outside these permissible considerations, such as the threat to funding at issue in this case, would be sufficient to invalidate such an agency decision, [even if the decision were not solely based on those additional factors](#). The court therefore directed the Secretary on remand to "[make new determinations based strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes](#)."

The court's reasoning here rests on a concern for safeguarding Congress's lawmaking authority. The court recognized that Congress, as a whole and through the legislative process, had restricted the Secretary's discretion by requiring that the Secretary exercise that discretion based on certain factors. Threats to unrelated funding by an individual Member were not among those factors identified by Congress and represented a concern that "[Congress could not have intended to make relevant](#)." Thus, Member intervention in an agency decision, in the form of pressure unrelated to the factors Congress intended to make relevant to that decision, may render that decision vulnerable to legal challenge if the Member intervention forms, in part or whole, the basis for the agency's decision.

Later Cases

Courts have continued to cite *Pillsbury* and *D.C. Federation* favorably but have repeatedly declined to overturn agency decisions based on claims of congressional interference. These cases have generally distinguished *Pillsbury* and *Koniag* as cases in which Congress intruded on the process of an ultimate decisionmaker, and they have generally relied on some version of *D.C. Federation*'s "permissible considerations" standard to uphold agency actions.

In the 1983 case *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, for example, the D.C. Circuit declined to set aside an agency decision in a debarment proceeding where a Senator repeatedly communicated with the agency about the proceeding. While acknowledging the importance of the appearance of impartiality, the court held that legislative "[\[p\]ressure must be evaluated in the context of a concrete decision process](#)." The court distinguished *Pillsbury* on the ground that, unlike in *Pillsbury*, the

legislator in *Kiewit* never communicated directly with the decisionmaker in the agency proceeding. Discussing *D.C. Federation*, the court characterized the relevant test in cases that are neither quasi-judicial nor legislative as “whether the congressional action actually affected the decision.” Quoting *D.C. Federation*, the court held that in the case of both adjudicative actions and mixed actions, “the test is whether ‘extraneous factors intruded into the calculus of consideration’ of the individual decisionmaker.”

In 1994, the D.C. Circuit reached a similar conclusion in *ATX, Inc. v. U.S. Department of Transportation*, a case involving an application for a license to operate an airline. In that case, the alleged congressional interference included letters to the Secretary of Transportation and the appearance of a Member as a witness at a hearing on the application. Citing *Volpe* and *Pillsbury*, the court acknowledged that administrative adjudication based congressional intervention violates a party’s due process rights. The court found, however, that—given the existence of an extensive administrative record that both “spoke for itself” and did not reference the congressional letters or testimony—there was no evidence that congressional intervention “actually affected the outcome on the merits,” and the court declined to set aside the agency decision.

Notice and Comment Rulemakings

Courts considering congressional intervention in notice and comment rulemakings—that is, decisions that fall within the “legislative” category in the dichotomy established in *D.C. Federation*—have also largely followed *D.C. Federation*’s reasoning. For example, in *Sierra Club v. Costle*, the D.C. Circuit decided a case concerning, among other things, alleged *ex parte* communications between the U.S. Environmental Protection Agency (EPA) and the majority leader of the Senate after the close of the comment period for a proposed rule. Plaintiffs alleged that this conduct improperly influenced EPA to abandon its support for certain emissions standards. The court read *D.C. Federation* to allow for overturning “an administrative rulemaking” only where congressional pressure was designed to force the decisionmaker to consider facts not relevant under the statute at issue and where the decisionmaker’s determination was in fact affected by those “extraneous considerations.” Concluding that the majority leader’s *ex parte* communications here were instead limited to the “entirely proper” role of representing his constituents within the bounds of statute and applicable procedure, the court declined to set aside EPA’s determination.

Considerations for Congress

When determining whether and how to engage with an executive agency, Members and congressional committees may take into account the constitutional concerns that inform courts reviewing Member intervention in agency actions. These concerns protect both individuals’ rights to due process and Congress’s legislative authority. Courts have, however, only rarely invalidated agency actions because of Member actions. Member intervention in quasi-judicial agency actions typically receives closer judicial scrutiny than Member intervention in rulemakings. A Member action consisting of an opinion on an agency matter that is rooted in the statutory criteria underlying the agency action and not directed to the specific agency official or employee responsible for the agency’s decision appears to present the least risk of invalidation. Alternatively, a Member action that attempts to influence an agency decisionmaker through means unrelated to the relevant underlying statutory criteria appears to present a much greater risk of judicial invalidation.

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