

## **Political Control of the Bureaucracy**

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A ubiquitous feature of modern statutory law is delegation. Legislation typically delegates policy implementation to a bureaucracy. This delegation presents a dilemma. The specialized knowledge of an expert agency may be necessary to unravel the technical uncertainties surrounding the impact of alternative policy actions; however, the policy preferences of bureaucrats are often different from those of political leaders, and, if they have unique expertise, the former may use their superior knowledge to advantage themselves rather than to carry out the latter's policy wishes.

This essay addresses the causes of the delegation dilemma and legislative responses to them. Our survey focuses on the use of administrative structure and procedure to mitigate the deleterious consequences of delegation.

### **The Delegation Dilemma**

Delegating decision-making responsibilities presents a dilemma in the sense that the legislature must sacrifice some control to capture the benefits of specialization. In all institutional settings, leaders have limited time and information, and so cannot take informed actions to solve every problem and take advantage of every opportunity that confronts them. To expand their opportunities and accumulate information, leaders can employ others to work for them. The danger is that these underlings will perform these functions unfaithfully. First, underlings may "shirk" by failing to put forth sufficient effort to produce outcomes that serve the leader's best interests. Second, underlings may pursue their own personal ends rather than the outcomes sought by the leader.

In the context of representative democracy, the leader is the collectivity of elected officials who have formal policy-making responsibility. The entities to which the leadership delegates some authority are the bureaucracy, the courts, and even private parties. We argue that the distribution of institutional powers and asymmetries in information between the leaders and their underlings determine the ability of leaders to control policy making.

Three institutional elements profoundly affect the distribution of institutional powers (Romer and Rosenthal 1978): agenda control, veto power, and the reversion policy. Agenda control is the power to decide which policies will be considered (including the status quo) and in what order. Veto power refers to the power to reject policy proposals unilaterally. The reversion is the policy that occurs in the absence of a policy decision. We discuss these in turn.

We can distinguish two forms of agenda control. The first, proposal control, occurs when the agenda setter proposes a policy that becomes law only if the legislature accepts the proposal in a vote. The second form is reversion control, whereby the agenda setter proposes a policy that becomes official unless the legislature specifically vetoes it. For example, when a regulatory agency issues a rule, the rule becomes the reversion, and the legislative process determines whether that policy will be changed. Agenda control may also be closed, in which case no amendments may be made, or it may be open, in which case some amendments may be offered. The former occurs in such situations as the ratification of a treaty, or a nomination to an appointive post. It may also occur in such highly political cases as the recent US base closings, where Congress bound itself to vote up or down on base closing proposals to prevent free rider outcomes. Both types of agenda control grant the bureaucracy some advantages. Reversion control, however, can

lead effectively to the abdication of policy making authority by the legislature to the bureaucracy.

The reversionary policy also influences policy making. If the reversionary policy is close to the legislature's ideal policy, then the agency's range of discretion is small (Romer and Rosenthal 1978). For the legislature to accept the agency's proposal, they must prefer it to the reversion. The closer the reversion is to the legislature's ideal policy, the closer the agency's proposal must be to the legislature's ideal policy. By contrast, if the reversion is far from the legislature's ideal policy, then the agency has an incentive to propose a policy that is similarly far from the legislature's ideal policy (Miller 1977).

Finally veto power influences policy outcomes. If the political leaders' veto power is shared, the power inhering in the agency's agenda control is enhanced. For example, consider delegation of broad rule-making authority to an administrative agency that can be overturned only by passing new legislation that vacates the agency's rule. This case can be regarded as shared veto power. To analyze this case, consider a shared veto that is enjoyed by three entities (e.g., three partners in a bare majority coalition government, or, in the United States, the president and majorities in the House and the Senate). In this case, all three must reject a proposal to exercise their collective veto. In responding to a proposal, the parties may be unable to agree about the best response to the rule because no policy change is preferred by all three to the agency's decision (McNollgast 1989). In this case, delegation of legislative authority to the bureaucracy gives the agency great discretion, for the only limit on its ability to adopt a policy is that it must produce an outcome that one of the three parties would prefer to the reversion point (Hammond and Miller 1990). By contrast, if any one of the three parties can veto the rule (a one-house

legislative veto is an example), the agency's discretion is more limited, because each party must prefer the agency's policy to the reversion point.

We turn now to the problem of information asymmetries. It is frequently reasonable to assume that bureaucrats know more about the effects of policies than do legislators. Many scholars have concluded that this information asymmetry gives the bureaucracy a strategic advantage in dealing with the legislature (Weber 1968).

Despite these problems, political leaders find it profitable to delegate. In what follows, we discuss the ability of the legislature to use institutional structure to mitigate the dilemma of delegation.

### **Bureaucratic Structure, Administrative Procedure, and the Political Control of Policy Making**

In creating, funding, and making appointments to bureaucratic agencies, a rational legislature would anticipate the problems discussed above. Thus, when delegating, legislators must be able to take steps to mitigate these problems. This section examines some of the ways that political leaders can structure the agency's decision-making process so that it is more responsive to their preferences than would be the case if the problems of delegation were unabated.

#### ***Structure and the Problem of Bureaucratic Agenda Control***

One important countermeasure that the legislature may take to mitigate the power of bureaucratic agenda control is referred to as institutional checks. Operationally, institutional checks require that when authority has been delegated to the bureaucracy

there be at least one other actor with the authority to veto or block the actions of the bureaucracy.

The US Congress, for many years, relied on a large variety of *ex post* legislative vetoes. These legislative vetoes allowed the House and Senate, and in some instances either one alone, to veto bureaucratic policy proposals before they were implemented (Fisher 1981).

Legislatures also possess numerous other *ex post* mechanisms with which to influence bureaucratic behaviour. These mechanisms add up to what Weingast (1984) refers to as "the big club behind the door" (see also Fiorina 1977). In making proposals and engaging in rule making, bureaucratic agents must anticipate the reaction of political leaders and accommodate their demands and interests. In discussing the Congress, Weingast (1984: 156) notes, "Ex post sanctions ... create ex ante incentives for bureaucrats to serve congressmen." That is, Congress' big stick engenders the well-known "law of anticipated reactions." Bureaucrats are aware of the limits to acceptable behaviour and know that they run the risk of having their agency's programmes curtailed or careers ended if they push those limits too far.

Checks on agency agenda power can also be created so that they affect the agency's choice, *ex ante*, that is, before it makes a proposal. An example is to assign agenda control to multiple agencies. In this case, no single agency has the ability to establish its own agenda in a particular policy arena. Moreover, agencies with overlapping jurisdictions will be direct competitors for budgets and statutory authority, which further increases their incentive to please political leaders.

Overlapping jurisdictional authority is common in parliamentary systems. For example, in Japan the authority to set electricity prices is vested in a working group composed of representatives from several ministries (Ramseyer and Rosenbluth 1993: 46-58; on German administrative procedure, see Rose-Ackerman 1994; in general, see Weaver and Rockman 1993). The US Congress has also pursued this strategy. In regulating workplace safety, the National Institute for Occupational Safety and Health (NIOSH) in the Department of Commerce must first identify a health or safety hazard. Only then can the agency charged with regulating workplace safety, the Occupational Safety and Health Administration (OSHA) in the Department of Labor, promulgate a rule regulating the identified problem.

Another example of a similar arrangement is to enfranchise constituencies in the administrative process (McNollgast, 1987, 1989). For reasons elaborated in Noll and Owen (1983), the resources available for representation in administrative processes vary systematically among constituents for reasons other than their stake in the issue. Some constituents are likely to be well represented regardless of the cost and complexity of the processes that affect them, and others not at all. Moreover, less well-represented constituents may differ in the extent to which they are politically relevant in the legislature or the executive. In this case, the legislature can, effectively, give important constituents a “seat” on the agency’s policy making boards. At one time, eleven US regulatory agencies had budgets for intervenor programmes (Cohen 1979, McNollgast 1987, Weingast 1980).

### ***Procedure and the Problem of Bureaucratic Agenda Control***

The tools available to political actors for controlling administrative outcomes through process, rather than substantive guidance in legislation, are the procedural details,

the relationship of the staff resources of an agency to its domain of authority, the amount of subsidy available to finance participation by underrepresented interests, and resources devoted to participation by one agency in the processes of another (Noll 1987). All else equal, elaborate procedures with stiff evidentiary burdens for decisions and numerous opportunities for seeking judicial review before the final policy decision is reached will benefit constituents that have considerable resources for representation. Coupled with the absence of a budget for subsidizing other representation and the absence of independent staff analysis in the agency, cumbersome procedure works to stack the deck in favour of well-organized, well-financed interests.

A prominent example of procedural deck stacking is offered by the regulation of consumer product hazards by the US Consumer Product Safety Commission (CPSC). Although the CPSC was responsible for both identifying problems and proposing regulations, it was required to use an "offeror" process, whereby the actual rule writing was contracted out. Usually the budget available to the CPSC for obtaining a proposed regulation was substantially less than the cost of preparing it. Consequently, only groups willing to bear the cost of writing regulations became offerors, and these were the groups most interested in consumer safety: testing organizations sponsored by manufacturers or consumer organizations. Thus, this process effectively removed agenda control from the CPSC and gave considerable power to the entities most affected by its regulations (Cornell, Noll and Weingast 1976). In 1981, Congress amended this process by requiring that trade associations be given the opportunity to develop voluntary standards in response to all identified problems, assuring that agenda control was never granted to consumer testing organizations.

The legislature can also make policy more representative to the politically relevant constituency by enhancing that special interest's role in agency procedures. The US National Environmental Policy Act (NEPA) of 1969 provides an example of how this works. In the 1960s, environmental and conservation groups in the United States became substantially better organized and more relevant politically. By enacting NEPA, Congress imposed procedures that required all agencies to file environmental impact statements on proposed projects. This forces agencies to assess the environmental costs of their proposed activities. NEPA gave environmental actors a new, effective avenue of participation in agency decisions and enabled participation at a much earlier juncture than previously had been possible. The requirements of the act also provided environmental groups with an increased ability to press suits against federal agencies.

In all agency decisions, proof must be offered to support a proposal. The establishment of the burden of proof perhaps best illustrates how legislatures can stack the political deck in bureaucratic decision making. The burden of proof affects agency decisions most apparently when the problem that is before the agency is fraught with uncertainty. In such a circumstance, proving anything -- either that a regulation is needed to solve a problem, or that it is unnecessary -- can be difficult, if not impossible. Hence, assigning either advocates or opponents of regulation a rigorous burden of proof essentially guarantees that they cannot obtain their preferred policy outcome.

For example, the US Federal Food, Drug, and Cosmetics Act of 1938, as amended, requires that before a pharmaceutical company can market a new drug, it must first prove that the drug is both safe and efficacious. By contrast, in the Toxic Substances Control Act of 1976, Congress required that the Environmental Protection Agency (EPA),

before regulating a new chemical, must prove that the chemical is hazardous to human health or the environment. The reversionary outcome is that new chemicals are allowed to be marketed. The results of the differences in the burden of proof are stark: few new drugs are marketed in the United States, while the EPA has managed to regulate none of the 50,000 chemicals in commerce under these provisions in the Toxic Substance Control Act.

The use of administrative procedure as an instrument of political control of the bureaucracy is part of a broader concept: *the mirroring principle* (McNollgast 1987: 262). Political officials can use deck-stacking to create a decision-making environment in the agency in which the distribution of influence among constituencies reflects the political forces that gave rise to the agency's legislative mandate. Because procedures rarely change, this environment endures long after the coalition behind the legislation has disbanded.

Ultimately, the point of deck-stacking is not to pre-select policy, but rather to cope with uncertainty about the most desirable policy action by making certain that the winners in the political battle over the underlying legislation will also be the winners in the process of implementing the programme. By enfranchising interests that are represented in the legislative majority, a legislature need not closely supervise the agency to insure that it serve its interests, but can allow an agency to operate on "autopilot" (McNollgast 1987: 271). Thus, policy can evolve without the need for new legislation to reflect future changes in the preferences of the enacting coalition's constituents. Agencies themselves will follow the same logic in their internal structure (Ferejohn 1987). Likewise, in political systems with a separately elected executive, the executive will also attempt to mirror the

political and electoral forces that he or she faces in the orders and rules imposed on the bureaucracy (Macey 1992, Moe 1990, Eskridge and Ferejohn 1992).

The courts also can play a role in the political control of the bureaucracy. Administrative procedures can affect an agency's policy agenda only if they are enforced, and their enforcement can be delegated by the legislature to the courts, in which case procedure can have an effect with minimal effort required on the part of politicians (McNollgast 1987, Shapiro 1986). For supervision by the courts to serve this function, judicial remedy must be highly likely when the agency violates its rules. If so, the courts, and the constituents who bring suit, guarantee compliance with procedural constraints, which in turn guarantees that the agency choice will mirror political preferences without any need for political oversight (McCubbins and Schwartz 1984).

Legislatures can further limit the potential mischief of agency agenda control by carefully setting the reversionary policy in the enabling statute that established the agency. Consider the example of entitlement spending. The reversion policy is specified by statute and the agency has no discretion in how, or to whom, it allocates funds. Another example is seen in the widespread use of "sunset" provisions, whereby an agency's legal authority expires unless the legislature passes a new law to renew the agency's mandate.

### ***Structure, Process, and Bureaucratic Expertise***

The second major source of the delegation problem is the special expertise of bureaucrats. The problem is not that legislators lack information, or that bureaucrats monopolize information. Legislators have access to numerous sources of information and expertise on technical subjects from sources outside the bureaucracy, such as legislative

staff, interest groups, and private citizens. The problem, then, is how to assess the accuracy of the information that comes in (Lupia and McCubbins 1997). Who do they believe? Who is credible?

These questions seem to imply that in order to ascertain whether an agency is doing its job, political leaders must engage in proactive oversight: they must gather enough information to assess whether an agency is producing good solutions to the problems that it confronts. Contrary to much conventional thought, legislators do not need to master the technical details of policy making in order to obtain decisions that approximate full-information decision making. Legislators need only collect and correlate enough information to make effective political inferences, and thereby reach reasonable conclusions about whether an agency is serving their interests. Thus, the problem confronting political leaders is how to acquire the information that is necessary to make good political inferences, which is not necessarily the same thing as being able to second guess the technical decisions of the agency (Lupia and McCubbins 1997).

McCubbins and Schwartz (1984) distinguish two types of oversight. They label them "police-patrol" and "fire-alarm" oversight. In the former, members of Congress actively seek evidence of misbehaviour by agencies: members look for trouble as a method of control much as does a prowling patrol car. In the latter, members wait for signs that agencies are improperly executing policy: members use complaints from concerned groups to trigger concern that an agency is misbehaving.

Fire-alarm oversight has several characteristics that are valuable to political leaders. To begin, leaders do not have to spend a great deal of time looking for trouble. Waiting for trouble to be brought to their attention assures that if there is trouble, it is of a

type that is important to constituents. In addition, responding to the complaints of constituents allows political leaders to advertise, claim credit for fixing the problem, and take popular issue-specific positions (Fiorina 1977). In contrast, trouble discovered by actively patrolling might not concern any constituents at all and thus yields no electoral benefit for members. Thus, political leaders are likely to prefer the low-risk, high-reward strategy of fire-alarm oversight to the more risky and potentially costly police-patrol system. Moreover, a predominantly fire-alarm oversight policy is likely to be more effective in securing compliance with legislative goals, for it brings within it targeted sanctions and rewards.

Recent surveys have, in fact, shown that fire alarm oversight is the modal type of congressional oversight (Aberbach 1990, Ogul and Rockman 1990). Nevertheless, police patrol oversight is more comprehensive and effective than is commonly believed.

Fire alarms are only useful when they are credible (Lupia and McCubbins 1997). Therefore, legislators must take care in constructing a reliable system of third party notification. To create credible fire alarms involves establishing appropriate procedures for managing the collection and dissemination of information about an agency's activities (McNollgast 1987, 1989). The US Administrative Procedure Act of 1946 (APA) as amended and as interpreted by courts, for example, establishes several provisions for agency decision making. First, an agency cannot announce a new policy without warning, but must instead give "notice" that it will consider an issue, and do so without prejudice or bias in favour of any particular action. Second, agencies must solicit "comments" and allow all interested parties to communicate their views. Third, agencies must allow "participation" in the decisionmaking process, with the extent often mandated by the

organic statute creating the agency as well as by the courts (McCubbins and Page 1986). If hearings are held, parties may be allowed to bring forth testimony and evidence and often to cross examine other witnesses. Fourth, agencies must deal explicitly with the evidence presented to them and provide a rationalizable link between the evidence and their decisions. Fifth, agencies must "make available" a record of the final vote of each member in every proceeding. Numerous countries have adopted measures similar to the US APA to achieve political control of the bureaucracy (Spiller 1996).

These requirements facilitate the political control of agencies in five ways. First, they ensure that agencies cannot secretly conspire against elected officials to present them with a *fait accompli*, that is, a new policy with already mobilized supporters. Rather, the agency must announce its intentions to consider an issue well in advance of any decision. Second, agencies must solicit valuable political information. The notice and comment provisions assure that the agency learns who are the relevant political interests to the decision and something about the political costs and benefits associated with various actions. That participation is not universal (and may even be stacked) does not entail political costs. Diffuse groups that do not participate, even when their interests are at stake, are much less likely to become an electoral force in comparison with those that do participate. Third, the entire proceeding is public, and rules against *ex parte* contact protect against secret deals between the agency and some constituency it might seek to mobilize against Congress or the president. Fourth, the entire sequence of decision making -- notice, comment, deliberation, collection of evidence, and construction of a record in favour of a chosen action -- affords numerous opportunities for political leaders to respond when an agency seeks to move in a direction that officials do not like. Finally,

because participation in the administrative process is expensive, it serves as an indicator of the stakes of a group in an administrative proceeding (Noll 1971).

In the end, the willingness to delegate depends on the degree to which political leaders can exercise substantial control over the activities of agencies. From the leader's point of view, greater uncertainty increases the difficulty of fashioning policies that are unambiguously better than the status quo. Consequently, the value of delegation to expert agencies is enhanced to the extent that guaranteeing good policies requires more specialized information. Yet greater uncertainty increases the risks associated with such delegation, for uncertainty increases the difficulty of detecting noncomplying actions.

The avenue available to political leaders for coping with this dilemma is to place ever greater reliance on the structure and process of decision making in order to limit the agency's choice to actions that are preferred unambiguously to the status quo. Hence, as technical uncertainty and political conflict increase, political leaders are motivated to delegate more responsibility to agencies, and to make greater use of procedural control. Therefore, both the scope of delegation and the complexity of administrative procedures are likely to increase with technical uncertainty and political conflict (McCubbins 1985, McCubbins and Page 1986).

## **Conclusion**

Structure and process enables legislators to have both *ex ante* control over the agenda and *ex post* oversight on agency actions. Legislators' implementation and reliance on these institutions is the keystone of successful delegation. When employed, the day to day operation of these institutions often goes unseen, but their effects on bureaucratic output are strongly felt.



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