

Abdication or Delegation? Congress, the Bureaucracy, and the Delegation Dilemma

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1. "*Delegata Potestas Non Potest Delegari*"

Since the establishment of the federal government, a large number and wide variety of executive branch organizations have been created to implement and execute laws. These range from independent commissions, to agencies, to cabinet departments, to national institutes; each possesses its own rules and routines, and each is responsible for a unique set of policies. Moreover, from the very beginning of the Republic, Congress has relied upon executive branch officials to fill in the details of legislation at their discretion.

A first proposition of many opponents to this delegation of legislative authority is that it is prohibited by the Constitution, and by the separation of powers in particular. This proposition has its roots in contractarian political theory, arguing that the consent of the governed—manifested in a popularly elected legislature—is the only legitimate basis for the exercise of the coercive power of government. This implies that non-elected federal officials should be allowed the smallest possible room for discretion or interpretation in carrying out the laws of the land. To this end, the Jeffersonians, for example, thought that it was imperative for Congress to write statutes that were concrete and specific, because allowing administrators wide latitude in interpreting the law was tantamount to allowing them to make the law. This belief became known as the "non-delegation doctrine."

The Jeffersonians' antipathy toward delegation did not halt its spread, however. In *The End of Liberalism*, Lowi documents the gradual growth of public control of the

economy. Beginning in the late 1880s, the federal government began to regulate the railroads, and moved quickly to the trusts with the Sherman Act and its enforcement, and eventually to regulating the quality of goods. At the start of the First World War, the federal government had established itself in regulating commerce with the formation of the Federal Trade Commission and Federal Commerce Commission. In the New Deal era, the federal government moved into regulating factors of production, with such agencies as the National Labor Relations Board, and markets, such as through the Securities and Exchange Commission. This growth of the federal government was bolstered in this century by the gradual overturning of the non-delegation doctrine in the courts.

To many critics of legislative discretion, this growth of the federal bureaucracy has been lacking in responsibility, as the delegations have grown ever more general in their directives to agencies. Some critics have seen these sweeping delegations of authority as the product of a colossal failure of institutional nerve. Facing public clamor to do something about pressing problems, such as the safety of food or drug products, while unable to agree on precisely how to solve the problems, Congress repeatedly has passed the buck by establishing more federal agencies.

Other critics contend that Congress's proclivity to delegate law making to non-elected administrators has been surpassed only by the amount of discretion conveyed by the delegation. Agency charters became litanies of noble-sounding sentiments devoid of specific instructions, such that by the end of the New Deal, a full-blown "administrative state" was firmly entrenched.

Many critics have called for a dismantling of the administrative state, and for a revival of the non-delegation doctrine in the federal courts. But both the delegation of

authority and its redelegation are facts of modern life. Lawson admits (1999: 2), "every relevant public and private segment of the country specifically chose, and continues to choose, a regime of domineering administrative governance." Thus, delegating to 'experts' is ubiquitous feature of our affairs, both public and private.

Lawson recognizes this too, citing both the Supreme Court's admission in Mistretta v. United States and James Landis's acknowledgment that delegation and redelegation, are often necessary to capture the efficiencies gained by specialization and the division of effort. If we desire that our government be efficient, then the *interesting* question is not whether delegation should be restricted or forbidden. Rather, can delegation be managed to ensure that it is responsible and accountable to elected office holders and, in turn, to the people?

Naturally, there exists some disagreement over the answer to this question. Some critics are troubled by what appears to them to be a lack of congressional oversight. Fisher (1981), in lamenting the lack of oversight, has offered an explanation. He observes that the benefits derived from oversight are collective goods. Consequently members of Congress lack the individual incentive to engage in it. Additionally, the operations of the federal government have become so vast that it is unrealistic to believe that oversight could ever be performed. Consequently the potential for government by experts, rather than by our elected office holders, exists.

Others express concern over the potential for special interests to dominate agencies' considerations. In his examination of the rise of the administrative state, Lowi contends that "parceling out policy making power to the most interested parties tends strongly to destroy political responsibility. A program split off with a special imperium to

govern itself is not merely an administrative unit; it is a structure of power with impressive capacities to resist central political control" (p. 59) By assigning bureaus specialized jurisdictions, Congress reduces the number of organized interests that have the interest and capability to contest the precise policy issue, and thereby creates a situation of oligopoly. Lowi further argues, "actual policy-making will not come from voter preferences or congressional enactments but from a process of tripartite bargaining between the specialized administrators, relevant members of Congress, and the representatives of self-selected organized interests" (p. xii).

There are two key reasons why special interests might come to dominate. First, administrators must depend on industry cooperation and information to achieve their goals, which requires them to adopt conservative policies in order to ensure that no serious dislocations occur, and thereby to get cooperation. Second, since bureaus' resources are so limited relative to those of the industry that they are regulating, too adversarial a stance would soon exhaust their meager budgets with legal fees. The combination of the conflict of interests between Congress and the agencies, with the vastness of the combined workloads of all the federal agencies, commissions and executive departments, makes it possible that Congress might lose control of policy implementation.

But the problem to many critics is potentially even more insidious than a lack of oversight or the capture of agencies by interest groups, for Congress itself might be a conspirator in the capture of public policy by private interests. Beginning in the 1930s, scholars have argued that executive agencies, the regulated interests, and congressional committees and subcommittees collude in making policy. These arrangements, which mirror the "military-industrial complex" of which President Eisenhower spoke, have been

called both "subgovernments" and "iron triangles." Each of the three participants in the triad benefits from the arrangement in the following way: the bureau is nurtured and funded by Congress; the interest groups receive influence over policy from the bureau; and the congressional committee members receive financial and electoral support from the interest groups.

Delegation of legislative authority to the executive thus presents something of a dilemma. To capture the benefits of specialization and the division of labor, members of Congress must sacrifice some control. In so doing, they may in turn sacrifice the public interest as the agency empowered through delegation may be both unaccountable and captured by special interests. Despite the potential problems, our nation's elected officials have opted in favor of delegating. Must this delegation turn into an abdication of public authority over policy making?

In what follows, I will discuss the means by which Congress and its members mitigate this dilemma of delegation. I first describe how Congress can use an *ex post* (after the fact) control strategy, employing rewards and punishment, oversight, and legislative overrides to keep bureaus in check. These methods are of limited effect, however, and are often criticized as a result. I will discuss these limitations and then discuss how Congress addresses these weaknesses *ex ante* (beforehand), by manipulating administrative structure and procedure.

2. The Problem of Agency, and the Delegation Dilemma

Delegation is ubiquitous in both private and public life. In all situations, from visiting the doctor to sending our kids to school, we delegate to others because of their expertise or their comparative advantages. Re-delegation is also ubiquitous. That is, the

doctors to whom we delegate authority to ensure our health may in turn assign certain tasks to a specialist. We can think abstractly about all delegations as a "principal-agent problem." The principal is the person who requires a task to be performed, and the agent is the person to whom the principal delegates authority to complete that task. In all delegations, a necessary condition is that there must be some advantage gained from delegating, such as taking advantage of the agent's specialization or expertise. But there are always disadvantages from delegating, in the form of agency losses and agency costs. The former, agency losses, are the principal's welfare losses due to the agent's choices, when the agent's choices are sub-optimal from the principal's perspective. The latter, agency costs, are the costs of managing and overseeing agents' actions (including the costs of the agent's salary, and so on).

Three necessary conditions give rise to agency losses, and thus the delegation dilemma. The first condition is that the agent must have *agenda control*. That is, the principal delegates to the agent the authority to take action without requiring the principal's consent *in advance*. This puts the principal in the position of having to respond to the action *ex post*, rather than being able to veto it *ex ante*. The second condition that underpins the delegation dilemma is that there will almost always exist a *conflict of interest* between the principal and the agent. If the two have the same interests, or if they share at least some common goals, then the agent will likely choose an outcome that the principal finds satisfactory. If not, then the third condition is that the principal must lack an effective check on the agent's actions, in the sense that the principal cannot simply overturn the decision after the agent makes it. Conventionally the lack of an effective check is said to be due to the agent's expertise—the agent may be chosen because of this

expertise in the first place, but the indirect consequence of the expertise is that the principal may be unable to evaluate the outcome of the agent's choice.

Further, members of Congress may lack an effective check over agency decision making because of the separation of powers in the American Constitution. This sets up the so-called "multiple principal" problem. The legislative process in the United States ensures that the consent of at least majority coalitions in the House and Senate, plus either the president or additional members of both chambers, is required for a proposal to become law. Because these many principals must all agree to legislation—even legislation to check an agency's actions—the agency may be unconstrained within some sphere of activity. This may be true even if all the principals are able to overcome the agency's expertise. The size of this sphere of activity will depend on the degree of conflicting interest between the many principals, such that the agency needs only to make a single "veto player" (someone who can definitively block a piece of legislation) sufficiently happy to sustain the agency's policy against an override or other form of punishment.

3. *Ex Post* Political Control of Policy Making

Agencies take many types of actions, such as proposing rules and adjudicating cases. Often these actions are taken without the appearance of congressional oversight, and therefore they tend to be seen as unaccountable. Of course, when agencies make decisions, their action is not necessarily final. Congress could always overturn their decision by passing a new piece of legislation. Even when Congress does not override an agency, however, the possibility that they might do so may create incentives for the agency to take the preferences of members of Congress into account. In a similar fashion, the threat of rewarding or sanctioning an agency for its actions may also create incentives

for the agent to respect the wishes of members of Congress. These factors constitute an *ex post* form of control, by which I mean they are possible actions that can be taken after the agency has made a decision. In what follows, I address how these means of control can and do resolve aspects of the delegation dilemma.

3.1 Mitigating Agency's Agenda Control and Conflicts of Interest

The first major source of the delegation problem is the fact that agencies often possess an "institutional" advantage, in that the agencies collectively make voluminous decisions, and Congress must pay potentially large costs of responding legislatively. Also known as a "first-mover" advantage, this puts Congress in the position of potentially facing a *fait accompli* from an agency. One important countermeasure that the legislature may take to mitigate the power of bureaucratic agenda control is that of 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. For many years, Congress relied on a large variety of *ex post* legislative vetoes.¹ 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).

Other *ex post* mechanisms add up to what has been referred to as "the big club behind the door" (Weingast 1984). In addition to the threat to eliminate an agency altogether, there are also numerous types of checks on agency implementation. The enabling legislation (that governs delegation to the agency) could establish presidential vetoes or congressional vetoes over proposed rules. Another form of veto threat is to

require an appropriations rider in order to implement the agency's proposal. Simply, by refusing to appropriate the funding for a proposal, Congress may undermine the proposal without rejecting it outright. Congress can also delegate this power to check agency decisions to other agencies, a point that I will discuss later in describing *ex ante* control strategies.

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 club engenders the well-known *law of anticipated reactions*, whereby bureaucrats are aware of the limits to acceptable behavior and know that they run the risk of having their agency's programs curtailed or careers ended if they push those limits too far.

3.2 Mitigating Bureaucratic Expertise

Bureaucratic expertise relative to members of Congress is an often cited reason that delegation to the bureaucracy becomes unaccountable. But 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 of the bureaucracy, such as legislative staff, interest groups, and private citizens. Rather, the problem is how to assess the accuracy of the information that is received.

¹ Although the Supreme Court struck these down as unconstitutional in *INS v. Chadha* (1983), Congress continues to employ them on a regular basis.

This might 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 of the conventional wisdom that developed initially, however, legislators do *not* need to master the technical details of policy making in order to oversee effectively an agency's actions. Legislators need only collect and correlate enough information to make accurate inferences, and thereby to reach reasonable conclusions about whether an agency is serving their interests.

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 misbehavior 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 with, 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. 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 research has indeed demonstrated that fire alarm oversight is the modal type of congressional oversight.

The U.S. Administrative Procedure Act of 1946 (APA) 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 favor 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 decision making process, with the extent often mandated by both the statute creating the agency and the courts, in their interpretation of that statute. When hearings are held, parties bring forth testimony and evidence and may often 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.

This set of 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 to members of Congress. 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 favor 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. Each of these four requirements helps create fire alarms, because they give constituents the means by which to gather information on agency behavior, and give members of Congress the opportunities to intervene in the regulatory process. Finally, because participation in the administrative process is expensive, it serves to indicate the stakes of a group in an administrative proceeding.

3.3 The Potential Problems of Ex Post Control

While the aforementioned means of *ex post* control are always present, utilizing these means to respond to any agency decision requires legislative action. With the exception of single-chamber legislative vetoes, any legislative action would have to pass through both chambers of Congress (and their committees) and survive a presidential veto. Because of the multiple actors whose assent must be achieved in order to undertake successful legislative action, the constraints faced by the agency are weakened to the extent that the principals—i.e., the House, Senate and president—disagree among themselves. The agency needs only to make a single chamber happy enough with their policy choice that they will not participate in an override. During a period of divided

government, for instance, the agency would only need to satisfy one party, who could then block any attempts to change the agency's decision by the other parties. Even if Congress is able to gather full information about an agency's decisions, and even if Congress can identify outcomes preferable to what the agency selected, they may be unable to punish an agency or override its decision if that agency was strategic in its decision making.

Therefore, because there are many principals, all of whom are delegating to the same agency, and who may have very different preferences over what the agency does, a strategy that depends wholly on *ex post* control has its limitations.

4. Ex Ante Political Control of Policy Making

In creating, funding, and making appointments to bureaucratic agencies, the legislature should naturally anticipate the problems just discussed. Thus, when delegating, legislators decide consciously whether to take steps to mitigate these problems. In this section I examine some of the ways that members of Congress and the president can structure an agency's decision-making process so that it is more responsive to their preferences.

One important countermeasure that Congress and the president may take to mitigate the power of bureaucratic agenda control is the aforementioned strategy of employing institutional checks. 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. We see examples of these strategies in federal delegations. As originally established, to regulate workplace safety, the National Institute for Occupational Safety and Health (NIOSH) in the Department of Commerce would first identify a health or safety hazard. Only then could the agency charged with actually regulating workplace safety, the Occupational Safety and Health Administration (OSHA) in the Department of Labor, promulgate a rule regulating the identified problem.

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. By structuring who gets to make what decisions and when, as well as by establishing the process by which those decisions are made, Congress and the president can stack the deck in an agency's decision making (McCubbins et al 1987). For example, elaborate procedures with stiff evidentiary burdens for decisions and numerous opportunities for seeking judicial review before the final policy decision is reached will, all else equal, benefit constituents that have considerable resources for representation. Coupled, for instance, 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 favor of well-organized, well-financed interests.

Congress and the president can use procedural deckstacking for many purposes. A prominent example of this was offered by the original regulation of consumer product

hazards by the U.S. 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. 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 U.S. 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 junction than previously had been possible. The requirements of the act also provided environmental groups with an increased ability to press suits against federal agencies. NEPA altered the

Nuclear Regulatory Commission's procedures for approving new projects, the key consequence of which was effectively to halt construction of nuclear power sites. This was particularly the case following the 1971 decision in the *Calvert Cliffs* case (McCubbins et al. 1989), which required that the Atomic Energy Commission (later the Nuclear Regulatory Commission) must follow NEPA's regulations, and therefore that environmental impact reports would be a necessary part of the approval process. Between 1978 and 1995, no new nuclear plants were ordered, and moreover, every single project planned after 1974 were cancelled (as were fully a third of those ordered before 1974).

The use of structure and process to stack the deck is widely understood. The 1972 California Coastal Zone Conservation Act also required similar institutional checks. The statute's objective was to protect the scenic and environmental resources along California's coastline, while preserving public access to the beach. The creation of a the permit review procedure with diffused power automatically biased the regulatory process against approving new water projects. While local governments were required first to approve or deny any proposed project, the six regional coastal commissions and the single statewide coastal commission both reviewed all permits passed by the local governments. The commissioners were also given the power to levy substantial monetary fines against violators, which aided them in inducing compliance. Thus by carefully choosing the *procedure* of the California coastal initiative, the state legislature was able to achieve its statutory goals even with a broadly-stated substantive mandate to the commissioners.

Perhaps the most important tool that legislatures use to stack the deck in bureaucratic decision making is the establishment of the burden of proof. In all agency decisions, proof must be offered to support a proposal. 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 U.S. 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 these two burdens of proof are stark: very few new drugs are brought to market in the United States each year (relative to the rates in other countries), while the EPA, by contrast, has managed to regulate none of the 50,000 chemicals in commerce under these provisions in the Toxic Substance Control Act.

Congress has also successfully used modifications in the burden of proof to change the outcome of regulation. In short, by requiring a certain actor to prove some fact in order to take a regulatory action, Congress can stack the deck against that particular actor's most preferred outcome. The Kennedy Amendments to the Civil Aeronautics Act come to mind as the primary example. Under the original act, in order to enter a new market by offering flights between certain locales, the burden of proof was on the potential entrant to demonstrate to the Civil Aeronautics Board (CAB) that their entry would not damage the competitive position of the existing carriers. Since the whole point

of entering a market in the first place is to take the excess profits of other carriers, this provision tended strongly to limit the growth of competition. In the Kennedy Amendments, Congress made a simple change to the procedure used by the CAB, shifting the burden of proof onto the existing carriers to show that any new entry would make their existing routes unprofitable. This modification now biased the process in favor of allowing entry, and against the old protections that carriers had profited from for so long. As a result, the airlines were deregulated. More recently, when stories of Internal Revenue Service abuses of power came to the national consciousness, Congress again responded by shifting the burden of proof. In this case the burden shifted from the taxpayer, who originally was required to prove that she had not violated tax law, to the IRS, who now must prove that the taxpayer has violated a tax law. Again, this change biases the administrative process by stacking the deck in favor of one group of actor's preferred outcome.

Using administrative procedure as an instrument of political control of the bureaucracy is part of a broader concept called *the mirroring principle* (McCubbins et al. 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 program. 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" (McCubbins et al. 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. 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.

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. 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 active, 'police-patrol' oversight.

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. For example, consider the creation of entitlement spending 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.

Since taking control of both chambers of Congress following the 1994 election, Republicans have attempted to change the way the deck is stacked with regard to environmental policy in particular. First, the Republican Congress proposed to impose cost-benefit analysis on most federal regulatory activity. Although this proposal did not pass, the anticipated effect of such a change would obviously have been to reduce the number of regulatory actions that would satisfy the more stringent procedural requirements. Second, the Republican Congress attempted to change the definition of takings. The definition that federal courts had been operating under held that a federal action was not a taking unless the entire value of a piece of property was taken from its owner. This left agencies with substantial discretion, then, to take up to almost the full value of a piece of property without violating the provision. The new proposal would have re-defined a taking to constitute any reduction in value, regardless of that reduction's share of the whole value. Given agencies' budgetary requirements and the improbability that the Republican Congress would have given agencies greater resources in order to compensate owners for these newly-defined takings, such a change would also stack the deck against regulatory action. The key facts to note are two: both of these proposed changes are procedural rather than substantive, and both potentially benefit Republicans' constituents over those parties presently favored under the current provisions.

These actions by the Republican Congress are consistent with a large and growing body of literature that demonstrates empirically that under certain conditions, when congressional preferences change the agency's behavior responds even without effort by Congress to force compliance. This literature began with Weingast and Moran's (1983) seminal article, which demonstrated how the Federal Trade Commission's choice of cases

to pursue shifted when the relevant Senate committee's composition changed following the 1978 election.

Unfortunately, this literature does little to relieve the most insidious potential problem with delegation, which remains that of iron triangles. If Congress and its committees are willing co-conspirators in agency capture, then all the evidence of congressional committees' influence cannot assuage critics' fears about the public interest being subverted. Congress does attempt to limit iron triangles' formation in two particular ways. First, procedures that stack the deck in agencies' decision making can make it difficult for any interest group, and even themselves, to change policy in the future (McCubbins et al. 1989). In other words, Congress can tie their own hands, such that if the legislative coalition in the future shifts, agency policy making might not respond to that change. Second, as Kiewiet and McCubbins (1991) demonstrate, the control committees in Congress—especially the appropriations and budget committees—serve to check iron triangles by reducing any substantive committee's ability to act unilaterally. That is, by requiring committees' proposals to pass through the appropriations process, which often is a much more party-dominated process due to its effect on each party's brand name to voters, the substantive committees are disciplined by the appropriations committees' ability to reject their proposals. Hence while the substantive committees that deal with an agency on a daily basis might develop clientele relationships with that agency, the presence of institutional checks in the legislative process restrict those committees' ability to deliver private goods to that agency or the interest groups it regulates.

5. Conclusion

In sum, two conditions are necessary for delegation to fail: principals and agents have conflicting interests over the outcome of delegation, and principals must have an ineffective check on the agent's actions. This can be due to either the agent having expertise regarding the consequences of the delegation that principals do not possess, or to conflict of interest among the principals. When delegation happens under these conditions, agents might be free to take any action that suits them, irrespective of the consequences for the principal, and the principal cannot cause them to do otherwise. Delegation, then, becomes abdication.

Delegation can succeed, however, when one of two conditions is satisfied (Lupia and McCubbins 1997). The first is the *knowledge condition*, which is that the principal, through her own personal experience or through knowledge gained from others, is able to distinguish beneficial from detrimental agency actions. The second is the *incentive condition*, which is satisfied when the agent has some incentive to take account of the principal's welfare in making his decisions. These conditions are somewhat intertwined, however, in that a principal who becomes enlightened with respect to the consequences of delegation can either motivate the agent to take actions that enhance her welfare, or can reject the agent's actions that do not.

The institutions that govern the administrative process often enable legislators to both learn about their agents' actions, and create incentives for bureaucratic compliance, so that one or both of the conditions just mentioned are satisfied. Legislators' implementation and reliance on these institutions is the keystone of successful delegation.

When employed, the day to day operation of these institutions often go unseen, but their effects on bureaucratic output are strongly felt.

I am not arguing that all is well in the Washington establishment. Delegation does produce agency losses and entails agency costs, and the sum of these can occasionally exceed the benefits gained from delegating. (The interesting questions are, when does this happen? and, how can we tell?) Federal agencies and departments do sometimes become the Club Med of the Potomac, or worse!

Delegation, while problematic in its outcomes, is not equivalent to the abdication of Congress's law making authority. Congress and its members always incur some costs—both personal and institutional—to make delegation to the executive branch accountable to them. Often, there are segments of the society, perhaps even comprising a majority, who dislike the policies implemented. Federal agencies are creatures of their environment and are subject to the limitations of their creation. Questions of policy, then, are more rightly directed at Congress. The ability to change public policy resides in the ballot box, not in the re-invention of the non-delegation doctrine or the dismantling of the federal bureaucracy.

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