

The solution to the “delegation problem” is
political, not constitutional

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

BY MATHEW D. McCUBBINS

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. The organizations

range from cabinet departments to agencies, national institutes, and independent commissions. Each possesses its own rules and routines, and each is responsible for a unique set of policies. Moreover, from the beginning of the Republic, Congress has relied on officials of the executive branch to fill in the details of legislation at their discretion. That is, Congress has delegated legislative authority to the executive branch.

A first proposition of many who oppose the delegation of legislative authority is that it is prohibited by the Constitution, in particular by the separation of powers embodied in the Constitution. That proposition has its roots in contractarian political theory, which argues that the consent of the governed—manifested in a popularly elected legislature—is the only legitimate basis for the exercise of the government’s coercive power. Nonelected federal officials should therefore be given the least possible room for discretion or interpretation in carrying out the laws of the land. To that end, the Jeffersonians, for example, thought it imperative that Congress write concrete and specific statutes, that allowing administrators wide latitude in interpreting the law was to allow them to

make the law. The Jeffersonians’ belief became known as the “nondelegation doctrine.”

DELEGATION AS SEEN BY ITS OPPONENTS

Constitutional Objections The Jeffersonians’ antipathy to delegation did not halt its spread, however. In *The End of Liberalism*, Theodore Lowi documents the gradual growth of public control of the economy. Beginning in the late 1880s, the federal government began to regulate the railroads, moved quickly to the trusts with the Sherman Act and its enforcement, and eventually to the quality of goods. At the start of the First World War, the federal government had established itself in the regulation of commerce with the formation of the Federal Trade Commission and Federal Commerce Commission. In the New Deal era, the federal government moved into the regulation of factors of production (through such agencies as the National Labor Relations Board) and markets (through

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the Securities and Exchange Commission, for example). The growth of the federal government's regulatory activities—and the attendant growth of the federal bureaucracy—was bolstered in this century by the gradual overturning of the nondelegation doctrine in the courts.

To many critics of legislative delegation, the growth of the federal bureaucracy has been irresponsible, as delegations to agencies have become ever more general. In the critics' view those sweeping delegations of authority represent a colossal failure of institutional nerve. Facing public clamor to do something about such pressing problems as the safety of food or drug products, but 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 nonelected administrators has been surpassed only by the amount of discretion conveyed by delegation. A full-blown administrative state had become entrenched by the end of the New Deal, as agencies' charters had become litanies of noble-sounding sentiments devoid of specific instructions.

Many critics have called for a dismantling of the administrative state and for a revival of the nondelegation doctrine in the federal courts. But both the delegation of authority and its redelegation are facts of modern life. As Gary Lawson notes in the preceding article, "No one seriously doubts the outcome of a showdown, in any authoritative forum, between the Constitution and the modern state. Quite simply, the nation has chosen administrative governance over a Constitution that was designed precisely to prevent any such outcome."

What about Efficiency? Delegating to "experts" is a ubiquitous feature of our affairs, both public and private, as Lawson also recognizes by 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 want efficient government, then the *interesting* question is not whether delegation should be restricted or forbidden but whether it can be managed so that it is responsible and accountable to elected office holders and, in turn, to the people.

Naturally, there is some disagreement about the answer to that question. Some critics are troubled by what they see as a lack of congressional oversight. Fisher, 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 individual incentives to engage in oversight. Additionally, the operations of the federal govern-

ment have become so complex that it is unrealistic to believe in the possibility of effective oversight. The field is clear for government by experts rather than by elected office holders.

Special Interests and Collusion Others express concern about the potential for special interests to dominate agencies' deliberations. In his examination of the rise of the administrative state, Lowi contends that

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parceling out policymaking 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 specialized jurisdictions to bureaus, Congress reduces the number of organized interests that have the interest and ability to contest a specific policy issue, thereby creating a situation of oligopoly.

Lowi further argues that

actual policymaking 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 policymaking. First, administrators depend on industry cooperation and information to achieve their goals. To obtain such cooperation requires them to ensure against dislocations by adopting conservative policies. Second, because agencies' resources are limited relative to those of the industries they are regulating, too adversarial a stance would result in legal fees that quickly exhaust agencies' budgets. (A third, somewhat related reason could be that Congress loses control of policy because agencies' interests conflict with those of Congress, which cannot effectively oversee the vast number of agencies and their complex workings.)

But many critics of delegation see a problem that is potentially even more insidious than a lack of oversight

or the capture of agencies by interest groups. Scholars have argued since the 1930s that executive agencies, regulated interests, and congressional committees and subcommittees collude in making policy. Such arrangements, which mirror the “military-industrial complex” of which President Eisenhower spoke, have been called both “subgovernments” and “iron triangles.” In them, agencies are nurtured and funded by Congress, interest groups receive influence over policy from agencies, and members of congressional committees receive financial and electoral support from interest groups.

THE DELEGATION DILEMMA AND THE PROBLEM OF AGENCY

DELEGATION OF LEGISLATIVE AUTHORITY TO THE EXECUTIVE thus poses a dilemma. To capture the benefits of specialization and division of effort, members of Congress must delegate some control to executive agencies. But

Agency losses occur when three conditions are met:

- The agent has *agenda control*. That is, the principal delegates to the agent the authority to act without getting the principal’s consent *in advance*. The principal is then in the position of having to respond to an action after the fact (*ex post*), rather than being able to veto it before the fact (*ex ante*).
- There is a *conflict of interest* between the principal and the agent. (If the two have the same interests—or share some common goals, at least—then the agent will likely choose an outcome that the principal finds satisfactory.)
- The principal must lack an effective check on the agent’s actions; that is, the principal cannot simply overturn a decision after the agent makes it. Conventionally the lack of an effective check is said to result from the principal’s inability to evaluate the performance of an agent who was chosen, in the first place, to provide expertise the principal does not have.

Further, members of Congress may lack an effective check on agency decisionmaking because of the separation of powers in the American Constitution, which sets up the so-called “multiple principal” problem. For a proposal to

become law requires the consent of at least a majority in the House and Senate and the concurrence of the president or, if he vetoes a bill, the consent of additional members of both chambers.

Because *all* of the principals must agree to legislation (including legislation to check an agency’s actions) the agency may be unconstrained within a sphere of activity—even if all the principals can overcome the agency’s advantage in expertise. The scope of the agency’s unconstrained sphere of activity will depend on the extent to which the principals’ interests conflict. The agency may be able to sustain its policy against an override or other form of punishment simply by pleasing a single “veto player” (a party capable of blocking legislation).

EX POST POLITICAL CONTROL OF POLICYMAKING

AGENCIES’ ACTIONS, SUCH AS PROPOSING RULES AND adjudicating cases, often are taken without apparent congressional oversight, and agencies therefore tend to be seen as unaccountable. But when an agency makes a decision, the decision is not necessarily final. Congress can always overturn the decision by passing new legislation. Even when Congress does not override an agency’s decision, however, the possibility that it might do so may create incentives for the agency to take into account the pref-

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that delegation may in turn harm the public interest because the agencies may be both unaccountable and captive to special interests.

Congress nevertheless has opted in favor of delegation. Must delegation necessarily lead to the abdication of public authority over policymaking?

Delegation is ubiquitous in both private and public life. In many situations, from visiting the doctor to sending our kids to school, we delegate to others because of their expertise or comparative advantage. Redlegation is also ubiquitous; for example, the doctors to whom we delegate authority to ensure our health may in turn assign some tasks to a specialist.

We can think abstractly about delegation as a “principal-agent problem.” The principal is the person who wants a task performed; the agent is the person to whom the principal delegates authority to complete the task. The principal delegates because he perceives an advantage in drawing on the agent’s specialization or expertise.

But delegation also has disadvantages, namely, agency losses and agency costs. Agency losses are incurred when an agent’s choices are suboptimal from the principal’s perspective. Agency costs include direct costs (an agent’s salary and expenses, for example) and the pecuniary and opportunity costs of managing and overseeing an agent’s actions.

erences of members of Congress. Similarly, the possibility of a reward or sanction for an agency's action may also encourage the agency to respect the wishes of members of Congress. These possibilities are *ex post* forms of control; that is, they are actions that could be taken *after* an agency has made a decision. I discuss below how *ex post* controls can and do resolve aspects of the delegation dilemma.

MITIGATING AGENCIES' AGENDA CONTROL AND CONFLICTS OF INTEREST

A MAJOR SOURCE OF THE DELEGATION PROBLEM IS THE fact that agencies often hold an "institutional" advantage, in that they collectively make myriad decisions and Congress would have to bear heavy costs to respond legislatively to those decisions. An agency's institutional advantage (also known as a "first-mover" advantage) faces Congress with a potential fait accompli by the agency. Congress may mitigate the institutional advantage by ensuring that there is at least one other actor with the authority to veto or block the agency's actions.

Congress, for many years, relied on a variety of *ex post* legislative vetoes, which are still used even though the Supreme Court found them unconstitutional in *INS v. Chadha* (1983). According to Louis Fisher, those legislative vetoes allowed the House and Senate, or either of them, to veto bureaucratic policy proposals before they were implemented.

Other *ex post* mechanisms amount to what Barry Weingast has called "the big club behind the door." There are many checks on an agency besides a threat to eliminate it. The enabling legislation that governs delegation to the agency could permit presidential or congressional vetoes of proposed rules. Or Congress can simply refuse to appropriate funds for a proposal, thus undermining the proposal without rejecting it outright. Congress can also delegate veto power to other agencies, a point 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 the leaders' demands and interests. As Weingast notes, "*Ex post* sanctions ... create *ex ante* incentives for bureaucrats to serve congressmen" (p.156). That is, Congress's big club engenders the well-known *law of anticipated reactions*—bureaucrats are aware of the limits of acceptable behavior and know that they risk having their agencies' programs curtailed or their careers ended if they push too far beyond those limits.

MITIGATING BUREAUCRATIC EXPERTISE

THE EXPERTISE OF BUREAUCRATS RELATIVE TO THE expertise of members of Congress is often cited to explain why a bureaucracy becomes unaccountable to Congress. But the problem is not that legislators lack information or that bureaucrats monopolize it. Legislators have access to

many sources of information and expertise outside the bureaucracy, including legislative staff, interest groups, and private citizens. Rather, the problem is how to assess the accuracy of such information.

Contrary to earlier thought, however, legislators need not master the technical details of policymaking to oversee effectively an agency's actions. Legislators need only collect and correlate enough information to infer with some accuracy whether or not an agency is serving their interests.

Thomas Schwartz and I have distinguished two types of oversight: "police patrol" and "fire alarm." In the first type of oversight, members of Congress actively seek evidence of misbehavior by agencies; that is, the members exert control by looking for trouble, as do police officers prowling in a patrol car. In fire-alarm oversight, members wait for complaints by concerned groups to indicate that agencies are misbehaving.

Fire-alarm oversight has several characteristics that are valuable to political leaders. To begin with, leaders do not have to spend a lot of time looking for trouble. Waiting for trouble to be brought to their attention assures leaders that the trouble is important to constituents. Moreover, responding to the complaints of constituents allows political leaders to claim credit for fixing problems. In contrast, trouble discovered by actively patrolling might not be of concern to constituents and thus of no electoral benefit to members.

Political leaders are therefore likely to prefer the low-risk, high-reward strategy of fire-alarm oversight to the riskier and potentially costlier police-patrol system. Moreover, fire-alarm oversight is likely to be more effective in securing compliance with legislative goals, for it brings with it targeted sanctions and rewards. Indeed, recent research has shown that fire-alarm oversight is the modal type of congressional oversight.

The U.S. Administrative Procedure Act of 1946 (APA) provides several rules for agency decisionmaking:

- An agency cannot announce a new policy without warning but must instead give notice that it will consider an issue, and must do so without prejudice or bias in favor of any particular action.
- Agencies must solicit comments and allow all interested parties to offer their views.
- Agencies must allow participation in decision-making processes. (The extent of participation often is mandated by the statute creating an agency and by the courts, in their interpretation of the statute.) When hearings are held, parties offer testimony and evidence and may often cross-examine other witnesses.
- Agencies must deal explicitly with the evidence presented to them and provide a "rationalizable" link between the evidence and their decisions.

- Agencies must make available a record of the final vote of each member in every proceeding.

These requirements facilitate political control of agencies in five ways:

- An agency cannot conspire to hand elected officials a fait accompli, that is, a new policy with already mobilized supporters. Rather, the agency must announce its intent to consider an issue well in advance of any decision it may make.
- Agencies must solicit valuable political information. The notice and comment provisions of APA help to ensure that an agency identifies political interests relevant to a decision and gains information about the political costs and benefits of various actions. Members of Congress do not pay a political price if that participation is not universal (or even stacked) because diffuse groups that fail to participate, even when their interests are at stake, are much less likely to become an electoral force than those that do participate. Further, because participation is expensive, it serves to indicate the seriousness of a group's interest in the outcome of the process.
- The entire proceeding is public, and rules against *ex parte* contact deter secret deals between an agency and a constituency it might seek to mobilize against Congress or the president.
- The entire sequence of decisionmaking—notice, comment, deliberation, collection of evidence, and construction of a record in favor of a chosen action—affords many opportunities for political leaders to respond when they dislike the direction in which an agency seeks to move.
- And, at any point, interested constituents can activate fire alarms, because the process enables constituents to gather information about an agency's behavior and call on members of Congress to intervene.

THE POTENTIAL PROBLEMS OF *EX POST* CONTROL

ALTHOUGH *EX POST* CONTROL IS ALWAYS POSSIBLE, IT requires legislative action. Excepting single-chamber legislative vetoes, any legislative action has to pass through both chambers of Congress (and their committees) and survive a presidential veto. Because of the many actors who must assent to legislative action, the constraints on an agency are weakened to the extent that there is disagreement between the House, the Senate, and the president. To avoid an override of its policy, an agency need only please one chamber or the president.

Ex post control is therefore a problematic strategy because, regardless of the facts or the wisdom of an

agency's decisions, Congress may be unable to override the agency's decisions or punish the agency for them.

EX ANTE POLITICAL CONTROL OF POLICYMAKING

AS THEY CREATE AND FUND AN AGENCY AND MAKE appointments to it, the president and Congress have many opportunities to structure the agency's decision-making so that it is more responsive to their preferences. I examine several strategies in this section.

Institutional Checks Checks on an agency's agenda-setting power can be arranged to affect the agency *ex ante*, that is, before it makes a proposal, as well as *ex post*.

An example is the assignment of agenda control to more than one agency so that one agency cannot dominate a particular policy arena. Moreover, agencies whose jurisdictions overlap will compete for budgets and statutory authority, making it all the more necessary for them to please political leaders.

We see examples of these strategies in federal delegations. As originally established, the National Institute for Occupational Safety and Health in the Department of Commerce would first identify a health or safety hazard in the workplace. Only then could the agency charged with actually regulating workplace safety, the Occupational Safety and Health Administration in the Department of Labor, promulgate a rule regulating the identified problem.

Stacking the Deck 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 an agency's staff resources to its domain of authority, the funding available to finance participation by underrepresented interests, and the resources devoted to participation by one agency in the processes of another.

By structuring who gets to make what decisions and when, and how those decisions are made, Congress and the president can stack the deck in an agency's decision-making. For example, all else being equal, elaborate procedures with strict evidentiary tests and many opportunities for judicial review before a final policy decision is reached will benefit constituents with ample resources for representation. The effect of a cumbersome procedure, reinforced by, for instance, the lack of a budget to subsidize representation of other parties and an independent analytical staff in the agency, is to *stack the deck* in favor of well-organized, well-financed interests.

A prominent example of deck-stacking is found in the original procedures established for the U.S. Consumer Product Safety Commission (CPSC). Although CPSC was responsible for both identifying problems and proposing regulations, it was required to use an "offeror" process to contract for rule writing. The cost of contracting for rule writing would exceed the funds available to CPSC for the entire approval process. Consequently, only

groups willing to bear the cost of writing regulations became offerors, and those were the groups most interested in consumer safety: testing organizations sponsored by manufacturers and consumer organizations. Thus the process effectively removed agenda control from CPSC and gave considerable power to the entities most affected by its regulations. In 1981, Congress amended the process by requiring that trade associations be given the opportunity to develop voluntary standards as CPSC identified problems, ensuring that consumer testing organizations could not control CPSC's agenda.

The legislature can also make policy more responsive to politically relevant constituencies by enhancing their role in agencies' procedures. An example is provided by the U.S. National Environmental Policy Act (NEPA) of 1969. Environmental and conservation groups in the United States had become much better organized and more politically potent in the 1960s. Through NEPA, Congress required all agencies to file environmental impact statements on proposed projects, forcing agencies to assess the environmental costs of such projects. NEPA gave environmental interests a new, effective avenue of participation in agency decisions and enabled those interests to join the decision process at a much earlier point than previously had been possible.

NEPA also made it easier for environmental groups to sue federal agencies. NEPA so altered the procedures for approving new nuclear-power projects that construction of new plants was effectively halted. The 1971 decision in the *Calvert Cliffs* case required the Atomic Energy Commission (later the Nuclear Regulatory Commission) to follow NEPA's regulations, thereby making environmental impact reports a necessary part of the approval process. No new nuclear plants were ordered between 1978 and 1985, and every project planned after 1974 was cancelled, as were a third of those planned before 1974.

Deck-stacking also is found in the 1972 California Coastal Zone Conservation Act (CCZA). That statute was enacted to protect the scenic and environmental resources along California's coastline, while preserving public access to beaches. The creation of a permit review procedure with diffused power instituted a bias against the approval of new water projects. All six regional coastal commissions and the statewide coastal commission must review all permits approved by local governments. The commissioners' ability to induce compliance with CCZA is aided by their power to levy substantial fines against violators of the act. Thus, by carefully writing *procedures* into CCZA, the state legislature was able to achieve its statutory goals even with a broadly stated substantive mandate to the commissioners.

Burden of Proof Perhaps the most important tool legislatures use to stack the deck in bureaucratic decisionmaking is the placement of the burden of proof. Burden of proof is a critical element of agency decisionmaking when an issue before an agency is fraught with uncertainty. In such a circumstance, proving that a regulation is either necessary or unnecessary can be difficult, if not impossible. Hence, imposing a rigorous burden of proof on either the advocates or opponents of a regulation can ensure that the burdened party cannot attain its preferred 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 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

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the chemical is hazardous to human health or the environment, otherwise the new chemical may be marketed. Few new drugs are brought to market in the United States each year, relative to the rates at which new drugs are introduced in other countries. By contrast, with the exception of chemicals deemed to pose an imminent risk to public health, EPA has not been able to regulate any of the 50,000 different chemicals that are potentially within its purview under the Toxic Substances Control Act.

Congress also has successfully modified burdens of proof to change the effects of regulations. The Kennedy Amendments to the Civil Aeronautics Act (CAA) are a primary example of such modifications. Under the original act, the burden of proof was on a potential entrant into a particular air-passenger market to show the Civil Aeronautics Board that its entry would not damage the competitive position of the carriers already in the market. Because the point of entering a market is to take the excess profits of other carriers, the original provision of CAA limited the growth of competition. The Kennedy Amendments shifted the burden of proof onto existing carriers by requiring them to show that new entry would make their routes unprofitable. And thus were airlines deregulated.

More recently, when abuses of power by the Internal Revenue Service gained national prominence, Congress

again responded by shifting the burden of proof. In that instance, the burden shifted from the taxpayer, who had been required to prove that he had not violated tax law, to the IRS, which now must prove that the taxpayer has violated the law. Again, changing the administrative process stacked the deck in favor of one group (taxpayers) and against another (IRS).

Underlying Agendas Deck-stacking is related to a concept that Roger Noll, Barry Weingast, and I have called *the mirroring principle*. Political officials can use deck-stacking to create a decisionmaking environment in which the distribution of influence among constituencies reflects the political coalition that gave rise to an agency's legislative mandate. Because procedures rarely change, the influence of the coalition can persist long after the coalition

cy in the statute that establishes the agency. For example, in the case of entitlement spending specified by statute, the administering agency has no discretion in how or to whom it allocates funds. Another example is the widespread use of the "sunset" provision, whereby an agency's legal authority expires unless the legislature passes a new law to renew the agency's mandate.

Since the Republicans took control of both chambers of Congress following the 1994 election they have attempted to change the way the deck is stacked with regard to environmental policy. First, the Republican Congress proposed requiring cost-benefit analysis of most federal regulatory activities. Had that proposal succeeded, its effect would have been to reduce the number of regulatory actions by agencies. Second, the Republican Congress attempted to change the definition of takings.

Federal courts had been operating under a definition that held that a federal action was not a taking unless the entire value of a property was taken from its owner. That definition gave agencies the discretion to take up to nearly the full value of a property. The Republicans would have redefined a taking to constitute *any* reduction in value, no matter how small. Such a change would have stacked the deck against regulatory action

because it was unlikely that the Republican Congress would have given agencies more money for the additional compensation that would have been owed to property owners. In sum, both of the proposed changes would have been procedural rather than substantive, and it is likely that both would have favored Republicans' constituents at the expense of other groups.

The actions by the Republican Congress are consistent with a large and growing body of empirical literature which shows that under certain conditions an agency's behavior responds to shifts in congressional preferences without an effort by Congress to force compliance. Barry Weingast and Mark Moran's seminal article, for example, shows how the Federal Trade Commission chose to change its case mix when the relevant Senate committee's composition changed following the 1978 election.

Iron Triangles Unfortunately, the same literature does little to resolve the most insidious problem that can afflict delegation: the formation of iron triangles. If Congress and its committees are willing co-conspirators in the capture of an agency by certain interests, then no amount of evidence about the influence of congressional committees can assuage fears that the agency's agenda subverts the public interest.

Congress does attempt to limit the formation of iron triangles in two ways. First, as Noll, Weingast, and I have argued, procedures that stack the deck in agencies' deci-

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that fomented the legislation has disbanded.

The ultimate aim of deck-stacking is not to preselect policy but rather to ensure that the winners in the political battle over the underlying legislation will also be winners as the program is implemented. By enfranchising interests that are represented in the legislative majority, a legislature need not closely supervise the agency to ensure that it serves the legislature's interests. Thus an agency's policy can evolve without the passage of new legislation reflecting changes in the preferences of the enacting coalition's constituents. (Agencies' internal structures often mirror the agendas of supporting interests, just as elected executives often attempt to mirror outside political and electoral forces in the orders and rules they impose on the bureaucracy.)

The courts also can play a role in the political control of the bureaucracy. Enforcement of administrative procedure can be delegated by the legislature to the courts, reducing the effort the legislature must make to ensure the effectiveness of the procedure. If a judicial remedy is likely when an agency violates its procedures, then the threat of lawsuits and adverse judgments will help to ensure that the agency follows its procedural path and, thus, that the agency's choices will mirror political preferences, without the need for costly "police patrol" oversight.

Legislatures can further limit an agency's ability to set its own agenda by carefully setting the reversionary poli-

sionmaking can make it difficult for any interest group, and even Congress, to change policy in the future. In other words, Congress can tie its own hands, so that if the legislative coalition shifts, agency policymaking might not respond to the shift. Second, as D. Roderick Kiewiet and I have shown, the controlling committees in Congress—in particular, the budget and appropriations committees—counteract iron triangles by reducing the substantive committees’ ability to act unilaterally. That is, the substantive committees are disciplined by the budget and appropriations committees’ ability to constrain, modify, and reject their proposals. Thus, although the substantive committees that deal with an agency daily might develop clientele relationships with the agency, the institutional checks in the legislative process restrict the substantive committees’ ability to deliver private goods to the agency or the interest groups it regulates.

CONCLUSION

IN SUM, TWO CONDITIONS ARE NECESSARY FOR DELEGATION to fail: principals and agents must have conflicting interests in the outcome of delegation and principals must lack an effective check on agents’ actions. Principals may lack an effective check because their agent has expertise that the principals do not possess or because of conflicting interests among the principals. Where delegation occurs under such conditions, agents may be free to take any action that suits them, regardless of the consequences for the principals. Delegation then becomes abdication.

Arthur Lupia and I have argued that delegation *can* succeed when one of two conditions is satisfied. The first is the *knowledge condition*, in which the principal, through his own experience or through knowledge gained from others, is able to distinguish beneficial and detrimental agency actions. The second is the *incentive condition*, which is satisfied when the agent has an incentive to take account of the principal’s welfare in making his decisions. These two conditions are somewhat intertwined because a principal who becomes enlightened about the consequences of delegation can either motivate the agent to take actions that enhance the principal’s welfare or reject actions by the agent that do not do so.

The institutional settings in which administrative processes unfold often enable legislators to learn about their agents’ actions and to create incentives for bureaucratic compliance. Legislators’ implementation of and reliance on such institutions is essential to successful delegation. The day-to-day operation of those institutions is often unnoted, but the institutions’ effects on bureaucratic output are felt strongly.

I am not arguing that all is well in the Washington establishment. Delegation does produce agency losses and does entail agency costs, and the sum of these can exceed the benefits of delegation. (The interesting questions are: *When* does this happen? And *how* can we tell when it does?) Federal agencies and departments do

sometimes become the Club Med of the Potomac, or worse!

Delegation, although problematic in its outcomes, is not equivalent to the abdication of Congress’s law-making authority. Members of Congress always incur some costs—both personal and institutional—to hold the executive branch accountable for its policy choices because there are often segments of society—sometimes even a majority—that dislike those choices. Federal agencies are creatures of Congress and are subject to the strictures of their creator. 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 nondelegation doctrine or the dismantling of the federal bureaucracy.

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