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MATHEW D. McCUBBINS
University of California, San Diego

ROGER G. NOLL
Stanford University

BARRY R. WEINGAST
Stanford University

A central problem of representative democracy is how to ensure that policy decisions are responsive to the interests or preferences of citizens. The U.S. Constitution deals with the electoral side of this problem by constructing institutional safeguards and incentive structures designed to make elected representatives responsive to citizens. But making policy involves more than decisions by elected legislators and the president. Inevitably, elected officials delegate considerable policymaking authority to unelected bureaucrats. Because elected officials have limited resources for monitoring agency performance, the possibility arises that bureaucrats will not comply with their policy preferences. This gives rise to the question how—or, indeed, whether—elected political officials can reasonably effectively assure that their policy intentions will be carried out.

This paper explores the principles of the political control of bureaucratic decisions. In so doing, we seek to develop a unifying conceptual framework for two general types of controls: "oversight"—monitoring, rewarding, and punishing bureaucratic behavior—and administrative procedures.

We begin with the premise that the political control of agencies is a principal-agent problem. In general, principal-agent problems do not have

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first-best solutions that guarantee perfect compliance. Moreover, the best available solution typically consists of a method for altering the incentives of the agent (here, the agency). Usually this involves some mechanism for (costly) monitoring of the agent, combined with a system of rewards and punishments. Standard political oversight—hearings, investigations, budget reviews, legislative sanctions—corresponds nicely with this form of solution to a principal-agent problem.

Administrative procedures are another mechanism for inducing compliance. Procedural requirements affect the institutional environment in which agencies make decisions and thereby limit an agency's range of feasible policy actions. In recognition of this, elected officials can design procedures to solve two prototypical problems of political control. First, procedures can be used to mitigate informational disadvantages faced by politicians in dealing with agencies. Second, procedures can be used to enfranchise important constituents in agency decisionmaking processes, thereby assuring that agencies are responsive to their interests.

The most subtle and, in our view, most interesting aspect of procedural controls is that they enable political leaders to assure compliance without specifying, or even necessarily knowing, what substantive outcome is most in their interest. By controlling processes, political leaders assign relative degrees of importance to the constituents whose interests are at stake in an administrative proceeding and thereby channel an agency's decisions toward the substantive outcomes that are most favored by those who are intended to be benefited by the policy. Thus, political leaders can be responsive to their constituencies without knowing, or needing to know, the details of the policy outcomes that these constituents want.

The idea that administrative law plays an important role in political control is not novel. Nevertheless, scholarly analysis has left many controversies and puzzles. The traditional study of administrative law, reviewed in detail by Stewart, views administrative procedures as means of assuring fairness and legitimacy in decisions by administrators. Its foundations are constitutional and common law principles of nondelegation, separation of powers, due process, and other procedures that protect against autocratic and capricious decisions by government officials. A major puzzle that emerges from this view is why administrative law is as complex as it is, and especially why legislation often specifies administrative procedures that go beyond the requirements for assuring conformity with these principles. Among these puzzles are the differences among regulatory agencies in procedures for policy decisions, enforcement, and judicial review. For example, the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) often regulate the same pollutants, OSHA inside the workplace and EPA everywhere else, yet their procedures—from setting priorities to methods for evaluating regulations, to the timing, scope, and nature of judicial review—are quite different.

Obviously, neither the Constitution nor common law requires that the same problem be attacked in different ways by different agencies to achieve fairness and political legitimacy.

Positive political theory has virtually ignored administrative procedures in analyzing how political actors—the president and the Congress—can retain control of policymaking when dealing with bureaucracies. The theory holds that political actors secure and retain office in part on the basis of policy outcomes, including the overall performance or "output" of a program and the distribution of its benefits and costs among politically relevant categories of citizens. This theoretical superstructure rests on the assumption of effective political control of the bureaucracy. Yet the literature on political oversight provides good reasons to believe that the traditional means of political control are unlikely to be very effective. The puzzle is that if political actors cannot control administrative decisions and, therefore, policy outcomes, their preferences, and those of their constituents, are irrelevant, and it is difficult to imagine why performance in office should matter at all to voters in evaluating candidates.

The traditional view of administrative law provides a partial solution to the puzzle in political theory. Judicial review of agency decisions includes an examination of the conformity of an agency's decision to its mandate (which is derived not only from the actual legislation, but from committee reports, floor debates, veto messages, and other detritti of the legislative process). It also considers the conformity of the legislation and agency decision processes with individual rights and democratic values. In reviewing agency decisions, then, an impartial court can veto agency choices which do not conform with legislative intent and democratic procedural values.

Nevertheless, the mechanism of judicial review is insufficient for assuring political control. First, legislative mandates are often vague and broad, thereby placing only loose boundaries on agency decisions. Second, even when legislation is relatively specific, it is unlikely to foresee completely all contingent circumstances that might confront an agency, which inevitably leaves some degree of discretion to administrative officials. Hence, judicial review can only hold administrative discretion within reasonable bounds. Third, to the extent that administrative law does more than simply protect democratic values, the nature of political forces that give rise to administrative law becomes a puzzle in the problem of political control of agencies. Fourth, as argued by Shapiro (1986), traditional views of judicial review rest on an analytically weak foundation, for they assume that the objectives of the judiciary (unlike those of elected officials and bureaucrats) are purely to pursue principles of fairness and legitimacy. To the extent the courts pursue policy objectives that do not conform to the wishes of elected officials, administrative law (through legislation or executive order) may be in part a means for controlling the judiciary as well as for assuring adherence to democratic values.

This paper examines the role of administrative law in assisting political actors in controlling the bureaucracy. While it borrows from the discussion of administrative law as assuring the political legitimacy of agency decisions, our discussion is broader and is positive, not normative, in its objectives. Specifically, the hypothesis we put forth is that much of administrative law—indeed, most administrative law that is not derived from judicial interpretation of the Constitution and common law principles of administrative fairness—is written for the purpose of helping elected politicians retain control of policymaking. Our hypothesis primarily concerns Congress, but it also applies to the Executive, which often helps develop and always approves legislative changes in administrative law and which directly alters administrative procedures through the issuance of executive orders.

Section 1 reviews the literature on political control of the bureaucracy. The principal mechanisms for influencing bureaucratic implementation that are discussed in the literature are monitoring and sanctions. Congress and the president can reward or punish agencies for their policy choices. We argue, however, that the costliness of monitoring and sanctions limits their effectiveness. Moreover, the magnitude of sanctions is limited. This leads to less effective control and ultimately to slippage in compliance.

Section 2 argues that the legal constraints imposed in the Administrative Procedures Act (APA) and elsewhere enable political officials to overcome certain informational inequalities between themselves and administrative officers. By requiring agencies to collect and disseminate politically relevant information, Congress and the president make the threat of sanctions a more efficacious control device. Moreover, the administrative system is designed so that some of the costs of enforcement are borne not by politicians, but by constituents and the courts. Finally, administrative procedures affect the costs to agencies of implementing policies that are opposed by groups enfranchised by these procedures. This alters the incentive structure of the agencies and thereby shapes their decisions.

Section 3 contains specific examples of the phenomena described in section 2. Section 4 discusses how the administrative system is affected by, and affects, the prerogatives of the courts. Section 5 examines how the system creates a form of representative democracy in administrative proceedings.

1. SOLUTIONS TO THE PROBLEM OF BUREAUCRATIC COMPLIANCE

Creating an agency with discretionary authority to make policy decisions causes a potentially important problem: the agency may make decisions that depart from the policies (including distributive benefits and costs) that Congress and the president would otherwise have chosen. The mechanics of

how and why agency decisions would depart from the policies preferred by members of Congress and the president are the subject of a vast literature, and we review it only briefly here. The fundamental premise of this literature is that bureaucrats have personal preferences which conflict with members of Congress and the president. The policy choices of the latter are disciplined by the requirement that periodically they seek ratification of their performance in office by their constituents. The choices of agency officials are not subjected to electoral discipline. Consequently, in the absence of effective oversight, they are likely to reflect personal preferences, derived from some combination of private political values, personal career objectives, and, all else equal, an aversion to effort, especially effort that does not serve personal interests.

The crime of runaway bureaucracy requires opportunity as well as motive, and this is supplied by asymmetric information. A consequence of delegating authority to bureaucrats is that they may become more expert about their policy responsibilities than the elected representatives who created their bureau. Information about cause-effect relations, the details of existing policies and regulations, the pending decision agenda, and the distribution of benefits and costs of agency actions is costly and time-consuming to acquire. As in all agency relationships, it may be possible for the agency to take advantage of its private information.

Several consequences can emerge from this situation. One is simple shirking: an agency becomes a Club Med for government officials who undersupply policy decisions. Another is corruption: agency officials allow the bureau to be "captured" by selling out to an external group. Still another is oligarchy: the peculiar political preferences of the agency override democratic preferences. The challenge for political overseers is to prevent these outcomes.

Because monitoring and enforcement are not costless, no method of influencing administrative decisions will be perfect. Rather, elected representatives face a tradeoff between the extent of compliance they can command and the effort that is expended to assure it, effort which has an opportunity cost because it can also be used for other politically relevant purposes. Moreover, political actors can be expected to engage in delegation even if they find perfect compliance to be excessively costly. Delegation confers a benefit by expanding the scope of politically relevant activity available to them. Imperfect compliance, then, is simply a cost of delegation to be balanced against this benefit.

The problem of bureaucratic compliance has long been recognized as a principal-agent problem.[1] Specifically, members of Congress and the president are principals in an agency relationship with an executive bureau. As

1. See, for example, Rose-Ackerman; Moe (1984); Weingast (1984); and, of course, Mitnick (1975, 1980).

in all agency relationships, the principals will seek methods to ensure that delegation is more beneficial than costly.

One difference between this agency relationship and the ones normally encountered in economic theory is that there are many principals. The Constitution established a governmental system whereby the authority to make and control public policy is fragmented: not only was authority divided between the president and Congress, but legislative authority was divided into two branches. Indeed, one of the virtues Madison saw in the Constitution was that authority was divided still further between the federal and state governments. In order to reduce the opportunities for collusion among the members of each institution, the founders gave each a different tenure of office and made them responsive to different constituencies. Because they represent different interests, the elected officials in each of these institutions, acting as principals with respect to the agency, will likely seek to influence an agency's policy choices in different directions.

In the twentieth century, policymaking in Congress has become further fragmented, as committees and subcommittees have become the loci for decisions. In our analysis, we ignore most of this complexity. We focus solely on the mechanisms by which elected officials control decisions in agencies, and not on how various elected officials enforce their own agreements and compromises.

1.1. Rewards, Sanctions, and Monitoring as Control Strategies

The literature on political control of the bureaucracy describes a variety of control strategies available to political actors that exemplify traditional solutions to the principal-agent problem. For the most part, the scholarly literature emphasizes the use of "reactive" strategies which elected politicians adopt after some blunder or radical departure from their intended policy has occurred.[2] Even the monitoring function is largely reactive, especially in Congress, where active oversight of many agencies (especially regulatory agencies) is infrequent (U.S. Senate, Committee on Government Operations, 1977).

Politicians have several means available to reward or punish agencies. Under extreme circumstances, civil servants can be removed from office, and even prosecuted, if their actions stray too far from the grey areas surrounding the mandate and power of their agency. The top officials in an agency are usually political appointees and can be impeached by Congress or, with a few exceptions, fired by the president. Appropriations and reauthorizations bills also provide a means for either general or programmatically targeted rewards and punishments (Kirst). Public hearings and investigations, while part of the monitoring function, also can serve to subject

2. See, for example, Fiorina (1982); McCubbins and Schwartz (1983); Moe (1985); and Weingast and Moran (1983).

recalcitrant bureaucrats to public humiliation that devastates their careers. Finally, legislation or executive order can reorganize agencies and shuffle policy responsibilities among them, thereby reallocating policymaking authority.

Although these actions are reactive in that they take place after a suspected impropriety has occurred, their availability affects the incentives facing bureaucratic decisionmakers. The value of a political punishment, multiplied by the likelihood that improper behavior will be detected and punished, enters as a cost in the calculation of net benefits by a bureaucrat who contemplates straying from the preferences of political overseers. If detection and punishment are sufficiently likely, and the magnitude of the punishment sufficiently great, a noncomplying action can be deterred. Thus, the presence of sanctions, by forcing administrators to anticipate political reactions to their policy decisions, provides some measure of protection from noncompliance.[3]

Recent studies of bureaucratic decisionmaking have supplied evidence that agencies are responsive to members of Congress and the president. Weingast and Moran (1983) show how the mix of cases at the Federal Trade Commission (FTC) changes in response to changes on the relevant oversight committees in Congress; Moe (1985) shows that both the president and congressional committees play an important role in the determination of cases at the National Labor Relations Board (NLRB); Grier and Beck both show that the Federal Reserve Board responds to its political principals to a far greater extent than was previously thought possible.

Nevertheless, by itself, a system of rewards and punishments is unlikely to be a completely effective solution to the control problem. This is due to the cost of monitoring, limitations in the range of rewards and punishments, and, for the most meaningful forms of rewards and punishments, the cost to the principals of implementing them.

Monitoring. By themselves, rewards and punishments do not deal directly with the problem of asymmetric information. If agencies have better information, they have a range of discretion that is undetectable to political overseers, and so, in the absence of monitoring, some noncomplying decisions will not be subject to retribution. Thus, if noncompliance is a serious problem, one would expect political actors to invest substantial resources in monitoring; indeed, this appears to be the case (Aberbach).

Policy monitoring in Congress takes two forms. The more apparent, but

3. Examples are numerous: the dismantling of the Area Redevelopment Administration in 1963, only two years after its creation, is an extreme (Ripley). In the last twenty years, Congress has repeatedly intervened in decisionmaking at the FTC, the most famous case regarding proposed FTC regulation on cigarette advertising (Fritschler). More recently, Congress has intervened to stop the FTC from regulating the insurance industry, television advertising aimed at children, funeral homes, and used car sales. Congressional intervention at the FTC also sends a clear message to administrators in other agencies: it is necessary to anticipate congressional reaction to their regulatory policies (Mendeloff).

probably less important, is ongoing oversight and evaluation by congressional subcommittees and agencies that are arms of Congress, such as the Congressional Budget Office (CBO) and the General Accounting Office (GAO). Less apparent, but probably more important (judging from how members of Congress allocate their time and staff), is "fire-alarm" monitoring (McCubbins and Schwartz, 1984)). This form of monitoring consists of disappointed constituents pulling a member's fire alarm whenever an agency harms them. Oversight is then a form of constituency service for members. Constituency service has become an increasingly important activity of members of Congress in the postwar era, to the point where it now accounts for more than half of the staff effort in Congress and is a critical factor in assuring the reelection success of members (Fenno, 1973; Fiorina, 1977a; Fiorina and Noll, 1978; Cain, Ferejohn, and Fiorina).

Policy monitoring in the executive branch is concentrated in the evaluation process. The Executive Office of the President is comprised of numerous organizations, most notably the Office of Management and Budget (OMB), that scrutinize budgets, programs, and operations of agencies. Furthermore, cabinet officials—the people most politically responsive to the president—also have their own independent evaluation staffs.

To facilitate the monitoring process, political actors impose information collection and reporting requirements on agencies. Both Congress and the OMB receive oceans of data and reports from offices within agencies about ongoing programs. And, through GAO and the General Services Administration (GSA), political actors impose rigid accounting and record-keeping requirements on agencies that can be used subsequently as the basis for sanctions (Kiewiet and McCubbins).

Though monitoring is probably far more pervasive and effective than was once thought, it imposes costs on political actors. First, resources devoted to monitoring have an opportunity cost, for they presumably could be devoted to delivering more government services to constituents or shrinking the burden of the public sector. Second, the time used by political principals in acquiring information, assessing the degree of noncompliance, and deciding what punishment strategy, if any, to undertake also has an opportunity cost. Easy and quick compliance is preferred, for it enables political actors to provide more service to constituents in a given amount of time.

In addition to imposing significant costs, monitoring is likely to be only an imperfect mechanism for detecting noncompliance. First, cause-effect relations in human affairs often are subject to an important degree of irreducible uncertainty, so that no matter how carefully the consequences of an agency's actions are monitored, political actors will be unsure about the extent to which an agency undertook best efforts to comply with its principals' wishes. Second, monitoring consists primarily of information received after an action is taken. One form of noncompliance is for an agency to

make a decision that creates a new political interest which is antithetical to the existing political structure.[4] In this case, sanctions against an agency generate political costs that would not have to be faced had the policy decision been anticipated and prevented. The result is more noncompliance than would otherwise be the case, despite accurate retrospective monitoring.

The final difficulty of any monitoring system pertains primarily to the more traditional oversight function, as practiced by OMB and in congressional hearings. It is the ultimate dependence of external monitors on information supplied by agencies. In a sense, the agency both keeps the books and performs the audit. If agencies have important private information, not all of which can be obtained by external monitors, they can use this information to hide noncompliance. This problem cannot be solved by increasing the intensity of external monitoring but must be solved by giving the agency an incentive to make all of its information public.

We have already observed that noncompliance must be perceived as a serious problem because so much effort is devoted to monitoring. Now we conclude that direct monitoring by elected representatives is likely to be an imperfect mechanism for detecting noncompliance. If so, there is a good chance that some shirking by bureaucrats goes undetected. This can be offset only if penalties are sufficiently high and sanctions, when applied, are not commensurately costly to political principals.

Limits to sanctions. A key result in principal-agent theory is that in some circumstances—and especially when noncompliance is difficult to detect—the magnitude of the sanctions necessary to effect compliance must be very large (indeed, often much larger than the potential rewards to the principal from compliance—see Holmstrom). In the case of policy implementation through administrative agencies, the maximal stakes of bureaucrats are criminal penalties, and these are available only when noncompliance takes the form of willful violation of the letter of the law. In cases where noncompliance is not criminal, the range of sanctions is more limited and of comparable magnitude to the costs an agency can impose on political actors. Specifically, each can undermine the career objectives of the other, and each can thwart the other from achieving preferred policy actions. Thus, absent illegal activities by agencies, the sanctions available to political actors are roughly comparable to the costs agencies can impose on politicians.

If this is the case, two logical consequences follow. First, monitoring effort should be intensive so that the limits to sanctions can be offset to some degree by higher detection probabilities. Hence, limits to sanctions of public officials provide an explanation for the elaborate monitoring sys-

4. See Wildavsky concerning the development of agency constituencies, and Noll and Owen (1983) concerning the creation of interest groups by regulatory decisions that define new property rights.

tem of the public sector. Second, if sanctions are based primarily on monitoring, then imperfect monitoring implies that substantial noncomplying behavior will go undetected.

Political costs of sanctions. Not only is the magnitude of sanctions for noncompliance limited, but most of the methods for imposing meaningful sanctions also create costs for political principals. Some forms of sanctions require legislation, which demands the coordinated effort of both houses of Congress and the president.[5] The introduction of legislation creates the additional problem that it can reopen long settled, but still contentious, aspects of a policy that are unrelated to the compliance problem. To impose legislative sanctions, therefore, requires running the risk of other undesirable legislative outcomes from the perspective of any given elected official.

Another potential cost of sanctions is the response of the electorate to new information about government wrongdoing. Citizens have a principal-agent relationship with elected political officials that is broadly similar to the relationship between elected officials and bureaus. Specifically, in the face of imperfect and costly information of considerable complexity, constituents must assess the extent to which elected officials, not agencies, are guilty of noncompliance with wishes of the electorate. Hence, a publicly visible investigation and punishment of an agency may raise doubts in the minds of the electorate about the attentiveness to business of their elected officials. They may conclude that Congress or the White House, not the agency, was the Washington branch of Club Med. Or, if citizens vote retrospectively, they may respond to information about government malfeasance of any sort by simply voting against incumbents.

Finally, the act of imposing sanctions distracts agencies from the delivery of public services, focusing their attention on minimizing the damage they will suffer as a result of detected malfeasance. Investigations, "midnight massacres" of key officials, and reorganizations are disruptive of the business of the agency. To the extent the agency is delivering some politically relevant services, this disruption, too, is costly to elected politicians.

Of course, if imposing significant sanctions is costly to political actors as well as to bureaucrats, the ardor for them among politicians will be proportionately dampened. Specifically, not all acts of noncompliance, once detected, will be punished significantly, giving agencies an additional incentive to pursue their own preferences at the expense of political principals.

5. Procedures have been established that decrease the collective action costs involved in imposing sanctions. Committee vetoes, as imposed on the FTC in the FTC Reauthorization Act of 1980, involve only a small subset of the legislature. Procedures have also been designed that circumvent the requirement of presidential acceptance for proposed sanctions. The most obvious example is the legislative veto. Congress adopted legislative vetoes in hundreds of acts since the 1930s. Another method of effectively bypassing presidential influence is through the use of riders on appropriations legislation. With the loss of the legislative veto, appropriations riders have become a favorite tool with which to sanction agencies (Cooper).

The thrust of these arguments is not that rewards, punishment, and monitoring are unimportant in the public sector. Indeed, monitoring is intense only if it is useful to political principals, and its utility arises in part from the ability of political actors to punish or reward agencies on the basis of detected compliance patterns. Extensive monitoring makes detection of noncompliance more likely and sharpens the incentive effects of sanctions by allowing political actors to impose them in more exact proportion to the probability and magnitude of noncompliance. Consequently, shirking and malfeasance are going to be less attractive to agencies than they would be in the absence of monitoring and sanctions.

Nevertheless, by themselves, monitoring and sanctions do not comprise a perfect solution to the problem of bureaucratic compliance because they are costly, inexact, and subject to fundamental limitations. Thus, one would expect politicians to welcome other measures that may be available for altering the incentive structure of agencies, especially if these alternatives have relatively low cost. An optimal mix of the measures, where each measure complements the strengths of the other and substitutes for the other's weaknesses, will establish less costly and more effective control of the bureaucracy by political principals. Hence, the stage is set for analyzing administrative law as such a mechanism.

2. PROCEDURAL SOLUTIONS TO COMPLIANCE PROBLEMS

Administrative procedures can be solutions to problems of noncompliance by agencies only if procedures actually affect the outcomes of decisionmaking processes. Such is not necessarily the case, for elaborate procedures can serve at least two other ends. First, as developed by both Michaelman and Mashaw (1983; 1985a), procedures may be ends in their own right. Regardless of the outcome, people may derive greater value from processes that treat them respectfully and give the appearance of rationality than from processes that are perceived to be cruel, unfair, and arbitrary. Second, procedures may be a ruse aimed at the electorate in that they have no effect on outcomes but transfer apparent responsibility for decisions from elected political officials to agencies or courts (Fiorina, 1985). Whereas as usually stated this implies irrationality or gullibility on the part of the electorate (for example, see Edelman), this is not necessarily the case. Administrative procedures in some form may be necessary to protect other values (such as constitutional rights and procedural characteristics referred to above) and so bound (but not determine) outcomes while simultaneously increasing the complexity of decisionmaking processes and the informational requirements to comprehend them. If so, administrative procedures can simultaneously provide a net benefit to citizens and attenuate the ability of citizens to allocate political responsibility for policy outcomes.

While both lines of argument point to plausible features of administra-

tive processes, we argue that this is not all there is to procedures. Specifically, we assume that the details of administrative law as applied to any given decision problem will affect the outcome. The basis for this assumption is the presumption that decisions depend on the information that underpins them and on the means for relating that information to decisions that are permissible according to the strictures of administrative law. If decisionmakers must take account of all of the relevant information that is available to them, and if participants in an administrative process can be relied upon to provide information that is, on balance, favorable to their interests, then rules of standing and evidence and the allocation of burdens of proof will affect the range of decisions available to an agency. Of course this observation is hardly novel; a classic public administration text, written shortly after the passage of the APA, predicted that the new procedures would alter the range of interests represented before federal agencies (Simon et al.: 521). Indeed, the basis for proposals to assure broad representation in administrative processes (see Stewart) and for relatively narrow interpretation of the extent of legislative delegation to an agency (see Aranson, Gellhorn and Robinson; and Mashaw, 1985b) is a belief that process matters.

If procedures do affect outcomes, political officials have available to them another tool for inducing bureaucratic compliance. Specifically, alterations in procedures will change the expected policy outcomes of administrative agencies by affecting the relative influence of people who are affected by the policy. Moreover, because policy is controlled by participants in administrative processes, political officials can use procedures to control policy without bearing costs themselves, or even having to know what policy is likely to emerge. The burden of this section is to demonstrate the plausibility of the contention that an important function of administrative procedures is to provide a means of inducing bureaucratic compliance that does not require the time, effort, and resources of political actors.

A wide variety of administrative procedures may be applied to an agency's decision processes. This reflects in part the diversity of the interests of its principals. Some mechanisms may disproportionately enhance the ability of some principals to control agency choices. The traditional means of control, both statutory and nonstatutory, are largely exercised by congressional committees. The appropriations committees, for example, can legislate a great deal of policy under the cover of spending bills. But this does not necessarily mean that committees are benefiting most from the exercise of this power. It may be, as Fenno (1966) argued, that the appropriations committees are acting as agents for the entire legislature. The game played out between the committee and its chamber, between the chambers, and between Congress and the president determines which of these actors, when placed in its relationship as principal with respect to some agency, will be most advantaged by a given set of procedural constraints. The anal-

ysis of this "meta-game" between principals is beyond the scope of this paper. Instead, we wish to advance the hypothesis that administrative procedures enhance the ability of political principals in general to solve their agency control problems.

There are two general forms off control problems. First, *political principals in both branches of government suffer an informational disadvantage with respect to the bureaucracy.* Because of this ubiquitous problem, the political principals will seek a ubiquitous solution. We argue that many of the provisions of the Administrative Procedures Act solve this asymmetric information problem. Second, *the coalition that forms to create an agency—the committee that drafted the legislation, the chamber majorities that approved it, and the president who signed it into law—will seek to ensure that the bargain struck among the members of the coalition does not unravel once the coalition disbands.* Specifically, the coalition will seek to combine sanctions with an institutional structure to create pressures on agencies that replicate the political pressures applied when the relevant legislation was enacted. Here, the point of administrative procedures is *not* to preselect specific policy outcomes, but to create a decisionmaking environment that mirrors the political circumstances that gave rise to the establishment of the policy. Whereas political officials may not know what specific policy outcome they will want in the future, they will know which interests ought to influence a decision and what distributive outcomes will be consistent with the original coalitional arrangement. In other words, the coalition "stacks the deck" in the agency's decisionmaking to enhance the durability of the bargain struck among members of the coalition. We take up specific examples of "deck-stacking" in section 3.

If these uses of administrative process are effective, the agency, without any need for input, guidance, or attention from political principals, is directed toward the decisions its principals would make on their own, even if the principals are unaware, ex ante, of what that outcome would be. By structuring the rules of the game for the agency, administrative procedures sequence agency activity, regulate its information collection and dissemination, limit its available choices, and define its strategic advantage. Moreover, an important feature of this system is that constituents, agencies, and the courts bear much of the costs of ensuring compliance. Indeed, courts are the key, for without them political actors could not rely on decentralized enforcement.

2.1. Political Consequences of the Administrative Procedures Act

The Administrative Procedures Act of 1946 codified over a half-century of court decisions affecting administrative proceedings. The court's rationale for establishing the procedural requirements embodied in the act was to

ensure that procedural justice applies in agency decisionmaking. But the APA did more than this. Indeed, it took Congress and the president a decade to work out the details of an act to which they could both agree. Thus the APA is in part a political document, written to enhance political control. The twin goals of procedural justice and agency control were noted in the Report of the House Judiciary Committee accompanying the proposed act: the act "is designed to provide . . . fairness in administrative operation" and "to assure . . . the effectuation of the declared policies of Congress" (U.S. Congress, 1947: 252).

Important ideological and symbolic factors undoubtedly played a role in the passage of the APA. But though little in the APA represented a new procedural innovation not found in previous court decisions, the APA was not only symbolic legislation, nor was it simply a statutory recognition of existing judicial precedent. Prior to the APA, procedural requirements imposed by the courts differed across agencies. This included procedures relating to information gathering and disclosure and to those concerning evidentiary standards. Two important effects of this act, therefore, were to impose greater uniformity across agencies and to raise the minimum standards to which an agency must adhere. A major focus of the congressional hearings, for example, concerned differing evidentiary standards. For example, the court had held the Interstate Commerce Commission (ICC) to a substantial evidence standard since the early part of this century, but many of the New Deal agencies were not subject to this constraint (see U.S. Congress, 1947).

2.2. Incentives to Gain Relevant Political Information

Politicians delegate authority to an agency for a variety of reasons. One is that the policy is inherently controversial and so politicians may seek to distance themselves from the ultimate policy choice by "shifting responsibility" to an agency designed to take blame (Fiorina, 1985). In this case, the principle design criterion for an administrative process is likely to be procedural fairness, as perceived by the warring interests, and a propensity to find compromise, so that in the end the participants will have a blunted incentive to take further political action to alter the policy outcome.

Another motive for broad delegation of authority occurs when political leaders are uncertain about what politically is the most desirable policy (McCubbins, 1985). It can then be in their interest to set in motion processes that will resolve these uncertainties and that will use the newly acquired information to carry out the policy preferences they would have if fully informed. To accomplish this, political principals must first provide bureaucrats with the means to collect information about the consequences of various policy options (Fiorina, 1982). Second, political leaders must impose

procedures that cause the information to be used to make decisions that serve their interests.

Delegation of authority makes it *possible* for agencies to adjust policies in directions desired by political leaders as more information is obtained (Mashaw, 1985b). But this is only a possibility, not a certainty. If greater delegation allows agencies greater opportunities to pursue their own goals, it only helps the agencies, not the political principals. Hence, greater delegation implies a greater need for effective control mechanisms (McCubbins, 1985).

In order to make decisions that serve their own interests, elected officials need to know the following: (1) the precise nature of the policy problem; (2) the relevant policy options and their likely consequences; (3) the identities of the politically relevant parties and their interests; and (4) the likely political reactions of each group to each policy option. In fact, with uncertainties about the technical, economic, and political aspects of a policy, ex ante specification of the best policy outcome is not possible. Administrative procedures, however, can be used to guide agencies to make decisions that are broadly consistent with the policy preferences of political principals. If so, "flexibility" in "vague mandates" is, in fact, more apparent than real, for it will necessarily be accompanied by more procedural controls to assure compliance.[6] To illustrate, consider the procedures governing rulemaking.

The constraints of due process imposed by the APA and the courts are primarily procedural. Courts ensure that agency actions are neither "arbitrary" nor "capricious." The requirements are as follows:

1. The 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 or any particular action.
2. Agencies must solicit "comments" and allow all interested parties to communicate their views.
3. 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 (see McCubbins and Page, 1987). If

6. Mashaw's (1985b) critique of scholars who argue for strict interpretation of the Constitutional prohibition against legislative delegation is instructive in illuminating this point. Nondelegation is defended on the grounds that it prevents the "runaway bureaucracy" or "iron triangle" whereby policy drifts from one that could be sustained by a legislative majority. Mashaw makes the observation that, under conditions of uncertainty, more flexible delegation can produce a normatively superior policy outcome from the perspective of either welfare economics or individual rights. Our additional observations are two: (1) political actors know a vague delegation when they create one and thus must be doing so for rational reasons, taking into account the possibility of attenuated political control, and (2) in any event, vague delegation does not necessarily mean loss of control, as long as it is accompanied by a combination of monitoring systems, reward structures, and deck-stacking administrative procedures that create incentives for the agency that mirror the incentives acting upon elected officials.

hearings are held, then parties may be allowed to bring forth testimony and evidence and often to cross-examine other witnesses.

4. Agencies must deal explicitly with the evidence presented to them and provide a rationalizable link between the evidence and their decisions.

These requirements play an important role in governing information collection and dissemination by agencies. Their paramount political implications are fivefold.

First, they ensure that agencies cannot secretly conspire against elected officials by presenting 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 who 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 the 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 decisionmaking—notice, comment, deliberation, collection of evidence, and construction of a record in favor of a chosen action—afford numerous opportunities for political principals to respond when an agency seeks to move in a direction that officials do not like.[7] These procedures also ensure that relevant political information is available to form the basis of such action. Neither Congress nor the president need first undertake costly collection of this information, nor need they contend with an agency which has substantial private information. An important consequence is that this allows political reaction prior to agency choice, and prior to the agency's ability to mobilize a constituency. The strategic advantage of agencies is therefore limited.

Fifth, administrative participation also works as a gauge of political interest and controversiality (Noll, 1971). In administrative processes with broad rights of standing and relatively harsh evidentiary standards pertaining to the agency's basis for its decisions, interested parties have an incentive to burden the record with voluminous evidence supporting a decision favorable to their interests. But marshalling this evidence and its supporting

7. Even though this may mean, as Ferejohn, McCubbins and Page (1987), and Noll (1971) all argue, that no matter what the agency does, some political principal will be displeased.

legal argument is expensive, so that parties will face a tradeoff between the likely effect of more evidence on the agency's decision and the costs of submitting it. In noncontentious proceedings, a party need not participate intensely to affect outcomes favorably; however, in highly controversial policy decisions, intense participation is an absolute necessity to prevent a catastrophic outcome (assuming that an interest's position is in some measure defensible). Hence, demanding procedural requirements (including a "hard-look" judicial review) have the political side benefit of selectively causing the most politically contentious issues—and the ones in which political overseers would be most concerned about the distributive aspects of the decision—to generate the most complete information, as well as to provide substantial advance warning about the likely decision that, in the absence of political intervention, the agency is most likely to make.

2.3. Public Disclosure Requirements

In the mid-1960s, the Freedom of Information Act (FOIA) was added to the APA. FOIA limits the ability of an agency to impose a change in policy without warning by requiring that, with minor exceptions, all records be publicly available.[8] The APA also requires that an agency "make available" a record of the final vote of each member in every proceeding (sect. 552 (q)(4)). The Government in the Sunshine Act (GITSA) plays a similar role by limiting how much of the decisionmaking process can remain hidden.

These acts enable interested parties to learn about any attempt by the agency to develop a new constituency or to change policy while it is still on the drawing board. This disadvantages the agency by making political intervention possible much earlier in the policymaking process, *before the agency can mobilize a new constituency* (Spitzer). FOIA contains another procedural device to make these requirements binding: it reversed the burden of proof in FOIA disputes and made it almost impossible for the agency to win a FOIA case in court. The agency must prove that it need not release the information, and it must do so under extremely short time constraints. This causes agency personnel to face sanctions if they do not disclose information but no corresponding threat if it is released (Spitzer).

Thus, procedures imposed under the APA, as amended, reduce an agency's information advantage over its political sponsors. But this has a further, critically important implication. *These procedures greatly increase the efficacy of ex post sanctions.* Because they can now be more readily tied to specific decisions, attempts by an agency to alter policy (either on its own, or in response to outside interference) can be spotted earlier by constituents, giving political officials more time to impose sanctions on er-

8. There are important exceptions, of course, such as the imminent hazard clauses under FDA or CPSC.

rant bureaucrats. Incentive effects of swifter and more accurately applied sanctions cause bureaucrats to be more reluctant to deviate from the policy preferences of political overseers. Moreover, the enhanced efficacy and, hence, heightened incentive effect of sanctions is achieved without the attention of political officials.

2.4. EVIDENTIARY STANDARDS

Rules and standards of evidence in administrative law serve another important political function. The key decision is to select the stringency of the evidentiary standard that an agency must satisfy to make its decisions withstand a court appeal. Weak standards give agencies more flexibility. If political principals believe that agencies will otherwise comply with their wishes, a weak standard is preferable, for it minimizes the chance that a favored policy will be precluded by the evidence.

For the most part, administrative agencies face weak rules of evidence. In the 1930s there was no universal evidentiary standard requiring agencies to present evidence in support of their decisions. The APA extended the substantial evidence requirement to all federal agencies, thereby limiting absolute discretion.[9] The substantial-evidence requirement that "findings of fact, if supported by substantial evidence shall be conclusive," together with the retreat from substantive due process and the presumption of agency expertise, are normally regarded as limiting the ways in which the court can scrutinize the political judgments and choice of agencies. But they are an essential ingredient of political control as well. The flow of program benefits to constituents would be considerably more variable and uncertain if political actors could not avail themselves of this protection against the intrusion of the courts. The rather weak requirement of substantial evidence can be viewed not solely as providing agencies with independence, but as giving agencies the flexibility to choose policies that reflect the preferences of political overseers. Independence occurs only if political control through procedures is lacking.

In some cases, legislation has sought to impose stricter evidentiary rules for agency decisions (as provided for the regulation of chemicals by the EPA under the Toxic Substances Control Act) or even to impose substantive policy outcomes (for example, new source performance standards). This may come about when conflicting interests among the political over-

9. Part of the motivation by members of Congress to impose this evidentiary requirement on agencies stems from the early New Deal agencies which in some cases would not even reveal during extensive hearings their decisionmaking criteria, evidence, or other inputs into their decisions. See, for example, the discussion of the Federal Emergency Relief Administration in Wallis. Since these agencies were part of the president's coalition, this extension appears to be an element of redistribution of power from the executive branch to the legislative branch.

seers creates conflicting pressures on the agency. The winning side in such a conflict will impose tighter procedural constraints on the agency to make sure that its interests predominate (McCubbins, 1985).

2.5. DECK-STACKING

Because much of administrative law is derived from case law, the political advantages of procedural requirements may at first appear to be the fortuitous gift of the courts, a by-product of decisions made on the basis of other, more noble purposes than enhancing the political control of agencies. But much of administrative law is not derived from the courts; rather, it is embodied in legislation and executive orders. Moreover, political actors control the extent of representation of various interests in administrative processes. Through these decisions, political actors assure that the influence accorded to different constituents is not random; indeed, by controlling the details of procedures and participation, *political actors stack the deck in favor of constituents who are the intended beneficiaries of the bargain struck by the coalition which created the agency.* Because administrative processes, once established, endure far into the future and may deal with issues in which there is considerable uncertainty over key economic and technical phenomena, elected representatives can be expected to be unsure about the substantive details of their most desired policy, even though they are certain about who should benefit and how the costs should be shared. In such a circumstance, political leaders could undertake to become sufficiently expert that they could fashion legislation that was rich in substantive policy content, as is often the case in tax legislation. Alternatively, the organic statute can be vague in policy objectives, seemingly giving an agency great policy discretion, but the administrative process can be designed to assure that the outcomes will be responsive to the constituents that the policy is intended to favor.

For reasons developed by Olson and elaborated in Noll and Owen (1983), the resources available for representation in administrative processes vary systematically and predictably among interests for reasons other than their stakes in the issue. Some constituents are likely to be well represented regardless of the cost and complexity of the processes that affect them, and still others not at all. Moreover, among the less well-represented constituents there may also be considerable differences in the extent to which they are politically relevant in Congress or the White House, owing to their participation in elections or because some are better represented on relevant congressional committees.

The tools available to political actors to control administrative outcomes through process, rather than through 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 fi-

nance 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 no budget for subsidizing other representation, or for independent staff analysis in the agency or in other agencies that might participate in its proceedings, cumbersome procedures exemplify deck-stacking in favor of well-organized, well-financed interests.

The assignment of the burden of proof is another mechanism for deck-stacking. If cause-effect relationships are subject to considerable uncertainty, the assignment of the burden of proof determines the stringency of the policy decision by determining which side will be given the benefit of the doubt.

Deck-stacking enables political officials to cause the political environment in which an agency operates to mirror the political forces that gave rise to the agency's legislative mandate long after the coalition behind the legislation has disbanded. Thus, the agency is not free to manipulate policy by seeking to create a new coalition that supports its preferred policies. The agency may seek to develop a new clientele for its services, but such activity must be undertaken not only in full view of the members of the initial coalition, but in an administrative process that is designed to favor them. This increases the chance that policy change either will benefit them, will be based on a compromise with them, or will reflect a dissipation of their political relevance for other reasons outside the agency's purview.

The rules against ex parte communication in the APA provide a more general bias in favor of politicians. These rules prohibit informal contact between private parties and the agency during formal rulemaking and adjudication and impose sever sanctions if such contact takes place. The APA authorizes the agency to take adverse action against the communicating party (sect. 557), and "section 556 makes clear that this includes an adverse final decision in the proceeding" (Spitzer 76). But this does not imply all informal contact between the parties and the agency is prohibited, only direct contact. Using politicians as intermediaries is still possible. Indeed, the rules practically guarantee that using politicians as brokers is the only form of informal negotiation that is permitted. As a consequence, the ex parte rules are almost never invoked—the punishments are too severe if it is detected, and an effective substitute is available.

Spitzer indicates a variety of ways in which politicians can steer a clear path through the rules against ex parte contacts. First, they may request "status reports" about a particular proceeding. Second, they can indicate their judgment in a variety of ways, for example, by reacting directly to the status report, by speaking out against the agency at the Washington Press

Club, by inserting items into the *Congressional Record*, and so forth. The status report, when paired with public indication of preferences, provides the appropriate signal to the agency. Unlike ex parte contacts with private parties—especially those being regulated—the courts are unlikely to set aside an agency action just because Congress or the executive has been calling agency members (Spitzer: 81).

From our standpoint, the major implications of these arguments are as follows. First, the rules against ex parte contact do not prevent agencies from informally negotiating with interested parties. Instead, they channel this through other government officials. Second, it is obvious that the brokerage function is not equally available to all interested parties but is biased in favor of constituents with access to political officials. According to the literature on Congress, this is precisely the type of congressional brokerage service that has come to be a major component of the "Washington Establishment" (see Fiorina, 1977a; and Fiorina and Noll, 1978).

2.6. Decentralized Enforcement and the Courts

Procedures will only have their desired effect if their requirements are enforced. If the constraints they impose are binding, they will establish an automatic control mechanism for Congress that keeps the agency from choosing undesirable outcomes. Moreover, they will do so with minimal effort required on the part of politicians. Administrative procedures have the advantage that their enforcement is left to constituents, who file suit for violations of prescribed procedure, and to the courts.

The courts thus play a key role in assuring political control. If the agency violates its procedures, judicial remedy must be highly likely. If so, the courts, and 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. Put another way, enforcement of procedures is *decentralized* in that enforcement does not depend on the action of political principals. This lowers enforcement costs and preserves the influence of politicians without direct participation or explicit knowledge on their part.

2.7. Changing Circumstances: The Autopilot Function

Procedural constraints have yet another advantage. From the perspective of elected politicians, one potential problem with delegating policymaking authority is that the relevant political interests may change over time. Consequently, the political costs and benefits of a policy also change, and so does the optimal political choice. One effect of establishing a bias in favor of participants in the process is that policy decisions made by the agency evolve as the composition of participating groups changes. The procedures

imply that agencies respond to changes in their environment even if the politicians have not first spotted these changes. Moreover, this allows committee members and agencies in their jurisdiction a degree of flexibility to adjust policies as political interests change *without recourse to new legislation.*

3. DECK-STACKING IN SPECIFIC POLICY CONTEXTS

The APA covers all agencies. Yet, agencies differ as to their political characteristics. Each agency was the product of a different coalitional alignment. As part of the bargain among principals to establish the agency, each agency is intended to provide benefits to a specific set of constituents. Some agencies operate in a continuing state of conflict among the groups with which they deal, while others do not. Agencies also differ according to the extent to which there is uncertainty over the costs and benefits of alternative actions. This includes both economic effects and the political consequences of agency decisions. Hence, we expect that procedural constraints will vary among agencies to reflect these differences and, further, will stack the deck in predictable directions. This section examines several enabling acts to illustrate how this is accomplished.

3.1. Enfranchising New Interests

If participation by outside interests in administrative processes affects policy decisions, policy can be made more responsive to a politically relevant constituency by enhancing its role in agency procedures. The National Environmental Policy Act (NEPA) of 1969 provides an example of how this works. In the 1960s, environmental and conservation groups became substantially better organized and more relevant politically. Though some programs were created to benefit these new interests, on the whole they were not represented in the decisionmaking processes of existing agencies. Most agencies, and the congressional committees responsible for them, resisted efforts to change the interest group environment in which decisions were made.

Environmental and conservation groups, and the congressional committees that represented them, sought to affect the programs of almost every federal agency. Agencies as diverse as the U.S. Army Corps of Engineers, the Atomic Energy Commission, and the Fish and Wildlife Service were making decisions that affected their interests. Because of the resistance to change of congressional committees, the prospect was bleak for passing legislation for each agency that would alter its procedural environment in ways favorable to environmentalists. Sweeping procedural change that af-

fected the decisionmaking of every federal agency was an attractive alternative.

NEPA imposed procedures that required all agencies to file environmental impact statements on proposed projects. These requirements force agencies to assess the environmental costs of their proposed activities. The procedures 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 (Melnick; Taylor). The requirements of the act also provided environmental groups with an increased ability to press suits against agencies. The passage of NEPA, therefore, effectively mirrored the new political environment in agency proceedings.

Because of its broad enfranchisement of environmental constituents, NEPA has had significant policy effects. Mazmanian and Nienaber provide examples of successful environmental participation in public hearings by the U.S. Army Corps of Engineers. In some instances, environmentalists managed to torpedo plans for new construction projects. Similarly, Ferejohn describes how the procedural requirements of NEPA changed decisionmaking at the corps. In evaluating projects, the corps was forced to seek out environmental interests. The result has been a significant change in the types of projects that the corps proposed.

Cohen provides another example. She shows that in nuclear licensing cases before the Atomic Energy Commission (AEC) and later the Nuclear Regulatory Commission (NRC), environmental interventionists almost never won. That is, almost all of their major contentions were denied by the AEC-NRC. Nevertheless, environmentalists had a major impact on policy outcomes. Their participation forced the agency to open important rulemaking proceedings and imposed significant delays in licensing cases. Indeed, Cohen estimates that the procedures imposed by NEPA added a full year to the consideration of construction permits at the AEC. These delays significantly increased the time required to complete a nuclear power facility, and the rulemaking proceedings led to more expensive requirements and regulatory reviews. This in turn raised the relative costs of the nuclear power option for public utilities and served the ends of the environmentalists by effectively stopping nuclear power development in the United States.

NEPA and other environmental, health, and safety acts of the 1970s impose substantial compliance and participation costs on business. Small businesses, however, usually cannot afford to participate in agency decisions and were effectively disenfranchised. Congress responded by passing the Regulatory Flexibility Act of 1980. Similar to NEPA in its implications and effect, the act requires analysis of rulemaking (but not adjudication) by public agencies on the costs to small business. The effect has been to enfranchise automatically the interests of small business in agency decision-

making. This in turn has led to exemptions for small business in the requirements of many proposed regulations.

3.2. Subsidized Representation

Like small businesses, consumers rarely have the resources to participate in agency decisionmaking and are effectively disenfranchised. With the emergence of several strong consumer lobbying organizations, and a growing concern among constituents about consumer safety, many congressional committees moved to enfranchise consumer interests in the decision rules of the agencies they oversee. At one time, eleven agencies had authorizations or appropriations for intervenor programs (FTC, National Highway Traffic Safety Administration [NHTSA], Department of State, EPA, Federal Energy Regulatory Commission [FERC], Consumer Product Safety Commission [CPSC], National Oceanic and Atmospheric Authority, Food and Drug Administration, Department of Agriculture, Civil Aeronautics Board [CAB], and the NRC).

Consider, for example, the case of the FTC. The Magnuson-Moss Act of 1974 created a public participation program. Consumer representation increased dramatically.[10] From the start, business lobbied hard to stop financial support for intervenors.[11] Following a recession and a new antiregulatory public sentiment, in 1980 Congress reduced the FTC's intervenor program in the commission's reauthorization act. Congress also placed restrictions on how the FTC could allocate its funds. The FTC Reauthorization Act of 1980 required that a minimum of 25 percent of the public participation funds were to be set aside for small businesses.

With the waning of the consumer movement, public participation programs quickly ebbed. In the early 1980s, public participation programs were explicitly *disallowed* for NHTSA, FERC, CAB, and the NRC, while the offeror processes at the CPSC was dramatically altered (Sarasohn, 1980). The introduction of these programs, and then their rapid demise, shows that agency decision processes can be periodically restructured to mirror the new political environment.

10. In the 1970s the FTC proposed new regulations in the following areas: used car sales, funeral industry practices, food advertising, advertising aimed at children, credit practices, retail installment contracts, garment labeling, vocation and home study schools, hearing aids, mobile homes, protein supplements, antacid advertising, health spas, eyeglasses, standard-setting by trade associations, home insulation, warranties, and the business conduct of doctors, dentists, and other professionals. On the FTC's efforts, see Schoenfeld; Singer (1974, 1979); Wehr; and Wines. During this period, Congress sought to strengthen the FTC's regulatory ability (Gardner), largely by expanding its substantive authority and providing increased consumer representation. See also Weingast and Moran (1983).

11. See Singer (1979); Berlow; Sarasohn (1980, 1982); and a *Congressional Quarterly Weekly Report* article entitled "House Curbs FTC: Senate Bill Advances," December 1, 1979.

3.3. Agenda Control

As was indicated by the Regulatory Flexibility Act of 1980 and the public intervenor programs of the 1970s, it is often the case that groups with conflicting interests seek representation in agency decisionmaking processes. If these groups are represented in the coalitional majorities created to pass legislation, the design of the agency will mirror the conflict. This is evident in the organic legislation that created two of the major new social regulatory agencies of the early 1970s, OSHA and CPSC (as well as the older NLRB). Responding to the interests of workers and consumers, the original legislative proposals sought to grant these agencies broad authority to identify and control a wide variety of hazards according to their own criteria. Both proposals placed the burden of regulation on business. For this reason, both proposals encountered strong opposition.

In order to obtain passage, sponsors of the legislation imposed additional procedural constraints, limiting the ability of the agencies to establish their own agenda in rulemaking. OSHA, for example, does not have complete freedom to identify the health hazards that it seeks to regulate. Rather, it can promulgate regulations only for health hazards first identified by the National Institute of Occupational Safety and Health (NIOSH). NIOSH is a separate agency located in another department (HEW, now HHS, as opposed to DOL), and is overseen by different subcommittees in Congress. As anticipated, it has proven only partially cooperative with OSHA. This has significantly limited OSHA's ability to set its own regulatory agenda and, in particular, to regulate health hazards according to its own priorities.

In the case of CPSC, a cumbersome "offeror" process was imposed, limiting both the commission's ability to select the consumer product hazards it sought to regulate and its ability to write regulations in any particular case. Under the Consumer Products Safety Act, the CPSC can take little independent action and is virtually dependent on organized interest groups to write safety standards. The CPSC merely identifies which products should be considered for mandatory standards and which hazards associated with these products are to be addressed. Originally, the writing of the standard was undertaken by outside contractors through the offeror process. The CPSC had insufficient funds to pay the costs of developing standards, so offerors were always interested parties, either firms, trade associations, labor groups, or consumer organizations. The CPSC acted only as a regulatory broker. This process proved so cumbersome that CPSC wrote few regulations and failed to become a major factor in regulating product safety.[12]

12. In its first few years, CPSC generally took two-and-one-half times longer than the maximum allowable time (330 days) under the act to complete a regulation.

The changes imposed in the 1981 reauthorization of the Consumer Product Safety Act reveal further deck-stacking in the CPSC's procedures. In order to issue new rules, CPSC must now invite proposals for voluntary standards from the industry to be regulated. If a feasible voluntary standard is proposed, the CPSC must adopt it and end its own process. CPSC can produce mandatory industry standards only if it finds that voluntary standards are unlikely to reduce risk or would not result in compliance. This finding, however, places the burden of proof on the commission to produce "substantial evidence" to support this conclusion. But Congress so limited CPSC's funds for this purpose that the commission cannot undertake the needed investigations to participate adequately in most of its own proceedings. These changes make the commission even more reliant on the firms it regulates, for now it cannot even choose anyone other than the industry to write the standard. Additionally, the lack of research budget, together with the deck-stacking, increases the risk that voluntary "safety standards" are likely to be collusive mechanisms, such as the infamous anticompetitive design features once proposed by the bicycle industry (Cornell, Noll, and Weingast).[13]

Like the procedures adopted for OSHA, the 1981 CPSC reauthorization integrates the commission's decisionmaking with that of another agency. The CPSC may not issue a rule on chronic health hazards until an expert advisory panel nominated by the National Academy of Sciences has made a report on the available evidence.

3.4. Burden of Proof

Another way that procedures can stack the deck in agency decisionmaking is by determining who bears the burden of proof. The requirements of TSCA provide an example. The bill, as originally proposed by Senator William Spong in 1971, was a Federal Food, Drug, and Cosmetic Act (FFDCA) for chemicals, in that it contained provisions which would have required safety tests and use regulations prior to introduction on the market.

The FFDCA and its amendments had been supported strongly by consumers, professionals such as the American Medical Association, and the industry itself because it created entry barriers. Spong's original proposal was only mildly supported by environmentalists, who were more concerned with the clean air and water bills, but was strongly opposed by chemical manufacturers and users. Spong, therefore, had little hope but for a compromise bill. In fact, his provisions were replaced by a section allow-

13. These examples also illustrate a principle articulated by McCubbins (1985). Greater degrees of controversy in the legislature lead to both broad grants of authority (that is, scope of delegation) combined with greater control through procedural constraints on the agency. These two cases illustrate this principle.

ing the production and distribution of a new chemical unless, during a brief notification period, the EPA moved to promulgate a test rule or to ban or restrict it.

The certification provision of the FFDCA places the burden of proof on the pharmaceutical manufacturers. Consequently, drugs are more expensive to introduce, thereby creating a disincentive for new product innovations. While the effect on consumers is ambiguous in that both good and bad drugs are inhibited, the law serves to enhance the value of existing drugs to pharmaceutical companies by protecting them against entry. Meanwhile, TSCA places the burden on the EPA to prove that a chemical is a risk to human health or the environment. Consequently, few chemicals are regulated prior to marketing. This makes it difficult to protect against the introduction of toxic chemicals but benefits users of toxics by minimizing the costs of regulation.

The Airline Deregulation Act of 1978 provides another example. Prior to its passage, the CAB had interpreted the rate-setting provisions of the Civil Aeronautics Act to the effect that air carriers proposing price changes were required to show that their proposed prices were neither "too high, nor too low," but that they were "just, reasonable, and nondiscriminatory" (Breyer). Competitors of the filing air carrier merely had to petition the CAB, arguing that the proposed price change was discriminatory (indeed, that it discriminated against them). The board would then postpone the price change pending a hearing. In the hearing, the burden of proof fell on the carrier applying for the rate change. This, of course, provided a benefit for existing air carriers by inhibiting price competition.

The Airline Deregulation Act, in seeking to increase competition in the airline industry, includes a provision that changed the burden of proof from the applying air carrier to those seeking injunctions against the price change. The amendment required the CAB to authorize a change unless it was not consistent "with public convenience and necessity." This provision benefited new entrants and ultimately consumers.

3.5. AUTOPILOT

The response of the FCC to the development of cable television illustrates how the administrative process keeps an agency in compliance with the preferences of political officials despite a vague mandate. The Communications Act of 1934 (as well as its predecessor statutes) establishes the authority of the FCC to regulate in a classically vague, broad way. Indeed, so flexible is the statute that, although it was intended to regulate AM radio, it has successfully been used to assert FCC authority over FM radio, television broadcasting, cable television, and direct broadcasts from satellites.

The cable television case is especially instructive. Obviously, it represents the most interesting stretch of the initial legislative mandate, for ca-

ble television systems are technically more similar to local telephone networks than to over-the-air broadcasts. Indeed, in recent years cable systems have begun to offer two-way telecommunications that compete at the fringe of the telephone business. As with local telephones, states and/or localities would appear to be the natural jurisdictions for cable regulation. No necessity to allocate scarce electromagnetic spectrum underpins FCC regulation. Instead, the basis of the FCC's assertion of jurisdiction, upheld in *U.S.* v. *Southwestern Cable Co.* (392 U.S. 157, 1968), was that uncontrolled cable development could interfere with the FCC's policies regarding over-the-air television. Once jurisdiction had been established, the FCC's principal broadcast constituency—commercial broadcasters—could then influence the development of regulatory policy toward cable.

Cable television began as a means for delivering signals to localities with poor reception, but eventually cable entrepreneurs discovered that customers in areas with good local reception nevertheless would pay for access to still more television. Southwestern Cable in San Diego was one of the first cable operations in a major city to attract customers by importing television signals from other cities (in this case, Los Angeles). Broadcasters immediately complained about this practice to the FCC, which then asserted jurisdiction and declared a moratorium on further development of cable systems that did more than bring cable to areas with poor reception or little or no local broadcast outlets. During the moratorium, the FCC began a long investigation into appropriate policy toward cable, and seven years later made public through congressional oversight hearings the gist of its findings and proposals. Not only Congress but, a few weeks later, the White House (acting through the Office of Telecommunications Policy in the Executive Office of the President) played a major role in altering these proposals so as to reach a politically acceptable compromise among the interested groups (Noll, Peck and McGowan, 1974). The result was a rather complex and highly restrictive set of rules on signal importation, program duplication, original cable programming, and carriage of local stations. Cable development was slowed by at least a decade (first the moratorium, then the programming restrictions and requirements), largely to benefit the television industry.

Eventually, two events made cable television a politically significant industry. First, a large enough market for restricted cable existed in small cities, rural areas, and poor reception areas in large cities that a base of subscribers emerged that could support programs directed largely (WTBS) or solely (HBO) at cable. Second, domestic communications satellites dramatically reduced the cost of distributing programs to the thousands of small cable systems that had been put in place despite the rules. By the late 1970s, a cable industry with significant customers and important commercial backers (such as the motion picture industry and professional sports) had finally emerged. The FCC first created a separate bureau for

dealing with cable (previously it had been handled by the Broadcast Bureau) and then proceeded to reopen the question of cable regulation. By 1980, this led to virtual deregulation of the industry.

The history of cable regulation illustrates the autopilot properties of administrative procedures. First, in the early 1960s, the FCC provided a mechanism whereby broadcasters could slow a threatening technology before it really became a serious threat. Second, the process of investigating the relationship between cable and over-the-air television provided Congress and the president with the means for forging a political compromise without recourse to legislative intervention: the agency simply did what its political overseers wanted, after the principal commercial interests affected by the issue had made their case. Third, when cable eventually became a potent political force, the FCC institutionalized its representation in the agency and largely overturned its previous policies, again without the necessity for legislative intervention. Legislation was needed for only one component of the last step—the establishment of the Copyright Royalty Tribunal to collect license fees from cable and to distribute them to program suppliers—and this only because the FCC could not plausibly stretch its mandate far enough to accomplish this task on its own. But the FCC's finding in its Cable Inquiry that such a copyright mechanism was desirable, and the quick congressional acquiescence to the proposal, provides evidence that, as in the first two steps, the FCC was in reasonable compliance with the preferences of its political overseers.

4. CONGRESS, THE PRESIDENT, AND THE COURTS

> The legislative department derives a superiority in our government from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can with greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. . . . On the other side, the executive power being more simple in its nature, and the judiciary being described by landmarks still less uncertain, immediately betray and defeat themselves. Nor is this all: As the legislative department has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former. —Madison, *The Federalist*, no. 48.

The extent to which the courts can and should "encroach" upon legislative and executive responsibilities has been a point of debate in legal scholarship. That they do encroach is unquestioned. Our thesis concerning the

political ramifications of the administrative system provides a new perspective on this debate.

Administrative procedures can be viewed as an "indirect" means by which politicians, in anticipation of judicial encroachment, use the courts to maintain political control. The courts, of course, use procedures as an "indirect" means of encroaching upon the prerogatives of other branches. The evolution of procedural standards has often occurred for policy-based reasons.[14] For example, throughout the late 1960s and early 1970s, courts increased the procedural rights of nonregulated interests.[15] Be enabling increased participation by environmental and consumer groups, and by enfranchising these groups to challenge agencies in court, agencies were made to accommodate new interests.

Encroachment by the courts is possible because legislation typically delegates to agencies vague mandates accompanied by broad grants of authority to the agency to define the "public interest." In contrast to substantive constraints such as the prohibition in the Consumer Products Safety Act on the CPSC from regulating firearms, these vague mandates appear to place no constraint on ultimate policy and give the agency little guidance about political preferences. Courts have the ability to encroach on policy in large measure because agencies possess considerable policy flexibility. Hence, "runaway bureaucracy" could only happen if the opportunity were also present for judicial encroachment.

As we argued, one of the great advantages of procedural—as opposed to substantive—constraints is that they allow considerable flexibility with regard to the ultimate policy chosen. This is most important in circumstances in which the substantive content of the politically most desirable choice is uncertain. In this circumstance, substantive constraints would prove limiting. Defining safety in the workplace rather than delegating the task to OSHA may rule out policies that turn out to be politically desirable, while promoting others that prove to be undesirable.

The thrust of this argument is that some possibility for court encroachment is simply a necessary cost of decentralized political control. Substantive legislative specificity is a substitute for monitoring and punishment as a means of assuring bureaucratic compliance. In a large, complex government operating in a world of economic, technical, and political uncertainties, and subject to shifting coalitions of questionable stability, widespread practice of substantive legislative specificity is as impractical as widespread use of monitoring and sanctions. Like the latter, legislative specificity is far more attractive if it can be used selectively, for especially hard cases (Mashaw, 1985b), in a milieu in which bureaucratic compliance is generally

14. This is well known in the legal literature. See, for example, both Stewart and Shapiro (1979).

15. This appears to have occurred in some instances because the agency attempted to ignore, or even shut out, the interest from participating in its decisions.

assured by automatic, decentralized means. For this to be the case requires only that the political costs of court encroachment in the administrative system be less burdensome than the costs of more direct means of control.

5. CONCLUSIONS

Assuring bureaucratic compliance with the preferences of political overseers is an especially rich example of the principal-agent problem. Noncompliance can be manifested in several ways: shirking by undersupplying policy outcomes; pursuing policy objectives that are inconsistent with the preferences of elected political officials; or creating new, organized political interests that are a political threat to political overseers. To cope with these problems, political actors engage in the kinds of activities that are emphasized in the principal-agent literature. They set up mechanisms to monitor agency activities, either directly or through constituent complaints, and they offer rewards and punishments to alter the incentives faced by agencies.

As can be expected, monitoring and sanctions are unlikely to provide a perfect solution to the noncompliance problem. Both are costly to use, and economic incentives have a limited range. Consequently, in the best of circumstances noncompliance is likely to be present in combination with extensive monitoring activity and at least some instances of punishment.

Administrative procedures constitute an additional mechanism for achieving greater compliance. First, because they ameliorate the problem of asymmetric information, administrative procedures are a useful, cost-reducing supplement to methods for monitoring and punishing agencies. They reduce the informational costs of following agency activities and especially facilitate "fire-alarm" monitoring through constituencies affected by an agency's policies. They also sharpen decisions to punish by facilitating the assessment of the extent and importance of noncompliance. Thus, by lowering the costs of monitoring and sharpening sanctions, administrative procedures produce an equilibrium in which compliance is greater than it otherwise would be.

A second role of administrative procedures is that they can be used by agencies to avoid inadvertent noncompliance of such a magnitude that it would lead to sanctions. In politics, sanctions are costly to both the principal and the agent, that is, they are *not* simply wealth transfers from the latter to the former but involve legislation, executive order, or litigation to punish an agency and change its policies.

Hence, sanctions impose a net loss that all sides have a common interest to avoid. Administrative procedures aid an agency in avoiding sanctions in three ways. By stacking the deck to benefit favored political interests, they channel decisions in directions preferred by political overseers. By mirroring the political environment faced by the agency's overseers, an agency's

processes give it information about which constituencies, if any, might threaten the agency politically should they be dissatisfied with its policies. And by facilitating early dissemination of information about further feasible policy decisions, administrative procedures increase the chance that the "fire alarm" will be sounded by an offended constituency before an agency is fully committed to a policy. Thus, administrative procedures reduce the likelihood that sanctions will actually have to be used.

Together, the legal constraints imposed by procedures and the incentives created by threat of sanction establish a decisionmaking environment that channels agency policy choices in favor of constituencies important to political overseers. Thus, the administrative system is automatic. The infrequency of visible oversight activities (and especially sanctions) does not mean that there is an absence of political control.

Of course, not every group will be included in an agency's environment. Influence will be accorded to those represented in the coalition that gave rise to the agency's organic statute. Well-organized special interests and the parochial interests of congressional districts will be well represented. Interests of a national constituency that is not well organized will not achieve representation unless it is built into the agency's process. And this will occur only if these broader interests are influential with elected politicians, usually because they are electorally significant. Thus, in the end, the politics of the bureaucracy will mirror the politics surrounding Congress and the president.

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