



# Unconstitutionally Appointed:

## Introducing Accountability to Marine Fisheries Management

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Fishing has always been a part of Karen Bell's life. She was born into a multigenerational fishing family on the Gulf of Mexico, and after graduating from college in 1986, she joined her grandfather's commercial fishing, processing, and distribution company.<sup>1</sup>

Part of Bell's business includes fishing for greater amberjack, but a federal regulation threatens her ability to do that. In 2022, the Gulf of Mexico Fishery Management Council reduced the number of greater amberjack that can be caught each year by nearly 80 percent. The rule, known as Amendment 54, makes it even more difficult to earn a living in an already heavily regulated industry. What's more, the federal government immediately ended that year's greater amberjack commercial fishing season when Amendment 54 was implemented. The new rule's catch limit had already been met.<sup>2</sup>

Fishing in federal waters is governed by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-

Stevens Act), which is meant to ensure fisheries are maximally and sustainably utilized.<sup>3</sup> When Congress passed the act, it created eight councils responsible for governing fisheries. However, the councils have a major flaw: Their voting members are not constitutionally appointed. In other words, the regulators were never lawfully given the power to make federal policy under the Constitution and are unaccountable to the people. Nevertheless, council members are responsible for creating major regulations that have serious economic effects on fishing communities across the country. On these grounds, Pacific Legal Foundation (PLF) is representing Bell in *Bell v. Raimondo* as she challenges Amendment 54.<sup>4</sup>

This research in brief explores how marine fisheries are managed in the United States and how the Magnuson-Stevens Act's eight regional councils violate the Constitution's Appointments Clause, the separation of powers, and democratic accountability.

## Managing Marine Fisheries in the United States

The Magnuson-Stevens Act was passed in 1976 to "promote domestic commercial and recreational fishing under sound conservation and management principles," such that "optimum yield" may be achieved from each fishery on a long-term, sustainable basis.<sup>5</sup> The act requires that rules and regulations pursuant to these ends minimize the economic downsides for those affected.<sup>6</sup>

The act established eight independent agencies called *regional fishery management councils*. Each of the eight management councils—New England, Mid-Atlantic, South Atlantic, Caribbean, Gulf of Mexico, Pacific, North Pacific, and Western Pacific—consists of member states and has authority over the commercial and recreational fisheries in its respective region.<sup>7</sup>

Each council exercises its authority by preparing fishery management plans, annual catch limits, and any amendments or rules necessary to implement its plans.<sup>8</sup> The councils can also issue emergency regulations and interim measures, as well as veto certain actions by the secretary of commerce. For example, councils can block the secretary from delegating fishery management to a state, repeal a fishery management plan, or restrict who can fish in each fishery.<sup>9</sup>

The councils' authority is significant: United States marine fisheries are the largest collectively in the world.<sup>10</sup> Together, they yielded 8.3 billion pounds of fish in 2022,<sup>11</sup> or 25 pounds of fish for every American, making the United States the 10th-largest supplier of seafood exports in the world.<sup>12</sup> US commercial and recreational fisheries made \$321 billion in sales and supported 2.3 million jobs in 2022, while recreational fishermen took over 200 million saltwater fishing trips.<sup>13</sup>

## Unsupervised Rulemaking in US Fisheries

Under the Magnuson-Stevens Act, the regional councils are the main regulatory bodies governing the nation's marine fisheries. In fact, the secretary of commerce's role in the rulemaking process is limited to reviewing proposed fishery management plans, plan amendments, and regulations submitted by the councils, then approving, disapproving, or partially approving them.<sup>14</sup> The secretary can disapprove or partially approve a council's proposed rule only if it is unlawful, and the council can then submit a revised rule for reconsideration.<sup>15</sup> The secretary, however, cannot disapprove or partially approve a council's proposed rule for policy-related reasons.

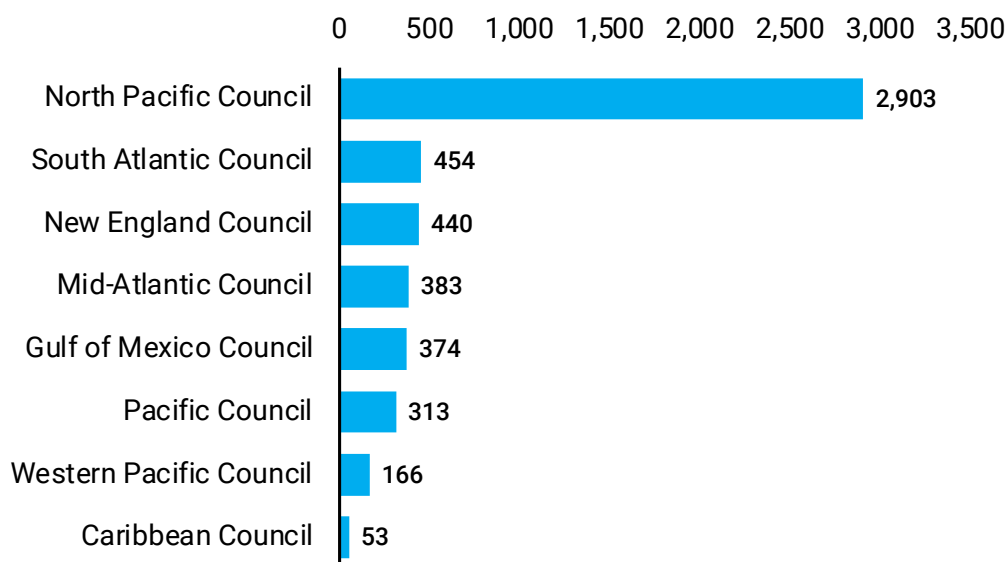
Within this structure, the regional council members craft the rules and regulations that govern the nation's marine fishery industry. An analysis of Federal Register documents shows that, as of September 2024, policies created by the eight councils have resulted in an estimated 5,086 rules published by the Department of Commerce since the Magnuson-Stevens Act first went into effect. The councils that created the most rules from April 1976 to September 2024 are the North Pacific Council

(2,903), the South Atlantic Council (454), and the New England Council (440).<sup>16</sup> Figure 1 breaks down each council's estimated total number of published rules.

Seventy-six of these rules have even been deemed "significant regulatory action[s]," defined by Executive Order 12866 as rules expected to affect the economy by \$100 million or more annually, interfere with other agencies' actions, alter the budgetary impact of entitlements or grants, or introduce legal issues.<sup>17</sup> One example is the Gulf of Mexico Council's Amendment 11 to the shrimp fishery management plan in 2002. This rule required the operators of all vessels harvesting shrimp in the Gulf to obtain a commercial vessel permit for shrimp, prohibited the use of traps to harvest royal red shrimp, and prohibited transferring royal red shrimp at sea.<sup>18</sup>

Consistent with the nominal role of reviewing rules and regulations for legal inconsistencies only, the secretary of commerce has rarely rejected or partially approved rules submitted by the regional councils. According to the response to a Freedom of Information Act request by PLF, the secretary of com-

Figure 1. Total Number of Published Rules by Council



Source: *Federal Register*, Document Search, <https://www.federalregister.gov/documents/search#>.

merce has rejected or partially approved only six proposed rules submitted by the two Greater Atlantic councils (New England and Mid-Atlantic). The secretary has never rejected or partially approved a proposed rule from the North Pacific or Western Pacific councils.<sup>19</sup> PLF did not receive a response regarding the other four councils.

## Unconstitutional Appointments to the Councils

The US Constitution is clear about how such powerful federal regulators should be appointed to their jobs. The Appointments Clause states that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States” whose appointments are not established in the Constitution.<sup>20</sup> “Officers of the United States” are those who wield “significant authority,” according to the US Supreme Court in *Buckley v. Valeo* (1976).<sup>21</sup>

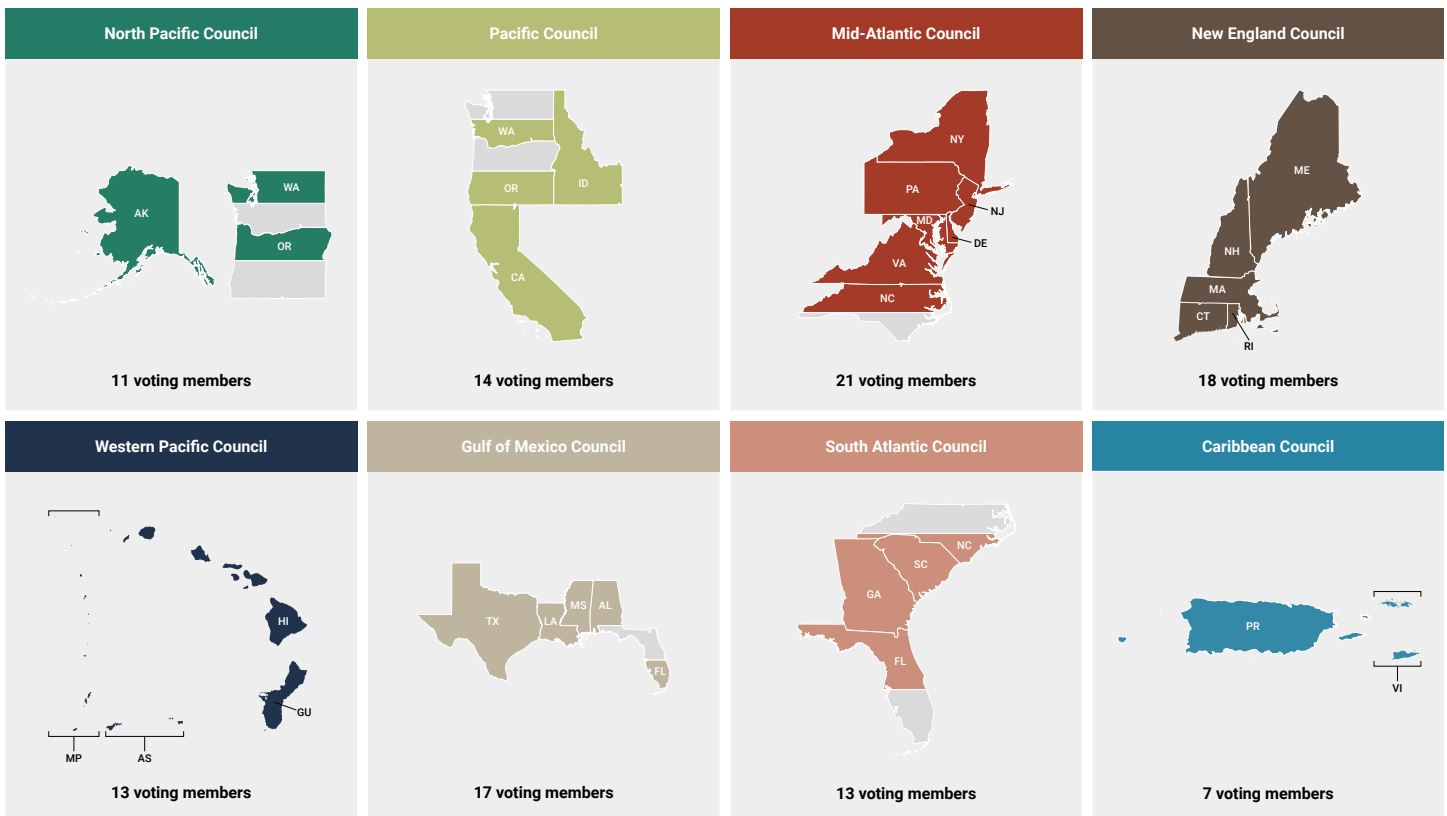
With significant authority over the nation’s fisheries and limited direction and supervision, these council members are

The secretary’s infrequent disapproval or partial approval of council rules is consistent with the lack of policymaking or supervision of the councils by the secretary. Instead, it is the regional councils who wield vast authority to make federal fishery policy through thousands of rules with little meaningful review by a department head.

principal officers of the United States and should be appointed by the president with Senate confirmation. But they are not.

A council’s voting members include both designated bureaucrats and appointees. The bureaucrats are each member state’s top marine fishery management official, as designated by their respective governors, and a federal bureaucrat from the Department of Commerce. The appointees, who constitute the majority of a council, are nominated by member states’ governors and appointed by the secretary of commerce for three-year terms, with at least one from each member state or territory on the council.<sup>22</sup>

**Figure 2. Eight Regional Councils and Their Voting Members**



Note: Florida, North Carolina, Oregon, and Washington each have voting members on multiple councils. Florida has members on the South Atlantic and Gulf of Mexico councils, North Carolina has members on the Mid-Atlantic and South Atlantic councils, and Oregon and Washington both have members on the Pacific and North Pacific councils. The Pacific Council also includes one member from a Native American tribe with federally recognized fishing rights from California, Idaho, Oregon, or Washington, selected from a list of at least three nominees submitted by the tribal governments.

Source: 16 U.S.C. § 1852(a)(1); 16 U.S.C. § 1852(b)(1).

Figure 2 shows the composition of each council, including its member states and territories and its voting members.

Every year, governors submit a list of at least three nominees to the secretary of commerce for their state's vacancies on a council. The secretary can reject a list only by "determin[ing] that any individual is not qualified."<sup>23</sup> In that case, the

## Council Appointments in Practice

The installment of council members does not conform with the Constitution's requirements for principal officers, who must be presidentially appointed and Senate confirmed. Even if council members were considered inferior officers, their appointments still would not pass muster.

The Appointments Clause allows Congress to vest the appointment of inferior officers—those supervised and directed by a Senate-confirmed official—"in the President alone, in the Courts of Law, or in the Heads of Departments."<sup>25</sup> On the regional fishery councils, the state bureaucrats are designated for their seats by state governors, while the Commerce Department bureaucrat is hired through normal agency staffing processes, not appointed by the president, a court, or the secretary of commerce. In practice, the secretary does not control the remaining council members' appointments.

The appointment power includes both the power to nominate and the power to confirm, just like when the president nominates a judge and the Senate confirms or rejects the nominee. The Magnuson-Stevens Act puts state governors at the center of this process by giving them sole nominating authority

nominating governor then submits either a revised list of qualified nominees or the original list explaining why the nominee in question is, in fact, qualified.

Once appointed, the secretary cannot remove council members at will, only for cause.<sup>24</sup> In addition, the secretary cannot remove the state bureaucrats from the councils at all.

over the majority of council members. The secretary of commerce cannot choose anyone she wishes to fill council vacancies; the secretary's choice must come from the governors' slates of qualified nominees.<sup>26</sup>

How does this process play out? Of the 287 slates of nominees submitted by governors to the secretary from 2015 to 2024, only eight were revised or resubmitted. In other words, the secretary was able to refuse a slate of nominees only 2.8 percent of the time.<sup>27</sup>

Additionally, governors usually note which nominee they prefer for council membership. From 2015 to 2024, governors indicated their top choice for the job 213 times. In only 38 of those cases, or 17.8 percent, the secretary did not select the governor's top choice.<sup>28</sup>

The secretary's seldom refusal of governors' slates of nominees and top choices is indicative of the secretary's lack of control over the appointments process. Rather, in practice, state governors are in the driver's seat. Under the Constitution, however, they should have no power over the appointment of council members at all.

## Implications for Democratic Accountability

Neither appointed nor removable as the Constitution requires, the regional councils' voting members illegitimately wield significant power to make federal policy. Each regional council is controlled by a handful of governors through their power to nominate members, and governors are not accountable to people outside of their states. But federal policies are meant to serve the national interest and require accountability to the entire nation.

## The People Impacted

One can infer the number of commercial marine fishery businesses that operate across the United States from operator permits, which vessels fishing federally managed species must obtain. As of September 2024, there were 5,910 operator permits currently active just in the Greater Atlantic region.<sup>29</sup> In the Pacific Islands region (American Samoa, Guam, Hawaii, and the Northern Mariana Islands), there were 186 current permit holders, all of which were small entities or businesses.<sup>30</sup>

Under the Constitution, that means accountability through the president as head of the executive branch and as a nationally elected official. The Appointments Clause requires this democratic accountability in the rulemaking process. But the mode through which regulators are supposed to be held accountable is nonexistent in the Magnuson-Stevens Act because council members are not presidentially appointed.

These permit holders rely on fishing to support themselves and their families, and a council's rules can devastate them. Take Gary Burke, who ran a small family fishing business that provided 30 to 40 percent of his income. Burke was one of about 20 active swordfish permit holders in California. The Pacific Council created a hard cap rule that would end an entire fishing season for every business whenever unwanted bycatch—catching species other than the intended species—reached a certain amount.<sup>31</sup>

If implemented, the council's rule threatened to destroy Burke's and many others' family-owned businesses. With PLF representation, Burke and others challenged the regulation. A federal judge ruled in their favor in 2021 in *Burke v. Raimondo*, finding that the Pacific Council's rule violated the Magnuson-Stevens Act because it did not minimize the negative economic impacts on relevant fishery businesses.<sup>32</sup>

Similarly, Wes Humbyrd had been a commercial salmon fisherman in Alaska's Cook Inlet for over 50 years. The inlet is managed in part by the North Pacific Council, which issued Amendment 14 to end commercial salmon fishing in the Cook Inlet's federal waters. The council's action would have obliterated Humbyrd's and others' salmon fishery businesses in Alaska. He challenged the rule in *Humbyrd v. Raimondo* with

PLF representing him. A parallel lawsuit brought by the United Cook Inlet Drift Association succeeded in keeping the inlet open for Humbyrd and others.<sup>33</sup>

These types of rules can ruin businesses in the fishery industry, which are often small and family owned. Rules and regulations dictating what fish can be caught, how many, and by whom also affect the supply and price of seafood at grocery stores and restaurants, directly impacting consumers. Plus, more than 4,600 coastal communities rely on commercial and recreational fishing.<sup>34</sup> Rules adopted by unelected bureaucrats affect them all. But those impacted have recourse only through litigation, not democratic accountability, because the regulators who craft and propose those rules are unconstitutionally appointed.

## The Solution

As of 2024, only one federal court has ruled that the regional fishery management councils violate the Appointments Clause. That was the US Court of Appeals for the Third Circuit in *Lofstad v. Raimondo*, a case won by PLF.<sup>35</sup>

Raymond Lofstad had been fishing off Long Island for more than 45 years, while Gus Lovgren had worked out of New Jersey for over two decades. In 2021, the Mid-Atlantic Council adopted Amendment 22, slashing the number of fish that commercial fishermen like Lofstad and Lovgren were allowed to catch each year and favoring recreational fishermen. Lofstad and Lovgren stood to lose tens of thousands of dollars in annual revenue, so they challenged the rule on the grounds that the council members' appointments were unconstitutional.<sup>36</sup>

The Third Circuit agreed that many powers exercised by the regional councils violate the Constitution.<sup>37</sup> With several other cases on deck, more federal courts will rule on this issue. Given councils' vast authority to regulate a large policy area with limited supervision, it is up to the courts and Congress to

determine that council members are principal officers and should be appointed and removable as the Constitution's Appointments Clause and the separation of powers require.

By ruling that the appointment of council members under the Magnuson-Stevens Act is unconstitutional and by vacating the rules challenged in the relevant cases, the courts would ensure that fishermen across the United States are no longer subject to rules promulgated by unconstitutionally appointed bureaucrats. Similarly, by amending the Magnuson-Stevens Act and vesting the appointment of council members in the president with Senate confirmation, Congress would reestablish democratic accountability in fisheries regulation.

The regional councils need not be discarded: There is immense value in having management councils composed of members with local knowledge of the regions they govern. But appointing those members consistent with the Constitution and the separation of powers will uphold the rule of law in how the United States governs its fisheries.

# Notes

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3. 16 U.S.C. § 1801(b).
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5. 16 U.S.C. § 1801(b).
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7. 16 U.S.C. § 1852(a)(1).
8. 16 U.S.C. § 1852(h); 16 U.S.C. § 1853(c).
9. 16 U.S.C. § 1855(c); 16 U.S.C. § 1854(c)(3); 16 U.S.C. § 1856(a)(3)(B); 16 U.S.C. § 1854(h).
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20. U.S. Const. art II, § 2.
21. Buckley v. Valeo, 424 U.S. 126 (1976).
22. 16 U.S.C. §§ 1852(b)(1)–(5).
23. 16 U.S.C. § 1852(b)(2)(C).
24. 16 U.S.C. § 1852(b)(6).
25. U.S. Const. art II, § 2.
26. 16 U.S.C. § 1852(b)(2)(C).
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