3

THE BUREAUCRACY'S BOSSES

In September 2011, President Obama stunned observers by rejecting a proposed Environmental Protection Agency (EPA) regulation on air pollution. The landmark regulation would have significantly reduced emissions of ground-level ozone, a smog producing chemical that has been linked to asthma and other lung diseases.[1] The regulation was a top priority of EPA Administrator Lisa Jackson, who had staked a strong claim that existing ozone standards were appreciably weaker than those recommended by the agency's science advisors and therefore were "not legally defensible."[2] Despite such claims and years of EPA effort, the regulation was quickly and unceremoniously scuttled during the course of a single White House meeting.

In a statement issued after the tense meeting, President Obama provided a rationale for his decision: "I have continued to underscore the importance of reducing regulatory burdens and regulatory uncertainty, particularly as our economy continues to recover."[3] According to EPA estimates, the ozone regulation would have imposed billions of dollars in annual costs on industries and local governments.[4] Such costs, and accompanying job losses, would have hit especially hard in the Midwest and Great Plains, regions that are major sources of ozone pollution.[5] Although the White House denied that political considerations informed the president's decision, the Midwest and Great Plains also loomed large as battlegrounds in the 2012 presidential election, which was just over a year away.

Regardless of the president's motivations, the ozone regulation withdrawal illustrates the power that policymakers outside the bureaucracy can wield over an agency. They usually exercise this power more subtly, however. Efforts by legislators to influence bureaucracies often take, for example, the form of informal staff communications and requirements that agencies give advance notice of their intended actions.

Despite the ubiquity of such efforts, bureaucracies retain considerable autonomy over policymaking, even in the face of direct instructions from elsewhere in government. In 2010, President Obama with great fanfare signed into law the **Dodd-Frank Wall Street Reform and Consumer Protection Act**. This massive law fundamentally overhauled the operation and supervision of the nation's financial system, in an effort to prevent a recurrence of the 2008 global financial crisis, the most significant economic downturn since the Great Depression. The law delegated to agencies such as the Federal Reserve (Fed) and Securities and Exchange Commission (SEC) the authority to write hundreds of regulations that were to collectively serve as the foundation of the government's management of financial practices and institutions.[6] As a means of expediting bureaucratic action, the law required that many of these regulations be promulgated by specified deadlines. Over the next several years, however, agencies missed more than fifty percent of these **statutory deadlines**.[7] It is certainly no small task to issue hundreds of complex, controversial regulations in short order, and some observers emphasize that the agencies in question have "actually done quite a bit."[8] Nevertheless, the implementation of Dodd-Frank demonstrates that agencies at times make decisions in a manner that explicitly deviates from the intent of Congress and the president.

Contentious episodes such as the battles over ozone emissions and financial reform are commonplace in the American political system. They are also vitally important. The interactions of agencies with their external political environments determine which public decisions will be made in bureaucracies and which will be made in other institutions of government. Put differently, the outcomes of these interactions establish the very **boundaries of bureaucratic authority**.[9]

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As illustrated by the ozone and financial reform examples, these boundaries are sometimes, but not always, set with an eye to democratic principles such as accountability and performance. President Obama took away EPA's authority to make ozone policy, at least until after the upcoming presidential election, a particularly blunt imposition of political accountability. In the case of the Dodd-Frank Act, it is not clear that the promulgation of regulations in accordance with statutory deadlines is effective in bringing about the outcomes—a secure and prosperous financial system—desired by policymakers and their constituents. In the end, the boundaries of bureaucratic authority are best understood as manifestations of the ongoing contest between government agencies and their political supervisors for control over the policymaking process.

With these issues in mind, this chapter provides a detailed examination of the relationship between agencies and the outside political world. It is organized around the following *core questions:*

- ***UNDER WHAT CONDITIONS IS POLICYMAKING RESPONSIBILITY DELEGATED TO THE BUREAUCRACY?*** In general, President Obama entrusted EPA with the authority to make environmental policy, only to severely limit this authority when the dictates of electoral politics trumped ordinary policymaking considerations.

- ***IN WHAT WAYS DO OTHER GOVERNMENT ACTORS SEEK TO INFLUENCE THE MANNER IN WHICH AGENCIES EXERCISE THEIR RESPONSIBILITIES?*** The Dodd-Frank Act not only gave agencies such as the Fed and SEC the authority to write regulations but also attached strict timetables to this authority, thereby limiting agency flexibility in making and implementing financial policy.

- ***TO WHAT EXTENT ARE EFFORTS AT POLITICAL CONTROL SUCCESSFUL, IN LIGHT OF THE FACT THAT AGENCIES CAN, AND DO, TAKE STEPS TO PRESERVE AND EXTEND THEIR -AUTHORITY?*** In contrast to the White House meeting that resulted in the withdrawal of the ozone regulation, a 2013 meeting between President Obama and financial regulators failed to bring about increased agency compliance with the Dodd-Frank Act's statutory deadlines.[10] These contrasting results suggest that political control of agency decision making varies widely across political and policy contexts..

The chapter approaches these core questions primarily from the perspective of principal-agent theory, an approach widely used to understand the origins and implications of delegated authority. It is particularly appropriate in that it places bureaucratic policymaking in its broader context. Agencies do not operate in a vacuum, but rather in an environment in which public decisions can be, and often are, made in alternative venues. As will become apparent, this environmental reality has fundamental consequences for both bureaucratic accountability and performance.

Delegation, Adverse Selection, and Moral Hazard

Delegation is a common feature of modern life. Clients grant attorneys the authority to provide legal representation, patients rely on doctors to treat illnesses, and employers hire workers to perform tasks of all sorts. These types of relationships share fundamental characteristics. Clients, patients, and employers all face difficulties in choosing and monitoring those to whom they delegate authority. Principal-agent theory is an approach to understanding the causes and consequences of these difficulties.[11]

A **principal** is an actor who enters into a contractual relationship with another actor, an **agent.** The agent is entrusted to take actions that lead to outcomes specified by the principal. For example, doctors act as agents when they prescribe medicines and perform procedures to enhance the duration and quality of the lives of their patients (that is, principals), and lawyers act as agents for persons accused of a crime. These arrangements arise when

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principals lack the ability to achieve their goals by themselves. Self-representation is not advisable, in most cases, for defendants seeking to minimize the likelihood of a guilty verdict!

A key assumption of principal-agent theory is that **self-interest** primarily motivates both principals and agents. These actors, in other words, are considered to be rational decision makers. In general, principals and agents face **divergent incentives**, and this divergence means that purely self-interested behavior on the part of agents may not produce the outcomes desired by principals. For instance, the owners of business firms are concerned first and foremost with maximizing profits. Although rank-and-file employees certainly share a stake in company performance, their subordinate status shapes their actions in important ways. The workers on assembly lines may have little reason to work at top speed if the benefits of their efforts accrue solely to corporate executives and shareholders.

Principals face two specific difficulties when dealing with agents. The first is known as **adverse selection.** This difficulty arises when principals cannot directly observe important characteristics of agents but must rely on rough indicators. Defendants cannot easily discern the true motivations and skills of attorneys and therefore must select legal representation on the basis of factors such as reputations and caseloads. Although such proxies may have merit, they are not foolproof. In the end, principals run the risk of hiring agents not ideally suited for the task at hand.

The second difficulty is known as **moral hazard.** This difficulty stems from the fact that agents, once selected, cannot be readily evaluated in their work environments. As a result, principals must make inferences about the degree to which agents are effectively securing the outcomes they were hired to bring about. Potential patients often judge doctors who perform laser eye surgeries by their success rates. Such measures, however, prove to be far from perfect. It may be hard to discern the individual performance of a doctor who works as part of a team of laser eye surgeons. To further complicate matters, the outcomes of surgeries are affected not only by the doctors' actions but also by the patients' pre-surgery eyesight conditions (such as how nearsighted or farsighted they were). Because of these uncertainties, agents may find it possible to shirk their duties, or even to undermine the goals sought by -principals, without being detected.

Can principals overcome the difficulties caused by adverse selection and moral hazard? One of the main lessons of principal-agent theory is that delegation almost invariably leads to **agency loss.** Agency loss occurs when the behavior of agents leaves principals unable to achieve their goals in an efficient manner or realize them at all. Agency loss, however, can be limited under the right circumstances. For principals, then, the key task is to take steps that help bring such circumstances about.[12]

For years, researchers have cited police departments as among the agencies that are most difficult for supervisors to control.[13] That is because their behavior is so difficult for supervisors to observe.[14] Yet there is growing evidence that police supervisors can reshape the behavior of front-line officers in profound ways if they have compelling reasons to do so. A good example would be New York City's stop-and-frisk policies, which came under fire because critics believed that police officers were using such interactions to harass and intimidate African American and Hispanic males. In March 2013, New York City Police Commissioner James Hall issued a memo requiring officers who stop someone suspected of possessing a weapon to write up the details (already required) and (ital.) share the notes with their supervisor (a new requirement). This seemingly modest procedural requirement had a sudden and dramatic effect on police behavior. Following the memo, there was a 40 percent decline in stops for criminal possession of a weapon (CPW).[15] At the same time, the percentage of weapons stops that produced an actual weapon increased. In short, principals were successfully controlling agents.

One reason why this intervention succeeded is because police departments are under much closer scrutiny for their interactions with persons of color and they are also more visible because of the rise of body cameras and cell phone videos of police-client interactions. Thus, the old premise that police officer interactions with suspects are unobservable is no longer correct. This makes accountability measures easier to implement successfully.

Perhaps the most common way to mitigate the agency loss associated with adverse selection is the use of **screening mechanisms.** Basically, principals induce agents to reveal their motivations and skills before hiring them. For example, employers routinely judge the qualifications of applicants through apprenticeships and examinations. The problem of moral hazard can be ameliorated in two distinct ways. The first is **institutional design.** Here,

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principals place agents in situations in which they find it in their self-interest to work toward outcomes favored by their principals. Corporations, for instance, commonly provide workers with a financial stake in company performance through devices such as stock options. The second approach is **oversight** of agent actions. By monitoring agents at work, principals aim to identify and redirect behavior inconsistent with their objectives. Principals can also use oversight as a deterrent. The mere possibility of being monitored may compel agents to forgo activities that do not serve principals well.

Principal-agent theory can readily be applied to policymaking in the bureaucracy. Administrative agencies are agents to whom policymaking authority is delegated. This authority originates with principals such as chief executives, legislatures, and judiciaries. The act of delegation brings each of these principals face-to-face with particular manifestations of adverse selection and moral hazard. For example, legislators have relatively little influence over the selection of agency officials, as personnel matters fall largely under the domain of the chief executive and the civil service system. Given such difficulties, why do principals empower agencies in the first place? Put differently, what are the benefits of policymaking in the bureaucracy?

Why Bureaucracy?

One obvious rationale for bureaucracy is the scope of modern government. Early in its history, the federal government performed only a handful of functions, such as setting duties on foreign goods. Figure 3.1 illustrates that as the government's reach extended, the **size of the bureaucracy** grew as well. Between the New Deal and Great Society, two of the most ambitious expansions of government power in American history, the number of employees in the executive branch grew from less than half a million to more than two million. On the other hand, the size of the federal bureaucracy declined noticeably during the Clinton administration, after peaking in 1990. It has been roughly stable since that time. A different indicator of the bureaucracy's growth is the number of pages the ***Federal Register*** (the executive branch's official daily publication) consumes. The documents published in the *Federal Register* include agency regulations and proposed rules, as well as executive orders and other presidential materials. As indicated in Table 3.1, the size of the *Federal Register* has grown more than sevenfold since 1960.

Figure 3.1 Size of the Federal Bureaucracy, 1820-2014

Source: *Sources:* U.S. Census Bureau, *Bicentennial Edition: Historical Statistics of the United States, Colonial Times to 1970,* https://fraser.stlouisfed.org/docs/publications/histstatus/hstat1970_cen_1975_v2.pdf (accessed July 7, 2015); U.S. Office of Personnel Management, "Executive Branch Civilian Employment Since 1940," https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/ (accessed July 7, 2015). All numbers exclude U.S. Postal Service employees.

Table 3.1 Number of Pages in the *Federal Register,* 1950-2013

Year	*Number of Pages*
1950	9,745
1955	17,989
1960	22,877
1965	34,783

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1970	54,834
1975	71,224
1980	102,195
1985	105,935
1990	126,893
1995	138,186
2000	138,049
2005	151,973
2010	165,494
2013	175,496

Source: George Washington University Regulatory Studies Center, "Pages in the Federal Register, 1936-2013," http://regulatorystudies.columbian.gwu.edu/reg-stats#Pages%20in%20the%20Federal%20Register%20%281936%20-%202013%29 (accessed July 7, 2015)/.

Contemporary government addresses issues that are not only wide ranging but often quite complex. In formulating the ozone regulation, EPA had to synthesize knowledge from fields as diverse as chemistry, economics, engineering, medicine, and meteorology. Policymaking efforts such as this one are simply beyond the existing capabilities of other government institutions. Congress, even with hundreds of members and thousands of staffers, possesses a mere fraction of the specialized expertise found in the bureaucracy.

Bureaucracies are also valuable to government actors pursuing specific, self-interested goals. Legislators build their cases for reelection in part by helping constituents overcome bureaucratic "**red tape**."[16] A classic example of such **casework** is the assistance commonly offered to retirees whose Social Security checks have been lost in the mail. On a broader scale, elected officials can use agencies to avoid the blame that comes with controversial or difficult decisions.[17] By placing responsibility for management of the financial system in the hands of agencies such as the Fed and SEC, Congress distanced itself from culpability in the event of a catastrophic economic breakdown.

Importantly, the motivation behind the delegation of authority to the bureaucracy cannot be meaningfully separated from agency effectiveness. For example, agencies called upon to perform contradictory tasks may find it particularly difficult to succeed. Despite the Dodd-Frank Act's emphasis on consumer protection, Congress still expects financial regulators to promote the profitability of Wall Street institutions. In a similar vein, EPA's mission—to protect human health and the environment—does not mention consideration of the costs imposed on businesses, even though it is central to the agency's often contentious decision-making processes.[18] In general, the efficacy of agencies as institutions of democratic policymaking is in part a product of the politics surrounding the bureaucracy's supervisors.

Inside Bureaucracy with Dan Glickman

Secretary of Agriculture (1995–2001)

"On farm issues, I heard from members of Congress all the time. It was part of the historic operation of the government. Congress had so much interplay on traditional farm and commodity issues that

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they would always be in contact with the department on the implementation of farm rules and farm programs. Less so in food and nutrition, and food safety and research. I would hear quite a bit. I used to kid the North Dakota senators that there was a door in my office that was 'reserved for North Dakota problems' -because Dorgan and Conrad would inundate me with problems. When I say inundate, I would get twenty to thirty calls a week directly from members of Congress about specific farm issues. It could be dairy, it could be wheat, it could be livestock, it could be disaster-related. The secretary of agriculture has to be very, very accessible to constituencies because there are lots of them out there."

Why Delegation Varies

Although delegation to the bureaucracy is widespread, it nevertheless varies considerably across issue areas, as laid out in Figure 3.2. When issues are low in **salience,** politicians are more likely to delegate authority to the bureaucracy. Occupational licensing and child care regulation usually fall into this category. When issues are high in salience, as is the case with civil rights disputes and environmental policy, delegation is less viable because citizens and organized interests expect elected officials to act decisively.[19] **Complexity** also matters, especially for highly salient issues. When issues are high in salience and low in complexity, politicians often seek to control the bureaucracy by specifying the substance of policy in great detail. Antidiscrimination edicts exemplify this approach. When issues are high in both salience and complexity, elected officials are more likely to exert leverage over policymaking through procedural instruments, such as the requirement that agencies conduct environmental impact assessments before adopting rules likely to have major ecological effects.[20]

Figure 3.2 Explaining Variation in Delegation

Source: William Gormley Jr., "Regulatory Issue Networks in a Federal System," *Polity* 18 (Summer 1986): 607.

For similar reasons, delegation also varies within issue areas. It is thought that congressional control of the making and implementing of health policy is greatest when both legislative preferences and capabilities are strong, as when issues are high in salience and low in complexity. Among the key provisions of the Patient Protection and Affordable Care Act (ACA) (i.e., ObamaCare) , those pertaining to dependent coverage expansion certainly fit this description. Historically, employer-based health insurance plans have covered dependent children until age 19 or college graduation. The ACA extends dependent benefits through the age of 26. This provision of the ACA was highly salient (expanding dependent coverage was bipartisan and popular), as well as low in complexity. On the latter score, the dependent coverage provision took up a grand total of 152 words, a drop in the bucket of the ACA, which altogether consumed more than 900 pages.[21] Furthermore, implementation of the dependent coverage expansion was straightforward and consistent with statutory intent. In fact, many insurance companies began enrolling older eligible dependents almost immediately after President Obama signed the ACA into law, before the provision officially took effect,.[22] When congressional preferences and capabilities are not as well developed, Congress is less apt to provide such precise instructions. The ACA called for a variety of changes in the manner in which doctors, hospitals, and other health care providers are paid for their services. To implement these highly complex changes, the ACA delegated to the Department of Health and Human Services (HHS) the authority to write the necessary regulations. In the years following passage of the ACA, HHS promulgated in excess of a dozen regulations, some of which took up hundreds of pages in the *Federal Register*.[23]

Issue characteristics alone do not determine whether delegation occurs and what form it takes. Characteristics of the delegating body are also significant determinants of bureaucratic authority. Consider the capacity of state legislatures. Some legislatures, such as the New York State Assembly, closely resemble Congress in their professionalism. The New York legislature meets throughout the year, employs thousands of staff members,

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and compensates elected representatives handsomely.[24] In contrast, the legislature in Mississippi is in session for three months, has a permanent staff of 164, and pays legislators a base salary of $10,000.

As one might expect, **legislative professionalism** is closely linked to delegation. As capacity increases, legislators who might like to limit bureaucratic power are in fact more inclined to craft detailed statutes that delegate little policymaking authority.[25] During the 1990s, states all across the country sought to create managed care programs as a way of containing the skyrocketing costs of Medicaid, which provides health care to low-income and other needy residents. However, individual states approached this task in different ways. In crafting its Medicaid managed care statute, the Texas legislature spelled out specific details regarding numerous aspects of the program, including eligibility requirements, continuity of care, and competition among public and private providers.[26] By contrast, the Medicaid managed care statute enacted in Idaho reads in its entirety:

> The Department of Health and Welfare is hereby directed to develop and implement, as soon as possible, a new health care delivery system for those clients on Medicaid, utilizing a managed care concept.[27]

The Idaho legislature—comprising " 'citizen' legislators, not career politicians"—delegated significantly more authority to the bureaucracy in the area of Medicaid managed care policy than did its more professional Texas counterpart.[28]

Partisan control of the legislative and executive branches affects delegation as well. When **divided government** exists—with one party controlling at least one chamber in the legislature and the other the office of chief executive—delegation becomes less likely.[29] Understandably, Democratic legislators are less trusting of bureaucracies headed by Republicans, and Republican legislators less trusting of bureaucracies run by Democrats. The history of major trade legislation illustrates these tendencies quite vividly. In the postwar period, it has been a virtual certainty for Congress to increase bureaucratic discretion over tariff rates in times of unified government and decrease this discretion when divided government is in place.[30]

In the end, political principals evaluate policymaking in the bureaucracy against its alternatives. The critical question is: Would these principals be better served by making policy themselves or by delegating authority to bureaucratic agents? As we have seen, principals sometimes eschew delegation altogether. The benefits of delegation, however, often prove too irresistible to pass up. For principals, then, the trick is to capture these benefits without being unduly harmed by the actions of self-interested agents.

Implementing Child Care Legislation

To more fully appreciate the politics of the delegation decision and the boundaries of bureaucratic authority, consider the implementation of a pair of federal child care laws passed in 1990 and 1996. In both instances, Congress approved child care subsidies to be distributed by state governments to families with relatively low incomes. The first law created the Child Care and Development Block Grant, while the second consolidated a number of different funding streams, including the block grant, under the rubric of the Child Care and Development Fund.

As Table 3.2 indicates, the 1990 legislation, sometimes known as the ABC bill, delegated considerable discretion to the Department of Health and Human Services. In addition to appropriating a certain amount of money for the program, thereby placing a ceiling on how much could be spent, Congress stressed the importance of parental choice, indicating that it wanted children to be enrolled with the provider preferred by parents "to the maximum extent practicable." In interpreting this provision, the agency specified that a state could not exclude certain categories of care (such as family child care), certain types of providers (such as church-based centers), or "significant numbers of providers" in any category or type of care. As for payment rates, Congress specified that the agency must take the costs of different settings and age groups into account and that there should be separate rates for children with special needs. But Congress left it up to the agency to determine whether states should be free to pay providers more for delivering higher quality services. After wrestling with this issue, the agency decided to allow

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such differentials but to limit these differences to 10 percent. In effect, Congress established basic guidelines for administration of the block grant but left a lot of the specific operational decisions to the agency.

When revisiting the program in 1996, Congress decided to reiterate its strong commitment to parental choice and payment rates that would promote equal access. For its part, however, the agency decided to lift the 10 percent ceiling on rate differences within a category of care. In addition, for the first time the agency decided to recommend that states imposing a copayment requirement on parents restrict that copayment to 10 percent of the total fee. Table 3.3 provides a summary of these new provisions.

A comparison of these decisions helps clarify both the constraints that legislation imposes on the bureaucracy and the discretion that agencies can use to promote their own policy preferences. The Department of Health and Human Services (HHS) under President George H. W. Bush, headed by Louis Sullivan, imposed limits on state child care agencies to promote parental choice and keep costs down. In contrast, the HHS under President Clinton, headed by Donna Shalala, sought to foster improvements in child care quality and limit the financial contributions parents would have to pay. Together these episodes demonstrate that the preferences of elected officials fundamentally shape bureaucratic decisions and that the influence of these political principals is invariably limited when policymaking authority is delegated.

Table 3.2 Implementation of the 1990 Child Care Law

Issue	*Provision of the Law*	*Agency Implementation*
Parental choice	The child will be enrolled with the eligible provider selected by the parent "to the maximum extent -practicable."	State and local rules cannot have the effect of -excluding certain categories of care, certain types of providers, or "significant numbers of providers" in any category or type of care.
Payment rates	Payment rates must take into account variations in the costs of providing child care in different settings, for different age groups, and for children with special needs.	States may distinguish -between higher- -quality and lower-quality providers within a category of care in setting payment rates, but such rate differentials may not exceed 10 percent.
Administrative expenses	States must spend 75 percent of their child care allotments to improve the quality and availability of child care, and a "pre-ponderance" of the 75 percent must be spent on child care services.	For the first two years at least 85 percent of the 75 percent share must be spent on child care -services, as opposed to -administrative expenses.

Source: Adapted from House Ways and Means Committee, Subcommittee on Human Resources, *Regulations Issued by the Department of Health and Human Services on Child Care Programs Authorized by Public Law 101-508* (Washington, D.C.: Government Printing Office, September 13, 1991).

Table 3.3 Implementation of the 1996 Child Care Law

Issue	*Provision of the Law*	*Agency Implementation*
Copayments	Rates should be designed in a way that facilitates parental choice.	It is recommended that no state require a copayment greater than 10 percent; copayments, if required, can be waived for children in protective services or for families with incomes at or below the poverty level.

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Payment rates	Rates should be designed in a way that promotes equal access.	States should be free to set differential payment levels within categories of care, to reward providers who offer higher quality; a prior limit of 10 percent for differential payment levels within a category is rescinded.
Market rate survey	Payment rates established by states should be comparable to those paid by families who are not eligible for subsidies.	States must conduct a biennial market rate survey to ensure that payment rates reflect changing market conditions.

Source: Adapted from U.S. Department of Health and Human Services, Administration for Children and Families, "Child Care and Development Fund; Final Rule," *Federal Register,* July 24, 1998, 39935–39998.

Managing Delegation

Given the persistence of agency loss, political principals not only make delegation decisions with an eye to strategic considerations but also think -carefully about managing the authority vested in agencies. Principals differ in the tools they can call upon as they set about this exceedingly difficult task. Some principals find themselves better equipped to cope with adverse selection issues than with moral hazard concerns, while others find the reverse to be true.

Presidential Power

When cataloging the efforts of principals to limit agency loss, a logical place to start is with the president, the formal head of the federal bureaucracy. The presidency is a unique institution in American politics. Only the president has a national constituency and a strong desire to build a legacy that will be remembered fondly in history. For these reasons, the president, more so than others in government, has an incentive to bring the bureaucracy under **coordinated control.**[31] A bureaucracy that functions well as a unit, rather than as an uncoordinated batch of agencies, would be a valuable asset for a president seeking grand policy achievements. But does the president possess the capabilities necessary to bring about such coordination?

Unilateral Actions. The ambiguity of Article II of the Constitution is widely viewed as important in determining the president's ability to command the bureaucracy. Historically, the relative dearth of enumerated powers has been taken as a sign of presidential weakness. With little formal authority, presidents must generally rely on their interpersonal skills to persuade other policymakers to go along with White House initiatives.[32] This lack of authority holds even within the executive branch, where the president is "chief" in name only.[33]

Recently, Article II's ambiguity has come to be seen by some analysts in a fundamentally different light.[34] Throughout history, presidents have taken **unilateral actions** not explicitly permitted by the Constitution. Famous examples include the Louisiana Purchase, the Emancipation Proclamation, and the creation of the EPA. Such actions are unilateral in that they are not subject to congressional or judicial approval. In fact, it is difficult for Congress and the courts to stand in the way of presidential unilateralism, even when such behavior expands and consolidates the power of the White House. The ability of the president to control the nation's policymaking apparatus, including the federal bureaucracy, has therefore accumulated over time and continues to accumulate to this day.

Examples from recent presidencies illuminate the potency of unilateral action as well as the boundaries of this approach to policymaking. During the course of the Obama administration, Congress became increasingly Republican in its composition. In the first two years of the Obama presidency, both the Senate and House of Representatives were controlled by the Democratic Party. This situation was completely reversed by the last two years of the administration, with Republican majorities in both chambers. Facing an increasingly hostile Congress,

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President Obama turned to **executive orders** and **presidential memoranda** as means of steering the bureaucracy and influencing public policy. Executive orders and presidential memoranda are declarations issued by the president that carry the full force of law without requiring the assent of Congress.[35] In 2014, President Obama issued more such unilateral actions than during the first three years of his presidency combined.[36]

Many of these actions instituted significant, and sometimes controversial, policy changes, such as making millions more American workers eligible for overtime pay, permitting families to make private ransom payments for relatives kidnapped overseas, and installing solar panels on federally subsidized housing developments.[37] In both quantity and scope, President Obama's use of unilateral actions resembled that of the closing years of the Clinton presidency. Facing Republican majorities in both the Senate and House of Representatives, President Clinton frequently turned to executive orders to achieve such policy aims as revising the food labeling system and banning discrimination against homosexuals in federal hiring practices.[38] As Paul Begala, one of the President Clinton's advisers put it, "Stroke of the pen, law of the land. Kind of cool."[39]

Although Presidents Clinton and Obama projected far-reaching authority through executive orders, their powers of unilateral action were not without limitation. The Clinton administration's executive order barring federal contractors from hiring permanent striker replacements was struck down in court. In addition, strident opposition from the nation's governors compelled the administration to suspend an executive order on federalism it had issued just three months earlier.[40] In 2014, President Obama issued executive orders on immigration that prompted responses on the part of both legislators and the courts. Among other actions, President Obama expanded amnesty and protection for immigrants brought to the United States illegally as children, as well as undocumented immigrants who are parents of U.S. citizens and permanent residents.[41] Twenty-six states filed a lawsuit against these actions, claiming they violate the Constitution. Shortly thereafter, a judge in Texas issued an injunction placing the actions on hold, and the 5th Circuit Court of Appeals ruled against the Obama administration, triggering a showdown in the U.S. Supreme Court.[42] A deadlocked Supreme Court, missing one judge following the death of Antonin Scalia, overturned the Obama administration's deportation policy in a 4-4 vote that effectively sustained the lower court decision without setting a precedent.[43] Following that decision, President Obama announced that deportation would not be a high priority, except for criminals.[44] However, the fundamental issues remained unresolved.

President George W. Bush also experienced both the utility and constraints of unilateral action as a means of steering the bureaucracy. Shortly after the September 11, 2001, terrorist attacks, the Bush administration instituted a program of monitoring, without first obtaining warrants, the international communications of individuals inside the United States when either the individual or the interlocutor was suspected of having ties to al-Qaida or other terrorist organizations.[45] This program placed surveillance authority in the hands of the National Security Agency (NSA), an organization that has traditionally focused on foreign communications, not domestic ones.

For four years, the program operated without any public disclosure. Knowledge of the program was limited to a handful of key policymakers.[46] Although some of these insiders, including Sen. John D. Rockefeller IV, D-W.Va., privately expressed concerns about the legality and constitutionality of eavesdropping inside the United States without a warrant, the program was never abandoned or modified in a substantial way.[47] The Bush administration's actions were a stark manifestation of the use of unilateral power as a tool for managing policymaking in the bureaucracy.

Even in this instance, however, the limitations of unilateral action were ultimately put on display. In 2006, after the *New York Times* exposed the -program, both Congress and the courts took steps to limit the NSA's discretion. Committees in both the House and the Senate held hearings on the program and heard testimony from administration officials such as Attorney General Alberto R. Gonzales.[48] Legislation to modify the program, either at the margins or more fundamentally, was introduced but never enacted into law.[49]

In the meantime, organizations such as the American Civil Liberties Union filed lawsuits against the program in federal courts throughout the country. In Detroit, a federal district judge ruled the program unconstitutional.[50] Perhaps in response to these accumulated efforts as well as to the midterm elections that delivered to Democrats

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control of Congress, the Bush administration agreed, in January 2007, to subject the program to court supervision, a move it had publicly resisted for more than a year.[51]

Six years later, NSA surveillance garnered unwanted worldwide attention again when former Central Intelligence Agency contractor Eric Snowden leaked documents showing that the NSA was, among other activities, collecting the phone records of Americans and tracking online communications through the servers of Yahoo, Google, Facebook, and Microsoft.[52] In the aftermath of the Snowden revelations, President Obama took unilateral actions that, while retaining such practices, placed procedural limits on the NSA's conduct of domestic surveillance.[53] The president also worked with Congress to enact legislation phasing out the bulk collection of phone records, a particularly unpopular program opposed by a strong majority of Americans.[54]

In the end, unilateral actions that do not clearly derive from formal presidential authority provide presidents with opportunities to exert powerful influence over the bureaucracy, opportunities that recent presidents have utilized frequently. That said, other policymaking institutions and the American public can check these opportunities when the conditions are "right," as they eventually were in the area of terrorism communications and NSA surveillance of Americans at home.

Two statements from President Obama neatly summarize the promise and perils of executive orders as instruments of presidential power. In 2014, the president—raring for a fight with Republicans on Capitol Hill—extolled the virtues of unilateralism: "I've got a pen to take executive actions where Congress won't, and I've got a telephone to rally folks around the country on this mission."[55] Two years later, the outgoing president, perhaps chastened by his experiences with unilateral action, had this advice to give President-elect Trump: "My suggestion to the president-elect is, you know, going through the legislative process is always better, in part because it's harder to undo."[56]

Despite this admonition, the president-elect vowed to issue executive orders, beginning on Inauguration Day, to start the process of repealing ObamaCare and undoing other policies enacted under his predecessor.[57] As a candidate, Trump promised to "eliminate every unconstitutional executive order" issued during the Obama administration.[58] Although he walked back on this promise in the extreme after Election Day,[59] it is nonetheless the case that erasing unilateral actions in areas such as immigration, climate change, Syrian refugees, transgender bathrooms, and the closing of the detention center at Guantanamo Bay remain high priorities for the Trump administration and represent prime pathways for limiting the policy legacy of the Obama presidency.[60]*Appointments.* In terms of formal authority, the president is relatively well equipped to address the problem of adverse selection. Presidents have the power to appoint cabinet secretaries, regulatory commissioners, administrators of independent agencies, and a host of subordinates to these -top-ranking officials. All in all, political appointees fill approximately three thousand positions in the executive branch bureaucracy.[61]

What factors do administrations consider when filling agency vacancies? Although observers generally agree that substantive knowledge and administrative competence are attributes that would serve any appointee well, there is no escaping the centrality of politics in the nomination process.[62] The politics of each presidency is somewhat distinctive, with the Reagan administration, for example, valuing loyalty to the conservative movement. George H. W. Bush put a premium on individuals who had served in previous positions with the president.[63] As a candidate Barack Obama stated the aspiration of assembling a Lincoln-esque "team of rivals." As president, however, he surrounded himself, a few notable exceptions aside, with a cabinet of loyalists.[64]

Inside Bureaucracy with Christine Todd Whitman

EPA Administrator (2001-2003)

"At the very beginning the Energy Task Force was put in place and every time I went in and talked with the President [George W. Bush] we were in the same place. He wanted not just no net loss of wetlands, he wanted to have more wetlands. That wasn't the issue. But the Vice President [Dick Cheney] was in a different place on a lot of those issues. Right at the beginning there was the Energy

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Task Force—because of the rolling brownouts in California and from the get go of that the focus was on EPA regulations, that they were the ones that were causing the problem. Particularly the Clean Air Act. They wanted to take some parts of that away to be enforced by the Department of Energy. I fought back and actually won that one."

One reason for this emphasis on politics is the fact that executive branch appointments normally require **Senate confirmation** before they can take effect. At first glance, the Senate—which approves almost every nominee offered by the president—does not act as much of a hurdle, but, as one expert has stated, "that is the wrong conclusion drawn from the wrong evidence."[65] Presidents strategically anticipate Senate reactions to their nominees and routinely put forth individuals likely to pass muster at confirmation. In addition, the Senate flexes its constitutional muscles in ways other than outright rejection, through tactics such as delay in considering and voting on nominations. In recent administrations, nominees to top positions in the executive branch have waited on average more than eight months to be confirmed.[66] Increasingly, presidential nominations to top executive branch positions and the federal judiciary are being defeated without a formal vote.[67] Delay is particularly prevalent during periods of divided government and ideological polarization in the Senate, suggesting that even the most well qualified individuals can run into trouble if the nomination is ill timed.[68] For example, Sen. Mary Landrieu, D-La., placed a **hold** on President Obama's nomination of Jacob (Jack) Lew to head the Office of Management and Budget, stating publicly that she would not lift the hold until the Obama administration lifted its freeze on deepwater oil and gas drilling. The Obama administration lifted the moratorium in October 2010, Landrieu lifted her hold, and Lew was confirmed the following month, four months after being nominated.[69] Similarly, in 2015, President Obama's nomination of Loretta Lynch as Attorney General was not confirmed by the Senate for nearly six months, held up due to opposition on the part of some Senators to the president's unilateral actions on immigration reform.[70]

The politics of confirmation underscore that appointments can be powerful instruments for influencing the scope and content of bureaucratic policymaking. For example, priorities and outputs in agencies ranging from the Food and Drug Administration (FDA) to the Equal Employment Opportunity Commission (EEOC) have shifted noticeably as a direct response to changes in leadership. -Product seizures by the FDA declined by more than 50 percent after the Reagan White House tapped Arthur Hull Hayes—a champion of regulatory relief for business—to lead the agency.[71] Under the leadership of commissioners who had mainly been appointed by President Obama, the EEOC issued enforcement guidelines regarding the use by employers of criminal background checks during the hiring process.[72] These guidelines were subsequently used to pursue actions (not always successfully) against companies whose background checks, according to the agency, discriminated against minority populations, such as African-American males, who are disproportionately incarcerated in the criminal justice system.[73]

Despite such influences, appointees face a variety of constraints when seeking to shape bureaucratic decisions. The tenure of the average agency head is less than three years.[74] With such a short time horizon, appointees must move quickly if they want to leave a significant mark on their organization. The fact that most appointees are not personal associates of the president and therefore do not enjoy open access to the White House and its resources makes this task all the more difficult. Hence, appointees are largely left to their own devices in dealing with their subordinates, the vast majority of whom were at the agency long before the current administration came to power and will continue in their positions well after the presidency has again changed hands. In this difficult environment, it is not uncommon for appointees to **go native.**[75] Rather than act as advocates for the administration, such appointees seek to advance the positions of civil servants inside the bureaucracy, those professionals with whom they interact regularly. The utility of appointments as a way of managing delegated authority is best viewed as highly variable across administrations, agencies, and appointees themselves.

Inside Bureaucracy with Christine Todd Whitman

EPA Administrator (2001-2003)

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"The Vice President [Dick Cheney] and I were just not on the same page on a lot of environmental issues. I had fairly good flexibility in being able to push back and it was tolerated for a while and then it would reach a point where it was: 'No, sorry, this is the way it's gonna be, so move on.' That's when I left. … I resigned over the definitions within the Clean Air Act of routine maintenance repair and replacement. I'd been arguing with the White House about that for about two years. The Vice President was the one who really put the EPA in a place that I could not support. He wanted where the definition was set at a place where we at the agency couldn't run numbers that made it real and could justify it. As a governor I had joined an amicus to go after the other states—the ones that were really gaming the system. There were companies and states that were truly gaming the system. But there were others that were dead honest in it. They were doing routine maintenance repair and replacement. Where the White House was going (their check point on the definition) was actually to let off the hook the bad actors. At the very end of the Clinton administration there had been a sudden rethink of how you define routine. The problem was when you've got ten regions the regions were acting pretty independently. Congress did not define routine when they put that language in. It had been left to the agency. And the agency had really left that to the various regions. It had been an uneven application of the criteria. This made it very difficult for utilities, particularly those that had utilities in a number of different states. The fact that we needed to define it better and needed to find the actual checkpoint if you will made absolute sense to me. It was where you put that that the argument came in. And that was what I argued for when I was there. I finally got called in. A lot of language went down … I had several long conversations with the Vice President just discussing how you would do this. Where and why and how we were running the numbers. Then there was the decision that there was no point discussing this any further. This was where it was going to be. That was their decision to make, not mine. I wasn't elected anything. So anyway that's when I decided that they had a right obviously to set that number and they had a right to have an administrator who could implement that in good faith. And I couldn't. So, time to step down."

What separates effective leaders from appointees who run into difficulties in dealing with their agencies and the administration? Instructive is the case of Paul O'Neill, President George W. Bush's first secretary of the treasury. Less than two years into his tenure, O'Neill became the first cabinet member to leave the administration. Several months of criticism about his handling of an economy in the midst of a prolonged slump preceded O'Neill's departure.

Despite his experience as chairman and chief executive officer of aluminum giant Alcoa, O'Neill did not enjoy the confidence of Wall Street, an absolutely critical constituency for any treasury secretary. In addition, O'Neill did not demonstrate the flair for publicity that successful appointees so often bring to their positions. Even on a made-for-TV trip to Africa, alongside rock star Bono, O'Neill came off as a wooden leader who did not fully understand and appreciate the plight of debt-ridden countries in the developing world.[76] In the end, O'Neill did not possess the combination of personal and professional skills necessary to be an effective appointee for President Bush.

By contrast, Ray La Hood proved to be a surprisingly effective Secretary of Transportation under President Obama. La Hood, a Republican, became a public champion of mass transit, high-speed rail, bicycle paths, and other infrastructure improvements. During his first two years in office, he helped to steer transportation grants to high-speed rail projects in California, Washington state, and elsewhere. [77] During his next two years, La Hood established pilot programs to curb distracted driving and encouraged states to adopt laws banning texting and driving, which causes many accidents and deaths.[78] When La Hood retired in July 2013, 41 states had such laws in place, thanks in part to La Hood's jawboning.[79] As for La Hood's efforts to improve high-speed rail, Federal Railroad Administrator Joseph Szabo put it this way: "When the history books are written on the success of the high-speed and intercity rail program, Ray LaHood is going to be one of the stars."[80]

The most prominent of President Obama's Cabinet secretaries was, of course, Hillary Clinton. While serving as Secretary of State, she drew praise for traveling to over 100 countries, for her strong condemnations of North Korea (for refusing to relinquish nuclear weapons) and Iran (for attempting to develop nuclear weapons), and for

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helping to convince the Russians not to sell military hardware to Iran.[81] She also became a strong champion of "civil society" throughout the world and forged ties between the State Department and nonprofit organizations in other countries.[82] On the other hand, she drew criticism for the deaths of U.S. Ambassador to Libya J. Christopher Stevens and three other Americans who were killed by a mob of Libyan militants in Benghazi on September 11, 2012. Although a congressional report found no evidence of wrongdoing by Clinton, the deaths occurred on her watch, after pleas for more security went unheeded.[83] Clinton also received harsh criticism from the FBI for using a private e-mail server to send and receive some classified information. Although the FBI decided not to prosecute Clinton for her behavior, FBI Director James Comey publicly criticized her and her colleagues for being "extremely careless."[84]

Firings. Although the most common transitions from office for political appointees are either voluntary resignations or departures by mutual consent, some appointees are fired outright, especially when they become embroiled in controversy. Several firings occurred in 2007, during President George W. Bush's second term, when it came to light that recovering Iraq war veterans were receiving substandard medical care at the Walter Reed Army Medical Center in Washington, D.C. As congressional and public protests escalated, three top officials lost their jobs, including Secretary of the Army Francis Harvey, Maj. Gen. George Weightman (commander of Walter Reed), and Lt. Gen. Kevin Kiley (surgeon general of the army).[85] These dismissals helped the White House and Defense Department assert that those responsible for the problem were being held accountable.

In 2013, President Obama fired Steven Miller, the commissioner of the Internal Revenue Service (IRS). The firing occurred in the aftermath of the revelation that IRS employees had targeted Tea Party organizations and other conservative groups for unusually close scrutiny.[86] The president's action quelled Republican outrage over the scandal, at a time when the administration was embroiled in political battles over the Benghazi killings and the Department of Justice's controversial seizure of Associated Press phone records.[87]

Perhaps most dramatically, President Obama fired Gen. Stanley McChrystal as the top military officer in Afghanistan on June 23, 2010, after the release of an inflammatory article in *Rolling Stone* magazine that hinted strongly at insubordination.[88] In that article, McChrystal and his staff made disparaging remarks about the administration's civilian leaders—including Vice President Joe Biden and Obama himself.[89] "I welcome debate among my team, but I won't tolerate division," Obama said in announcing McChrystal's dismissal.[90]

The president enjoys considerable—but not boundless—authority to fire political appointees. A relatively small number of independent commissioners cannot be dismissed without cause.[91] Also, even when the president has the authority to fire appointees, dismissals for political reasons sometimes draw critical attention. When Attorney General Alberto Gonzales fired eight U.S. attorneys in December 2006, presumably with the blessing of the White House, he appeared to have been responding in part to pressure from Republican members of Congress. News accounts revealed that two Republican members of Congress from New Mexico contacted one of the fired U.S. attorneys a few months earlier in an apparent effort to accelerate a corruption investigation against a Democratic officeholder.[92] Other disclosures revealed that high-ranking Justice Department officials had proposed firing U.S. attorneys who were "underperforming" or who were not "loyal Bushies."[93] Gonzales's failure to speak candidly about the political factors underlying these eight dismissals led to calls for his own dismissal.

At all levels of government, it is relatively hard to fire civil servants, even if they turn out to be incompetent. Laws and union contracts aimed at protecting employees from arbitrary dismissal for political reasons also sometimes protect employees who are not doing a good job. In recent years, the teaching profession has emerged as a key battleground for such disputes. Even change-oriented school superintendents have trouble sacking teachers for poor performance. Between 2008 and 2010, Joel Klein, then chancellor of New York City public schools, was able to fire only three teachers for incompetence.[94] During her three-year-plus tenure as chancellor of D.C. Public Schools, Michelle Rhee fired dozens of teachers whose performance was judged to be weak. But such actions infuriated teachers and their supporters and ultimately led to Rhee's resignation.[95] Under unusual circumstances, a local school superintendent can fire large numbers of teachers. In Rhode Island, the superintendent of the Central Falls School District fired all 77 teachers and other personnel at Central Falls High School after failing to reach agreement with the local teachers' union on a plan for teachers to spend more time helping students to improve their test scores.[96] The teachers were later rehired and the school has since made some progress from this

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ignominious low point, boosting its graduation rate from a miserable 52 percent to a more respectable but still far from excellent 70 percent.[97] In short, even when they occur, teacher firings may be reversed.

Although it is very difficult to fire civil servants, it is relatively easy to redeploy them, by transferring them to less desirable functions, offices, or locations. It is also possible to intimidate civil servants through veiled threats. The Trump transition team did this, intentionally or unintentionally, in December 2016, when it submitted a list of 74 questions to the Energy Department, asking agency officials to identify employees and contractors who have actively worked on or promoted climate change initiatives. For example, one question asked for a list of department employees or contractors who attended interagency meetings on the "social cost of carbon," a way of calculating the consequences of greenhouse gas emissions.[98] Scientists and Democratic members of Congress strongly objected to the questionnaire. Rep. Elijah Cummings (D.-Md.) put it this way, "I am sure there are a lot of career scientists and others who see this as a terrible message of fear and intimidation – 'either ignore the science or we will come after you.'"[99] After receiving considerable negative feedback from employees and others, the Department of Energy rejected request. A Department of Energy official announced that DOE would provide a good deal of information to the Trump team but not any individual names.[100] The Trump transition later disavowed the information request, saying it was not authorized.[101] Still, the episode raised questions as to whether climate change scientists and other civil servants within DOE would be free to continue their work on climate change reduction without political interference.

Civil Service Reform. Through much of the nation's history, presidents have sought to enhance their control over the bureaucracy by reforming the rules that govern civil servants, those executive branch officials not subject to presidential appointment and Senate confirmation. In 1905 President Theodore Roosevelt formed the **Keep Committee** to investigate ways of improving the organization and effectiveness of the federal government.[102] Franklin Roosevelt oversaw passage of the **Reorganization Act** of 1939, establishing the **Executive Office of the President,** which provides the White House with an apparatus for directing and coordinating policy in areas particularly central to the president's agenda. The Council of Economic Advisers and the National Security Council have both been a part of the Executive Office for many years. Under President Obama, the staff supporting the National Security Council—a body focused on foreign policy matters—was merged with the staff supporting the Homeland Security Council, an organization created by President George W. Bush in the aftermath of the September 1, 2001 terrorist attacks.[103] As General James L. Jones, the president's national security adviser, put it, "The idea that somehow counterterrorism is a homeland security issue doesn't make sense when you recognize the fact that terror around the world doesn't recognize borders."[104] As this example illustrates, presidents value the executive branch organization as an instrument for shaping their influence over policy priorities and implementation.

In 1978 the **Civil Service Reform Act** brought significant changes to the personnel system of the executive branch. For example, the act established the **Senior Executive Service (SES),** a group of top-level civil servants with less job security than their colleagues but more of an opportunity to earn bonuses based on productivity and other performance measures. The idea behind this reform was to create a senior management system under the president that could meaningfully compete with the private sector in recruiting and retaining individuals of exceptional talent. Decades later, in announcing a series of updates to the SES, President Obama noted that its ideals have not yet been achieved. The president called his initiative a "step toward fulfilling the vision of the Senior Executive Service and developing senior civil servants with critical skill sets such as leading change, building coalitions, working across government to solve problems and performance management."[105]

At first glance, career bureaucrats—who number in the millions—would seem unlikely to be very responsive to presidents and politics more generally.[106] Consider, however, that rather than remain loyal to supervisors in the face of changing presidents and administrative tasks, thousands of senior executives instead exited the federal bureaucracy altogether in the years following passage of the Civil Service Reform Act.[107] From the early 1970s to the early 1990s—a period during which Republicans controlled the White House for all but four years—top-level civil servants became increasingly conservative and Republican as a group.[108] In 1970 President Nixon faced a civil service leadership that favored Democrats by a three-to-one margin. By the first Bush administration, Republicans enjoyed an 11 percent edge among these officials.

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The potency of personnel management is illustrated by the debate over the creation of the Department of Homeland Security.[109] In 2002 President Bush proposed merging twenty-two agencies and 170,000 employees into a single organization aimed at protecting the American homeland from terrorist threats. The president's proposal ran into difficulty in the Senate, then under Democratic control. The key stumbling block was presidential prerogatives in managing the department's civil servants. Bush requested the authority to hire, demote, and transfer employees for national security reasons. A majority of senators opposed this request on the grounds that it represented too significant an erosion in the collective bargaining rights usually held by federal employees. Not until Republicans gained control of the Senate following the November 2002 elections did the administration muster the congressional support necessary to secure a personnel system with the flexibility and control President Bush sought.

The implementation of this system proved challenging for the Bush administration. In early 2005, four labor unions filed suit to block the Department of Homeland Security from adopting its rules, several years in the making, for strengthening the link between employee pay and performance on the job.[110] A series of court decisions upheld the unions' complaint, compelling the agency to redraft its rules, a cumbersome and time--consuming process.[111]

Regulatory Review. As the scope and complexity of bureaucratic policymaking have grown, presidents have taken steps to enhance their ability to observe and evaluate agency decisions. One way in which recent presidents have coped with the problem of moral hazard is by systematically reviewing agency regulations. Established in 1981 by President Reagan in Executive Order 12291, **regulatory review** is widely considered one of the most important developments in the executive branch during the past several decades.[112] Under regulatory review, agencies are required to submit drafts of prospective actions to the **Office of Information and Regulatory Affairs** (OIRA), an organization located in the White House's Office of Management and Budget (OMB). Only after OIRA clears an agency submission can the rule be published in the *Federal Register* and become law.

OIRA, a bureaucracy in itself, serves as a kind of **counterbureaucracy,** overseeing executive branch agencies to ensure that regulations will not be unnecessarily costly or deviate too significantly from presidential priorities.[113] Given its desire for a bureaucracy operating under coordinated control, the White House more than other institutions of government is concerned about the costs and benefits of the regulatory system as a whole. Individual agencies, by contrast, naturally emphasize the specific advantages of their regulatory actions without paying much regard to more general policy or political considerations.

Inside Bureaucracy with Donna Shalala

Secretary of Health and Human Services (1993–2001)

"You always negotiate with OMB. Everything with OMB is a negotiation. OMB would say that they influenced the privacy regulations, and they did, around the edges. But OMB normally acts as an honest broker. Also remember that the political side of the White House is going to weigh in. It doesn't mean they will win, but sometimes they weigh in on an issue. For example, OMB got involved in the question of whether a police officer would have unfettered access to read records without going to a judge. Justice said yes. We said absolutely not! OMB resolved it one way, and then I got them to resolve it the other way. There are advantages to being around for a while!"

Given such divergent incentives, regulatory review has been controversial from its inception. Supporters of OIRA argue that White House clearance promotes consistency and overarching standards in an otherwise uncoordinated regulatory system.[114] In this view, bureaucratic decision making is strengthened by passing through an array of economic, scientific, and technical checkpoints and by possessing the political and constitutional legitimacy of presidential approval. Critics claim that centralized clearance provides industry interests and ideological opponents of regulation with a way of undermining efforts to protect health, safety, and the environment. OIRA

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review, according to this perspective, is grounded in ideas, such as cost-benefit analysis, that are inherently antiregulatory in their orientation.[115]

Although such criticisms might be expected to be most prevalent during Republican administrations, Democratic presidents have found themselves facing similar complaints. During President Obama's first term, prominent legal scholar Cass Sunstein, a close friend of the President's, served as OIRA administrator. It was during Sunstein's tenure that the EPA's proposed ozone regulation was stopped dead in its tracks. Actions such as this, as well as Sunstein's unwavering support for the application of cost-benefit analysis in the regulatory process, led one disaffected observer to remark: "He's acting as if it was George W. Bush's administration."[116] Lisa Heinzerling, who served as a senior EPA staffer during the first two years of the Obama administration, characterized OIRA as "aggressive" in promoting cost-benefit analysis: "Certainly for a Democratic administration it's notably aggressive … You need to show bigger benefits than costs, and if you don't, except in exceptional circumstances, that rule won't issue."[117]

President Obama's utilization of OIRA as an instrument for considering regulatory costs was also evident in the administration's **regulatory look-back** initiative. Under OIRA's direction, agencies were instructed to revisit their existing stock of regulations and identify those that might be modified or eliminated altogether.[118] According to the administration, the first round of eliminations produced billions of dollars in cost savings for businesses and citizens.[119] When he stepped down as OIRA administrator near the end of President Obama's first term, Sunstein attributed $91 billion in net benefits to OIRA's review under his stewardship.[120]

Within days of winning the 2016 presidential election, Donald Trump called for regulatory look-back of a different sort: "for every one new regulation, two old regulations must be eliminated."[121] Similar requirements are in place in Australia, Canada, the Netherlands, and the United Kingdom.[122] If enacted in the United States, a two-for-one rule for regulations would in all likelihood be administered by OIRA under its regulatory review authority.

Information presented in Figure 3.3 leaves no doubt that OIRA has had a profound effect on regulatory processes and outcomes. Although OIRA rarely rejects agency rules altogether, it alters the content of a significant proportion of actions each year. During the Reagan administration, OIRA grew increasingly tough on agencies. In 1981 OIRA required modifications in only five percent of the rules it reviewed. By 1988, this percentage had grown to 22 percent.

President Clinton brought important changes to regulatory review shortly after taking office. **Executive Order 12866,** issued on September 30, 1993, limited OIRA's jurisdiction to rules designated as significant and with an annual impact on the economy of at least $100 million. Because of this limitation, and as illustrated in Figure 3.4, the number of rules reviewed by OIRA dropped noticeably from 1994 forward. With this smaller portfolio, OIRA now requires agencies to alter the vast majority of their submissions before granting approval.

Figure 3.3 OIRA Rejection and Alteration of Agency Rules

Source: Data gathered by authors from Web site produced by the Office of Management and Budget and General Services Administration, http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init.

Figure 3.4 Number of Rules Reviewed by OIRA

Source: Data gathered by authors from Web site produced by the Office of Management and Budget and General Services Administration, http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init.

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How effective is regulatory review as a way for presidents to mitigate the agency loss that follows from moral hazard? OIRA is charged not only with pursuing presidential priorities but also with increasing the role of economic analysis in the regulatory process. At times, these dual missions point OIRA in the same direction. But what happens when political imperatives and economic considerations are at odds? Here, the evidence suggests that accountability to the president trumps fealty to analytical ideals.[123]

During Clinton's administration, only sixteen rules were prevented from taking effect. During the administration of George W. Bush, who emphasized a strong response to the threat of terrorism, OIRA did not reject a single rule addressing homeland security, even though such regulations often had ill-defined benefits and high costs.[124] Although President Obama rarely rejected agency rules, OIRA did substantially affect the regulatory process in a different, yet important way during his administration. Historically, OIRA completes regulatory reviews on average in under sixty days.[125] In 2012, the average review time increased to 79 days, and then ballooned dramatically to 140 days the following year.[126] With a substantial number of reviews consuming more than one year's time, OIRA greatly impacted the allocation of costs and benefits across businesses and citizens that invariably accompanies government regulations. In the end, regulatory review provides presidents with an institutionalized mechanism for competing with other principals for influence over the content and timing of bureaucratic decisions. A recent study shows that OIRA reviews rules more quickly when the rule coincides with a high presidential priority.[127] This is a useful reminder of the special connection between OIRA and the White House.

Midnight Regulations. In the days and months leading up to the inauguration of President George W. Bush, agencies—still operating under the Clinton administration—issued tens of thousands of pages of rules.[128] These so-called **midnight regulations** represented a 51 percent increase in regulatory activity when compared with the same period during the three previous years.[129] Once in office, the Bush administration responded by releasing what became known as the **Card memorandum** (named after President Bush's chief of staff, Andrew Card). The Card memo called for agencies to "postpone the effective date of [recently issued but not yet effective] regulations for 60 days."[130] This postponement provided the incoming administration with an opportunity to review the regulatory output that had occurred since Election Day. Although the vast majority of rules were eventually allowed to take effect, a number of regulations did not survive the partisan shift in administrations.[131]

A battle over midnight regulations also occurred during the transition from the Bush presidency to the Obama administration. On May 9, 2008, President Bush's chief of staff, Joshua Bolton, issued a memo ordering agencies to issue all proposed rules by June 1 and promulgate all final rules by November 1.[132] Bolton justified these deadlines as a "principled approach to regulation as we sprint to the finish, and resist the historical tendencies of administrations to increase regulatory activities in their final months."[133] Despite this effort, regulatory activity spiked dramatically in the waning months of the Bush administration.[134] On January 20, 2009, with this spike in mind, President Obama's chief of staff, Rahm Emanuel, instructed agencies to "stop all pending regulations until a legal and policy review can be conducted by the Obama administration."[135]

One obvious explanation for midnight regulations is that a burst of rulemaking offers the outgoing administration one last opportunity to leave its mark on the executive branch and bolster its policymaking legacy. While not denying the centrality of this political motivation, there are also bureaucratic reasons for finishing regulations before the change in administrations. As Susan Dudley, who served as OIRA administrator during President Bush's midnight period put it: "Initially, there was broad support for avoiding the midnight crunch, but…we faced strong objections...not only from political appointees [but] career employees who had worked hard on many of the regulations, were disappointed when they did not get them across the finish line before the end...many...had been through presidential transitions before... [and] did not relish having to break in a new crew of political appointees before completing their projects."[136]

Underscoring the political and bureaucratic dimensions of midnight regulations, the transition from President Obama to President Trump was marked by significant regulatory activity in areas—such as environmental policy—characterized by the incoming administration's hostility toward the work of its predecessor. EPA Administrator Gina McCarthy signaled this action on the day after Donald Trump won the presidential election. Writing to agency employees, McCarthy encouraged a vigorous pace of work during the midnight period: "As I've

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mentioned to you before, we're running—not walking—through the finish line of President Obama's presidency. Thank you for taking that run with me."[137]

Inside Bureaucracy with Dan Glickman

Secretary of Agriculture (1995–2001)

"OMB exerted a lot of influence over almost all of our food safety rules, including the Hazard Analysis and Critical Control Point rule and modern food safety rules. They exerted a lot of influence over the organic standards act, food stamp, and nutrition rules. They would be engaged—sometimes for policy reasons, sometimes for budgetary reasons. Things would slow down considerably as a result of their involvement. Sometimes they were right, sometimes they were wrong. In one area, we wanted increased humanitarian assistance for food overseas. Both OMB and interagency process (high-level people) were very much involved in slowing that process down."

Congressional Control of the Bureaucracy

Owing to its orientation as a lawmaking and investigatory body, Congress is naturally equipped to manage the bureaucracy through institutional design and oversight. Congress enacts, usually with presidential approval, the statutes that create and assign tasks to executive branch agencies. These statutes provide legislators with opportunities to place structural and procedural constraints on bureaucratic policymaking. When Congress established the Consumer Product Safety Commission in 1972, for example, it allowed the agency to issue regulations but limited this authority to standards that had been offered by industry interests, representatives of the general public, and other parties from outside government.[138]

Congress also bears responsibility for keeping a watchful eye on the policies and programs formulated and operated within the executive branch. It carries out these responsibilities through channels such as **oversight hearings** and investigations into allegations of waste, fraud, and abuse. Many of these monitoring activities are routine and attract little outside attention, but occasionally oversight becomes front-page news and transforms bureaucratic organizations, as happened in the late 1990s, when Senate hearings exposed widespread mistreatment of taxpayers by officials in the Internal Revenue Service.[139] Oversight also generates publicity when overseers try to intimidate or embarrass a prominent witness. In May 2011, for example, Rep. Patrick McHenry, R-N.C., chairing a congressional oversight subcommittee hearing, came very close to calling Elizabeth Warren, the primary architect of the new Consumer Financial Protection Bureau, a liar.[140] This testy exchange led to demands for an apology, which did not happen.[141]

Toward what ends do legislators usually make use of instruments of institutional design and oversight? Because hundreds of different constituencies are enfranchised in the Senate and the House of Representatives, congressional control of the bureaucracy is fundamentally uncoordinated in its orientation.[142] Specific committees and subcommittees may influence what goes on in particular agencies, but the bureaucracy as a whole does not operate under the direction of Congress as an institution. In the end, no matter how potent Congress and its members may be, the control exercised by the legislative branch is particularistic rather than aimed at furthering general societal and political interests.

Politics of Bureaucratic Structure. At times, agencies seem designed to fail, or at least to operate in ways not even their most ardent supporters can appreciate and understand. Consider again the Consumer Product Safety Commission (CPSC). The CPSC is an independent regulatory body charged with reducing the risk of injury and death associated with consumer products. Reluctant to champion the burgeoning consumer movement, the Nixon administration originally proposed placing the CPSC within the Department of Health, Education, and Welfare, where it would have had relatively little power and could have been easily monitored by the White House.[143] Congress,

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however, rejected this proposal and structured the CPSC so that it would be well insulated from presidential control. Importantly, this insulation was not complete because the commission was forced to rely on the Justice Department to carry out most legal actions against violators of safety standards. Over time such requirements have served to weigh the CPSC down and inhibit its ability to carry out its mission effectively.

Critics have argued that the Consumer Financial Protection Bureau (CFPB), whose creation was authorized in the Dodd-Frank Act, has structural elements that limit the ability of political principals to bring accountability to bear on the agency.[144] The director of the CFPB can be removed only under a limited set of circumstances, which do not include poor performance.[145] Congress does not have the authority to appropriate money to the CFPB or exercise oversight of the agency's spending practices. The Dodd-Frank Act instructed the courts to defer to the CFPB on its interpretations of consumer financial laws. Five years after the creation of the CFPB, Elizabeth Warren defended such structures, arguing that the agency "should remain free of political influence."[146] Why do legislators structure agencies in ways that all too often undermine bureaucratic accountability and performance? Two features of the democratic process are particularly salient when considering these structural choices.[147] The first is **political uncertainty.** Thanks to periodic elections, powerful politicians and their favored constituencies cannot count on controlling the institutions of government into the indefinite future. Inevitably, opposing ideological and partisan forces will take over the reins of power. This uncertainty has important implications for bureaucratic design, as agency benefactors have incentives to protect their creations from meddling by unkind political authorities. In the case of the CPSC, such protection came through the appointment of commissioners to fixed, staggered, seven-year terms, thus effectively distancing the commission from presidential control, even from administrations with consumerist sentiments. The CFPB receives its appropriations directly from the Federal Reserve, effectively removing from legislators an important avenue of influence over agency priorities and actions. In the end, political uncertainty leads agency supporters to "purposely create structures that even they cannot control."[148]

The second key feature of the democratic process is **political compromise.** Under the separation of powers system, opponents of legislative action are usually granted concessions. At times, these concessions prove to be of great consequence, severely limiting the ability of legislative advocates to achieve their objectives. The creation of the CPSC was not a total loss for business interests. In addition to the **offeror process (**whereby the CPSC invites outside parties to propose a suitable safety standard) and Justice Department enforcement, these interests secured the right to judicial review of CPSC decisions and a guarantee that the agency would come up for reauthorization in the short span of three years. In other words, Congress gave business and other CPSC foes the leverage necessary to immediately set about the task of undermining the agency and abolishing it completely before it became too entrenched in the executive branch. By contrast, unified Democratic control of the White House and both chambers of Congress meant that Republicans had relatively little say in the passage of the Dodd-Frank Act and the subsequent creation of the CFPB. Despite this contrary example, the dictates of political compromise generally imply that agencies are designed "in no small measure by participants who explicitly want them to fail."[149] The lessons of political uncertainty and political compromise, taken together, reveal that if Congress has difficulty managing delegated authority, this difficulty springs not only from bureaucratic behavior but also from the nature of the legislative process.

Administrative Procedures. Within the constraints imposed by bureaucratic structure, Congress can influence what the executive branch does by manipulating the **administrative procedures** under which agencies operate. Administrative procedures specify the steps agencies must follow when making decisions and formulating policies. These steps typically include gathering certain types of information and consulting with stakeholders in particular ways. The **National Environmental Policy Act** requires agencies to prepare **environmental impact statements** for rules with potentially significant ecological consequences, as when the Federal Energy Regulatory Commission considers whether to approve the construction of a -hydroelectric facility.[150] Such assessments lay out the likely effects of the rule—harm to a fishery, for example—and the steps the agency will take to minimize prospective environmental damage.[151]

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Secretary of Health and Human Services (1993–2001)

"Members of Congress would call and ask us to see people. We tried to be accommodating as long as it wasn't illegal. We made sure it was legal. Members of the Congress intervened most often on waivers. They would say, 'We hope you'll approve the waiver.' Usually, they wouldn't have a clue what it was about! When we got a waiver request, if we were giving them flexibility, we wanted to be sure that they were protecting certain groups, such as the disabled. We wanted to make sure they were expanding services and improving quality."

Administrative procedures sometimes target specific agencies or decisions. For example, a statute requires the Federal Railroad Administration (FRA) to hold public hearings during all of its rulemakings.[152] These hearings provide interested parties with opportunities to address agency officials in person, often without having to leave their communities. When seeking to modify its regulations on the power braking systems used in non-passenger trains, the FRA convened hearings not only in Washington, D.C., but also in Chicago, Sacramento, and Newark.[153]

In what ways do administrative procedures potentially enhance congressional control over the bureaucracy? Administrative procedures can create bureaucratic environments that **mirror** the politics that occurred in Congress when it delegated authority to the agency.[154] In 1996 Congress amended the Safe Drinking Water Act. While they were working on the amendments, legislators heard from three distinct types of stakeholders—utilities and other water producer interests, state and local regulators, and environmental and consumer organizations.[155] The amendments delegated great authority to the EPA to set standards for contaminants, such as arsenic, that pose a threat to drinking water. The amendments also specified very carefully the composition of the National Drinking Water Advisory Council, a stakeholder organization with which the agency consults when crafting drinking water regulations. Specifically, the advisory council must be composed of an equal number of water producers, state and local government officials, and representatives of the general public. This membership requirement means that the agency can expect to hear from the interests that participated in the congressional debate over the amendments. In other words, the pattern of participation in drinking water rulemakings is likely to resemble closely the participatory environment that had characterized the lawmaking process.

Administrative procedures can also **stack the deck** in favor of particular constituencies. Over time, the National Environmental Policy Act has brought ecological considerations more to the fore than they would otherwise have been in agency proceedings. For example, environmentalists have used the act to stop construction projects initially endorsed by the Army Corps of Engineers. These successes have led to a noticeable change in the types of projects the corps is willing to propose.[156] Similarly, the -Federal Energy Regulatory Commission became substantially more inclined to -render proenvironment licensing decisions in the years following passage of the act.[157]

Finally, administrative procedures can place bureaucratic policymaking on **autopilot**. In other words, as the preferences of enfranchised constituencies change, agency decisions change correspondingly. During the 1970s the cable television industry emerged as a powerful political force in Congress. Shortly thereafter, the industry became the beneficiary of a major deregulation effort by the Federal Communications Commission. This deregulation occurred without any direct congressional intervention but came about through changes in the set of interests represented in commission proceedings.[158] In general, well-designed administrative procedures obviate the need for constant legislative attention to agency behavior.

Administrative procedures, it is important to recognize, vary in the leverage they give members of Congress over the management of delegated authority. Some administrative procedures, such as the requirement that the FRA hold public hearings, serve to place hurdles in front of agencies.[159] These hurdles increase the costs to agencies of doing their day-to-day business. The FRA for years deferred acting on power braking systems as a result of hostile and contradictory testimony delivered at its rulemaking hearings.[160] Other administrative procedures, by contrast, increase the costs of taking particular courses of action. The National Environmental Policy Act makes it difficult for agencies to give short shrift to the environment in cases where the ecological stakes are relatively pronounced. With

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this variation in mind, it is difficult to make blanket claims about the efficacy of administrative procedures in promoting congressional control of the bureaucracy.

Appropriations. As suggested by the examples of the CFPB, the **power of the purse** is of critical importance to Congress's success in influencing the bureaucracy. Without appropriations, most laws cannot be implemented. Without adequate appropriations, most laws cannot be implemented effectively. These realities give legislators who sit on appropriations committees extraordinary political clout. If stingy, they can starve an agency to death; if generous, they can help an agency to flourish. Congressional Republicans obviously appreciated this fact when they proposed a nearly 10 percent cut in the EPA's appropriations for the 2016 fiscal year.[161] If enacted, such a sharp cut in agency funding would severely constrain the EPA's ability to enforce sometimes unpopular environmental laws.

The power of the purse was demonstrated on a much broader scale in 2011 when Congress enacted the **Budget Control Act**. The law specified that if Congress was not able to produce a deficit reduction bill with at least $1.2 trillion in spending cuts then across-the-board reductions would automatically occur. Such compulsory reductions are known as **sequestration**. Sequestration was viewed at the time as a universally unpalatable outcome, so the common assumption was that Congress and the White House and Republicans and Democrats would together find a way to avoid walking over such a steep fiscal cliff.[162] In 2013, however, no deficit reduction deal had been signed and sequestration went into effect. The subsequent effects of sequestration have been the subject of widespread public debate, with some warning of massive job losses and others claiming minimal effects on employment.[163]

According to the U.S. Government Accountability Office, sequestration caused agencies to reduce or delay the provision of certain services, while taking steps to limit the effects of the spending cuts.[164] For example, public housing authorities provided less rental assistance to low-income households than prior to sequestration. U.S. Customs and Border Protection reported increased wait times for passengers arriving in the United States on international flights. The Department of Defense scaled back its military training and readiness activities. Air Force Secretary Deborah James was not alone in worrying about the impacts of such cutbacks: "I believe sequestration is going to place American lives at greater risk both at home and abroad."[165]

Uncertainty over appropriations decisions can sometimes have as big an impact on administrative agencies as appropriations decisions do -themselves. In the months leading up to the passage of the Budget Control Act, Congress passed a series of short-term continuing resolutions keeping federal agencies funded at current levels. Although this device averted a government shutdown, it nevertheless had profound effects on federal agency decisions. Unsure of where things stood, numerous federal agencies froze hiring, canceled projects, delayed contracts, curbed training, and reduced travel.[166] The Social Security Administration suspended plans to open eight new offices to cope with a backlog of appeals from people denied disability benefits, and the SEC delayed work on a major information technology project that would help the agency detect and correct securities law violations. Head Start programs across the country told parents they could not assure them that slots would be available in coming months. A new federal prison in New Hampshire, with enough space for 1,280 inmates, was unable to open because of uncertain funding.[167] These examples remind us how utterly dependent administrative agencies are on congressional appropriations.

Oversight. Legislators possess the ability to reduce their moral hazard problem through oversight of the bureaucracy. Oversight occurs in a variety of forms, including committee hearings and scandal-induced investigations.[168] For a long time, observers maintained that members of Congress tend to neglect oversight in favor of other functions, such as bringing federal projects and other forms of "bacon" home to their constituents.[169] Thus, in practice, oversight has not been viewed as an especially important tool of congressional control.

Inside Bureaucracy with Tom Ridge

Secretary of Homeland Security (2003-2005)

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> "I believe my three successors would probably share the same point of view. All of us believe in congressional oversight—an important part of how we govern ourselves—but the oversight was, I believe, dysfunctional because it was disparate … We were accountable, and overseen, by over 100 committees and subcommittees in the House and the Senate. And so no smaller group in the legislative branch ever understood the kind of integrative initiatives we were undertaking. My thought has been (and I think all my successors would say) the best oversight would have been and continues, even today as you are still trying to integrate this massive enterprise, to be to have far fewer members of the House and Senate become more completely aware, not of individual functions, but the operational integration of the department, rather than the siloed approach that a lot of these committees took. So it required an enormous amount of time and I think would have been for me helpful in helping to create a more effective and more closely integrated operational platform if at the same time as building the department they narrowed the committees of jurisdictions. I was on the Hill 12 years. I understand the role, the importance, and the criticality of congressional oversight. But when you're running helter skelter from this committee to the next and this group is more interested in these two agencies, you don't have an unlimited budget, so you have to set priorities. It's understandable. Committee chairmen and committees may deem that their particular focus on that particular part of the department deserves their attention and their priorities should be elevated to the highest among all. But I think it created appropriations problems. The process could have been more helpful in slowly integrating the capabilities that we had."

This assessment has come under critical scrutiny as evidence suggests a significant increase in the volume of oversight activity in the 1970s and 1980s.[170] On average, congressional committees collectively spent fewer than 200 days per year conducting oversight during the decade of the 1960s. By 1983, this level of activity had grown substantially, to 587 days. In relative terms, oversight as a percentage of total committee activity increased from 9.1 percent in 1971 to 25.2 percent in 1983. Oversight, then, emerged as an integral part of the surveillance system used by members of Congress to monitor the bureaucracy's exercise of delegated authority.

Why did legislators become more interested during these years in actively overseeing executive branch agencies? Internally, the congressional reforms of the early 1970s, such as the proliferation of subcommittees and staff resources, enhanced the ease with which most members could carry out meaningful oversight. Externally, increases in the size and complexity of government made bureaucratic accountability and performance more valuable commodities than in previous eras of policymaking.[171] Together with divided government, these internal and external changes made it exceedingly difficult to create new legislation and therefore put a premium on influencing policy by overseeing already existing programs.

High, sustained levels of oversight are still not a given, even under the favorable environmental conditions of the postreform Congress. It is well established that the business of governance, including oversight, was not a strong suit of congressional Republicans when, in 1995, they returned to a bicameral majority for the first time in four decades.[172] Congressional oversight of the George W. Bush administration was also noticeably weaker in 2003–2004 than it was of the Clinton administration in 1993–1994.[173] Democrats promised—and delivered—a revival of oversight when they regained full control of Congress in 2007. Within two months after assuming control of Congress, Democratic legislators conducted a total of eighty-one hearings on the Iraq war.[174] Congressional Democrats also held high-profile hearings on security leaks (the outing of Central Intelligence Agency undercover employee Valerie Plame), the quality of medical care at Walter Reed Army Medical Center, and other controversial subjects.

When Rep. Darrell Issa, R-Calif., became chair of the House Committee on Oversight and Government Reform in January 2011, he vowed to be a tough and aggressive overseer. He had already signaled that he would be a partisan overseer, calling President Obama "one of the most corrupt presidents in modern times."[175] During the course of his tenure, Issa investigated the Benghazi attacks and conducted contempt of Congress proceedings against Attorney General Eric Holder.[176] During a hearing on the IRS, Issa cut off the microphone of fellow committee member Elijah Cummings, D-Md.[177] Given his style, Issa received predictably partisan reviews from other

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members of Congress. While one Republican praised him for hitting a number of "singles" and "doubles," Democrats decried excessive partisanship and a lack of focus.[178]

When engaging in oversight of the executive branch, members of Congress can pursue one of two basic strategies. The first is **police patrol oversight.** In police patrols, legislators search for bureaucratic actions that fail to conform to congressional expectations, much in the way that officers on the beat seek to ferret out criminal activity. In contrast, **fire alarm oversight** places much of the burden of monitoring the bureaucracy on citizens and organized interests, through instruments such as the **Freedom of Information Act** and Government in the Sunshine Act. Like firefighters, legislators swing into action after an alarm is sounded, using their policymaking apparatus to bring recalcitrant agencies under control. Given that police patrols require a relatively significant investment of congressional time and resources, it is widely presumed that the fire alarm approach dominates oversight.[179]

This presumption is not necessarily accurate, however. According to research, committee hearings—over time, across policy areas, and in both chambers—more often than not prove to be police patrol in their orientation.[180] In 1995, for example, 86.1 percent of the House Judiciary Committee's hearings consisted of routine, ongoing legislative activities, not reactions to crises and other types of galvanizing events. These activities included consideration of the reauthorization of the **Administrative Conference of the United States (ACUS),** an organization charged with studying agency processes and making recommendations to Congress regarding how to improve these processes. Several months after this hearing, Congress voted to terminate the agency's funding and ACUS ceased to exist until it was reestablished fifteen years later. All of this occurred with very little outside involvement or even awareness. Rather, Congress's oversight of ACUS took place within the context of the agency's regularly scheduled reauthorization process. Also, recent research suggests that federal agencies can and sometimes do limit opportunities for fire-alarm oversight – for example, by limiting the length of the public comment period or by bypassing the notice and comment process altogether. In Rachel Potter's words: "Agencies are more likely to close the participation valve when the complaints of activated interest groups are likely to fall on sympathetic congressional ears." [181]

In all forms, oversight is inherently limited in its ability to constrain agency behavior. Once legislators have identified transgressions, they must have the incentive and capacity to sanction and redirect agencies. Each set of tools that might be used for such purposes—appointments, budgets, and legislative actions—is problematic in important respects.[182] Congress, with its dispersion of authority across chambers and committees, has difficulty passing legislation of any kind. Even if Congress enacts legislation targeting an agency, there is no guarantee that the new law will succeed where previous efforts failed in bringing about compliant behavior. Although oversight occasionally produces dramatic results, more often than not it is most useful as a way of deterring agencies from running too far afoul of legislators and their preferred policies.

Congressional Review Act. In the waning days of the Clinton presidency**,** the Occupational Safety and Health Administration (OSHA) issued a rule designed to protect workers against injuries caused by repetitive motion. This rule was a major policy action in that hundreds of thousands of Americans, in settings as diverse as corporate offices, meat-cutting plants, and medical facilities, miss work each year because of "ergonomics-related" injuries. The rule was also highly controversial. Analysts projected that collectively businesses would incur costs in the billions of dollars to comply with OSHA's requirements, which included reviewing employee complaints, redesigning problematic workstations, and providing compensation for disabilities.

Shortly after George W. Bush assumed the presidency, in 2001, the controversy surrounding the **ergonomics rule** erupted on Capitol Hill. Most Republican legislators, as well as some Democrats, vehemently opposed the rule, preferring either a less expansive approach or no regulation at all. Seeking to overturn OSHA's action, these lawmakers resorted to an obscure parliamentary maneuver. Under the **Congressional Review Act** (CRA) of 1996, agency rules can be nullified within sixty legislative days of promulgation if both chambers of Congress enact a **resolution of disapproval.** Because it is relatively difficult to subject such resolutions to committee hearings, extensive debate, and other standard features of the lawmaking process, they are easier to pass than normal legislation. On March 21, 2001, barely two months after the ergonomics rule took effect, it became the only agency action ever to have been repealed in this way when President Bush signed into law a resolution disapproving the standards established by OSHA.[183]

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The CRA has been called the "nuclear bomb" of congressional oversight of the executive branch, and with good reason.[184] Not only does the CRA eliminate a regulation in its entirety, it also prevents the agency from subsequently issuing a rule that is "substantially the same" without express authorization from Congress.[185] Perhaps for this reason, the CRA lay dormant for many years after the ergonomics regulation was disapproved.

This all changed in 2016 after the election of Donald Trump and Republican majorities in both the Senate and House of Representatives. Sensing a "stars align" opportunity to scuttle regulations issued at the end of the Obama administration, Republicans sought to revive and strengthen the CRA.[186] The Senate Republican Policy Committee, for example, listed 11 potential targets, including rules that govern overtime pay, coal mining near streams, and federal funding of Planned Parenthood.[187] On January 4, 2017, the second day of the 115th Congress, the House passed the **Midnight Rules Relief Act**. This bill, if it were passed by the Senate and signed by the president, would allow members of Congress to "bundle together multiple rules and overturn them en masse with a joint resolution of disapproval."[188]This expansion of the CRA was not the only regulatory reform measure under consideration in the aftermath of the political realignment caused by the 2016 presidential and congressional elections. A day after the passage of the Midnight Rules Relief Act, the House moved to enhance its power over the executive branch in an even bigger way. The **REINS Act** (Regulations from the Executive in Need of Scrutiny) requires that both chambers pass, and the president sign, a resolution before any major regulation can take effect.[189] Although President-Elect Trump has promised to sign the REINS Act, such reforms are unlikely to make it to his desk so long as Senate Republicans do not have the votes necessary to end a Democratic filibuster.

Judicial Review

The judicial system, like the presidency and Congress, is appropriately viewed as a principal to the bureaucracy's agents. Judges routinely oversee and review the work of executive branch agencies. In this vein, one of the most common judicial tasks is verifying that bureaucrats act in accordance with the law. A somewhat less common task is ensuring that bureaucratic actions are consistent with the Constitution. If an agency takes steps deemed illegal or unconstitutional, then its work can be overturned in the judiciary. When this happens, the court in question will often remand the action to the bureaucracy, with specific instructions as to how the agency's legal or constitutional mistakes might be rectified. How, then, do the courts go about dealing with their moral hazard difficulties?

Judges v. Politicians. **Judicial review** has several characteristics that distinguish it from instruments of presidential and congressional control. First, whereas politicians can engage in either police patrol or fire alarm oversight, the latter alone is available to judges. Courts can hear only those cases brought to their doorsteps by plaintiffs. Put differently, judges must wait for individuals or organizations to pull a fire alarm indicating that they have been injured or aggrieved by some agency action. Thus, in its basic orientation toward the bureaucracy the judiciary is more passive than either the executive or the legislative branch.

Second, judges place greater emphasis than do politicians on procedural fairness and irregularities. One of the hallmarks of judicial review is an acute awareness of the requirements the **Administrative Procedure Act** and other relevant laws impose on agencies. The courts sometimes overturn bureaucratic actions because agencies have failed to provide adequate notice of a proposed rulemaking. Likewise, an agency that fails to provide interested parties with an adequate opportunity to comment on a proposed rule or fails to adequately explain the reasoning behind a final rule may find itself prohibited from completing or implementing the action at hand.

Third, because the judiciary is subject to numerous legal and operational constraints, interactions between judges and agencies tend to be more formal and less frequent than those between politicians and agencies. The nature of these interactions can lead to both negative and positive results. On the one hand, formal, infrequent interactions discourage flexible problem solving by agencies and stifle negotiations between judges and bureaucrats. On the other hand, these arrangements make it somewhat more difficult for agencies to shirk judicial orders. Unlike politicians, who express themselves through laws, hearings, executive orders, informal meetings, telephone conversations, and other mechanisms, judges essentially express themselves through official decisions and decrees.

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Agencies can at times deflect pressure from one politician by contending that demands from elsewhere impose obligations to the contrary. Pressure from judges is far more visible, much easier to document, and ultimately more difficult to resist.

These characteristics can be observed in the reactions of federal agencies to Supreme Court decisions that reversed or remanded executive branch actions. Over the decades, there have been hundreds of such decisions. According to research, these decisions have provoked a significant response on the part of the bureaucracy. Major policy change occurred after 72.7 percent of the decisions, while moderate and minor alterations followed 14.1 and 5.9 percent of them, respectively. Only 7.3 percent resulted in a complete absence of policy change.[190] As these episodes indicate, the coercive power of the Supreme Court and other judicial bodies is rather potent on those occasions when it is imposed. What remains an open question is whether this coercion serves to enhance bureaucratic performance as well as accountability.

Circuit Courts and Administrative Law. Within the federal judiciary, most lawsuits challenging agency decisions originate in district or trial courts. By law, however, some agency decisions may be appealed directly to a circuit court of appeals. Regardless of where a case originates, circuit courts of appeals are particularly important in the field of administrative law. Prominent among them is the U.S. Court of Appeals for the District of Columbia—or the D.C. Circuit—because a disproportionate number of appeals are filed in the city, where most agencies are headquartered. Indeed, legal analysts sometimes refer to the D.C. Circuit as the second most important court in the land, behind only the Supreme Court.[191] Whether or not that assessment is true, it is indisputable that the D.C. Circuit "enjoys an unmatched reputation as a leader in determining the substance and content of administrative law."[192] As a general rule, circuit courts of appeals affirm decisions made by executive branch agencies. During the 1970s circuit courts affirmed, on average, more than 60 percent of all agency decisions subjected to challenges. During the 1980s this affirmation rate rose to more than 70 percent. The D.C. Circuit, however, has been consistently less deferential than other circuit courts. During the 1970s and 1980s the D.C. Circuit sustained agencies only 57 and 56 percent of the time, respectively.[193]

The greater judicial activism of the D.C. Circuit can be traced back to the 1970s, especially to the thinking of Judge Harold Leventhal. In *Greater Boston Television Corp. v. Federal Communications Commission,* Leventhal first articulated the **hard look doctrine** of judicial review, which called for judges to take their supervisory responsibilities seriously. In that decision, Leventhal wrote that a court must intervene if it "becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."[194] In a series of subsequent decisions, Leventhal and other judges on the D.C. Circuit struck down a variety of major bureaucratic actions after tough scrutiny of the agencies' substantive reasoning in complex cases. For example, in *International Harvester Co. v. Ruckelshaus,* the D.C. Circuit invalidated the EPA's emission standards under the Clean Air Act by challenging the agency's underlying methodology.[195]

Another prominent D.C. Circuit judge, David Bazelon, supported Leventhal's call for tough scrutiny but preferred strong procedural review over strong substantive review. In the *International Harvester* case, for example, Bazelon argued that the agency's refusal to grant a one-year suspension of its 1975 emission standards was procedurally flawed because the agency had not allowed the petitioners a general right of cross-examination during the rulemaking proceedings.[196] Ultimately, in the *Vermont Yankee* case in 1978 the Supreme Court curbed the D.C. Circuit's penchant for strong procedural review when it held that a federal court may not impose procedural requirements on an agency above and beyond those specified in the Administrative Procedure Act.[197] Importantly, this decision left strong substantive review untouched and may have even encouraged it.[198]

Although the D.C. Circuit enjoys considerable prestige, the Supreme Court does not automatically defer to it or any other court. The *Vermont Yankee* decision aptly illustrates this point. In 2001 the Supreme Court overruled a 1999 decision by the D.C. Circuit that had overturned a soot and smog rule adopted by the EPA. In *American Trucking Associations v. EPA,* the D.C. Circuit had reversed the agency's rule by reviving a moribund tenet of administrative law known as the **nondelegation doctrine.** This doctrine states that Congress may not delegate legislative authority to the executive branch of the government. In effect, the doctrine implies that congressional standards must have some teeth, some specificity. In *American Trucking,* the Supreme Court unanimously upheld the agency's authority

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to set new and tougher clean air standards without first considering the potential economic impact of these standards on the trucking industry. The Supreme Court also explicitly declined to invoke the nondelegation doctrine, thus repudiating the D.C. Circuit.[199]

In perhaps the most important case in modern administrative law, -*Chevron v. Natural Resources Defense Council,* the Supreme Court constrained judicial review by articulating the doctrine of **administrative deference.**[200] In short, the justices upheld the authority of the EPA to define sources of air pollution under the Clean Air Act of 1977. More generally, this ruling means that judges must defer to agency interpretations of executive branch authority when the statute granting this authority is ambiguous and the agency's interpretation of the underlying ambiguity is reasonable.

Supreme Court. In light of these decisions and doctrines, it is not surprising that, like circuit courts of appeal, the Supreme Court is more likely to defer to agencies than to overturn them.[201] While the outcome of any Supreme Court case depends on many factors—the legal merits of the case, the skills of the attorneys, and so forth—political ideology also plays a role in the Court's decision making. The more liberal Warren Court (1953–1969) supported liberal agency decisions 85.7 percent of the time, while the more conservative Burger Court (1969–1986) supported liberal agency decisions only 69.1 percent of the time. Similarly, the Warren Court supported conservative agency decisions 63.4 percent of the time, a rate nearly 20 percent lower than that of the Burger Court. Although the Supreme Court, and courts more generally, often hesitate to rule against agencies, this does not mean judicial review is ineffectual. Agencies undoubtedly craft decisions with an eye to the possibility that their procedures and substantive reasoning may at some point be subjected to judicial scrutiny.

Also, it is possible to exaggerate the importance of the *Chevron* decision. As William Eskridge and Lauren Baer have noted, the Supreme Court is more likely to engage in ad hoc judicial reasoning than to simply invoke *Chevron* as the rationale for deferring to administrative agency decisions.[202] In fact, the Court's reactions to administrative decisions fall along a "continuum of deference" with deference at one end of the spectrum and support at the other end. Many Supreme Court decisions fall somewhere in between these two extremes. Further, overall patterns can obscure important exceptions. Although the Court, under Chief Justice John G. Roberts, has deferred to administrative agencies in some instances, it has sometimes overturned significant administrative agency decisions.[203] While the overall pattern continues to be that administrative agencies win before the Supreme Court more often than not, administrative agencies cannot take judicial review for granted.

Principal-Agent Theory and the Bureaucracy's Clients

Consistent with principal-agent theory, chief executives, legislatures, and judiciaries all find themselves in positions where they can limit the loss associated with the delegation of policymaking authority to the bureaucracy. None of these political principals, however, can completely eliminate the problems raised by adverse selection and moral hazard. When setting about the task of managing delegation, each principal faces unique difficulties, from the judiciary's inherently reactive nature to the president's ambitious desire for coordinated control of a sprawling bureaucracy.

An approach common to all of these principals is enlisting the help of third parties in the use of screening mechanisms, institutional design, and oversight. For many years the White House has relied on organized interests to put forth and evaluate presidential appointees. In fact, President George W. Bush stoked a mild controversy when he broke from precedent by declining to consider the recommendations of the American Bar Association in filling federal judgeship vacancies. In Congress, the essence of fire alarm oversight is the empowerment of citizens and groups to keep a watchful eye on agency proceedings and decisions. To keep their dockets full, the courts rely on litigants to press claims about the illegality and unconstitutionality of bureaucratic actions.

All of this raises the question of whether principal-agent theory can provide insight into the role and influence of agency clients in bureaucratic policymaking. Strictly speaking, clients are not bureaucratic principals as

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they are neither the hierarchical supervisors of agencies nor the wellsprings of delegated authority. As a result, clients are only as potent as the public officials whose backing they enjoy.

For such backing to materialize, clients must possess attributes of significant value to political principals. For example, members of Congress have a never-ending need for information about the views of their constituents, the predispositions of their colleagues on pending legislation, and the outcomes likely to follow from their policy choices.[204] Clients who can meet these information needs are naturally advantaged in the lawmaking process. These advantages carry over into the bureaucracy when legislators structure agencies, design administrative procedures, and conduct oversight in ways targeted to ensure that policymaking in the executive branch does not stray too far from deals struck in Congress.

Who then are the clients best positioned to serve as powerful third parties in the principal-agent hierarchy? The key consideration here is -mobilization. For some time it has been clear that not all parties with a stake in government activity organize in pursuit of their policy preferences.[205] Likewise, the extensiveness of client mobilization varies greatly across the issues that fall under the domain of the executive branch. In the end, principal-agent theory points not only to the unique position of clients in the policymaking hierarchy but also to the need for a close examination of the factors affecting the mobilization of both the beneficiaries and targets of agency actions.

Principals and Principles

As this chapter has demonstrated, the bureaucracy has no shortage of bosses. At times these bosses exercise extraordinary influence over what agencies can and cannot do. In one meeting President Obama set aside the EPA's ozone regulation, a major policy action years in the making. Such highly visible cases aside, the bureaucracy's bosses usually exercise their authority, if at all, in much subtler and more conditional ways. Years after the passage of the Dodd-Frank Act, many regulations necessary to the implementation of financial reforms have not yet been completed, a state of affairs President Obama found himself unable to immediately resolve.

If the power of those who serve as the bureaucracy's principals is conditional, then what specific conditions determine the contours of agency discretion? Part of this story deals with the tools principals possess, and do not possess, to combat adverse selection and moral hazard. Although the Constitution provides the presidency with few formal advantages vis-à-vis the bureaucracy, presidents are powerful in ways difficult to measure. When the president puts the full authority and prestige of the White House behind an initiative, it is often difficult for other policymakers, including bureaucrats, to resist. Yet from the perspective of these policymakers, presidential agendas are usually rather limited in scope. As a result the president exercises power only on an occasional basis.

The judiciary is also a potent principal that gets involved in agency decision making under a limited set of circumstances. For most agencies most of the time, judicial review undoubtedly represents an unpleasant prospect, but one they experience only occasionally. The same cannot be said when it comes to legislative principals. Legislators have their hands on everything from agency design to oversight of the bureaucracy. Although these instruments give Congress and other such principals strong leverage over the -problem of moral hazard, this leverage by no means eradicates agency loss, as the following example illustrates.

The Resource Conservation and Recovery Act of 1976 empowers the EPA to issue standards for the treatment, storage, and disposal of hazardous wastes.[206] The act requires the agency to adhere to a variety of analytical, disclosure, and participation procedures when setting these standards. Importantly, the agency has found a way to get around these requirements when it so desires. In cases where it wishes to evade congressional scrutiny, the EPA eschews the issuance of formal rules and makes policy instead through **guidance documents.** Although guidance documents (statements agencies produce to flesh out their stances on particular issues) lack the full force of law, regulated firms routinely comply with them. Thus, despite Congress's efforts, hazardous waste policy is often made beyond the reach of the tools legislators normally use to limit bureaucratic discretion.

To put it differently, part of the story of the boundaries of bureaucratic authority concerns the willingness of agency officials to respond to their bosses' cues. In the broadest sense, the bureaucracy's bosses include not only

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chief executives, legislatures, and judiciaries but the public—the very society within which agencies operate—as well. With this in mind, many bureaucrats try to represent the public interest as best they can determine it. When viewed in this way, agencies appear to be populated for the most part with officials who are **principled agents.**[207] That is, agency officials are hard workers who are highly professional, devoted to the mission of their organizations, and only rarely driven to shirk or sabotage the policy aims of their bosses. In the end, control of the bureaucracy emanates not only from political principals but also from other sources inside and outside of agencies.

Key Terms

Administrative Conference of the United States,

administrative deference,

Administrative Procedure Act,

administrative procedures,

adverse selection,

agency loss,

agent,

autopilot,

boundaries of bureaucratic authority

Budget Control Act

Card memorandum,

casework,

Civil Service Reform Act,

complexity,

Congressional Review Act,

coordinated control,

counterbureaucracy,

delegation,

divergent incentives

divided government,

Dodd-Frank Wall Street Reform and Consumer Protection Act

ergonomics rule,

environmental impact statements

Executive Office of the President,

Executive Order 12866,

Executive orders,

Federal Register,

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fire alarm oversight,

Freedom of Information Act,

go native,

guidance documents,

hard look doctrine,

hold,

institutional design,

judicial review,

Keep Committee,

legislative professionalism,

midnight regulations,

Midnight Rules Relief Act,

mirror,

moral hazard,

National Environmental Policy Act,

nondelegation doctrine,

offeror process,

Office of Information and Regulatory Affairs,

oversight,

oversight hearings,

police patrol oversight,

political compromise,

political uncertainty,

power of the purse,

presidential memoranda,

principal,

principled agents,

red tape,

REINS Act

regulatory look-back,

regulatory review,

Reorganization Act,

resolution of disapproval,

salience,

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screening mechanisms,

self-interest,

senate confirmation,

Senior Executive Service,

sequestration,

size of the bureaucracy,

stack the deck,

statutory deadlines,

unilateral actions,

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