

Controlling Agencies through Appointments

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As a crude start to a complex subject, let us distinguish two strategies for controlling the behavior of government officials: on the one hand incentives, on the other hand selection. Action is a function of preferences and opportunities. So we may take the officials' preferences as exogenously given, and attempt to structure their opportunities in ways that produce the desired behavior; this is the incentives strategy. As an alternative, we may hold opportunities constant, but attempt to select officials with the right preferences, from our point of view.

Enacting coalitions face the same basic strategic choice when they attempt to control agency officials. Coalitions may attempt to structure the choices of agency officials by altering the costs and benefits of various actions; alternatively, however, coalitions may attempt to structure choice by selecting officials with preferences congenial to the coalition. Most of the relevant literatures in political science and law focus on various incentive-based strategies for controlling agency action. The techniques are familiar. Ex ante, enacting coalitions can limit or expand the agency's freedom of action by writing statutory text that is more-or-less specific, as Epstein and O'Halloran emphasize,¹ or coalitions can adjust the costs to agencies of various actions by adjusting the agency's structure and process, as emphasized by McNollgast.² Ex post, coalitions can monitor agency performance through "police patrols" and "fire alarms," and can attempt to punish opportunistic administrators through substantive lawmaking, appropriations reductions, or public humiliation -- although any threat of punishment that requires a new statutory enactment will lack credibility if the agency has been careful not to drift outside the area in which House, Senate and Presidential preferences conflict.

So far all the techniques I have mentioned -- writing substantive law, adjusting agency structure and process, ex post monitoring -- attempt to limit the feasible set of agency actions or to structure the agency's choice of actions within the feasible set; they are thus incentive-based in my sense. But legislative coalitions may also attempt to

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¹ David Epstein & Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policymaking under Separate Powers* 26-27 (1999). Epstein & O'Halloran use a model that includes statutory limits on appointments as one type of constraint on administrative discretion, among many others, but they do not attempt to distinguish the costs and benefits of the appointments strategy from those of the incentives strategy -- my interest here.

² Mathew McCubbins, Roger Noll & Barry Weingast, "Administrative Procedures as Instruments of Political Control," 3 *Journal of Law, Economics and Organization* 243 (1987).

select, or influence the selection of, agency officials who share the coalitions' preferences. The literature on this is much less developed, apart from some work by Nolan McCarty,³ and some preliminary analysis in earlier models.⁴ After looking at the basic political analysis of appointments, I'll cash out the analysis for law, asking how our view of the Appointments Clause and of the President's removal power should be affected by the political insights. It should be obvious that these remarks are incomplete and tentative in the extreme.

Begin with a key methodological point: in principle, the alternative forms of bureaucratic control are just substitutes. Legislative coalitions will shift between incentive and selection strategies, and among different selection strategies, as the relative costs and benefits of the available tools change across political contexts. It follows that any analysis of political control of bureaucracy that focuses only on controlling agencies through substantive law, or through adjustments to structure and procedure, will be incomplete, because it will fail to consider the full range of options that Congress and the President may command and must bargain over.

So the challenge is to compare incentive and selection strategies, to specify their relative costs and benefits across political settings. Here I can only sketch a few relevant considerations. Let us start with a temporal distinction. As with incentive-based strategies of control, the appointments strategy can take either an *ex ante* or an *ex post* form. *Ex ante*, legislative coalitions can write in statutory prerequisites that constrain the President's choice of agency officials. Examples include professional qualifications, such as a degree in a technical field; geographic qualifications; or even political qualifications, as in the common type of provision requiring that no more than a set fraction, near $\frac{1}{2}$, of agency commissioners be members of either political party.⁵ *Ex post*, Senators can use holds to block or at least delay appointments, as a means of preventing the President from moving the agency's preferences in undesirable directions.

A second distinction is institutional. The analysis of the appointments strategy can be run at three different institutional levels: intracameral, intercameral, or interbranch. Intracamerally, committees rather than the floor do most of the monitoring once an appointee takes office. The hypothesis might be that the floor will prefer an incentive-based strategy to the extent that it trusts committees, as faithful agents, to conduct the *ex post* monitoring or to subcontract monitoring tasks to allied interest groups. Conversely, the floor will prefer a selection strategy to the extent that there is agency slack between the floor and committees. At the intercameral level, statutory

³ Nolan McCarty, "Bargaining over Authority: The Case of Appointment and Removal Power" (unpublished manuscript available at <http://www.princeton.edu/~nmccarty/agency.pdf>).

⁴ See, e.g., Randall Calvert, Mathew McCubbins & Barry Weingast, "A Theory of Political Control and Agency Discretion," 33 *American Journal of Political Science* 588 (1989); Barry Weingast & Mark Moran, "Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission," 91 *Journal of Political Economy* 775 (1983).

⁵ For an overview, see Adam J. Rappaport, "The Court of International Trade's Political Party Diversity requirement: Unconstitutional under any Separation of Powers Theory," 68 *U. Chi. L. Rev.* 1429, 1438-40 (2001).

qualifications and restrictions are a way for the House to participate in the appointments process, at the expense of the Senate.

The most complicated dynamics occur at the interbranch level. In general, the more the president's preferences diverge from those of Congress, the more attractive the incentive-based strategy will be to legislators, while an appointments-based strategy will become increasingly attractive to legislators as congressional and presidential preferences converge. So there are at least two different ways to think about the interbranch setting, depending on whether the President's preferences are close to or distant from those of the legislative coalition.

If the President and legislators have convergent preferences and are perfectly informed about the preferences of appointees, the appointments strategy will prove attractive to all. Agents with the right preferences need little or no monitoring; once safely in place, they can be trusted to run on autopilot.⁶ To be sure, there is always some uncertainty about agents' true preferences – this is the David Souter problem – but statutory qualifications can help dampen this uncertainty. Statutory requirements of party membership, professional qualification, or geographic origin may reduce the uncertainty about officials' future behavior, for those traits will be partially correlated with officials' views in ways that are predictable *ex ante*.

The harder case occurs when preferences diverge across branches. Then the risk is that Presidents will use appointments, or removals, to undo an earlier bargain between the President and an enacting coalition. Here enacting coalitions in Congress who would bargain with the President face a problem of intertemporal commitment. Congress and the President must jointly decide how much authority or money to give to an agency, but legislators fear that the President will subsequently use appointments or removals to move the agency towards his ideal point, or preferred policy, and away from Congress'. Both Congress and the President would be better off if the President could precommit to choosing moderate agency officials, thereby inducing Congress to provide the agency with more power or a larger budget.

This is what McCarty calls the “appointments dilemma,”⁷ and it can be solved by legal rules and innovations that restrict the President's discretion over appointments and removals. Beyond the requirement of senate confirmation, statutory requirements of cause for removal and statutory requirements of partisan balance in appointments both place a drag on the President's ability to move the agency's ideal point closer to his own. This is so even if, as is usually the case, the statute allows the President to have a one-member majority on a given commission. There is always a residual risk that control of

⁶ As emphasized in Calvert, McCubbins & Weingast, *supra*, 33 AJPS at 595.

⁷ McCarty, *supra*, at 9. McCarty does not distinguish between the interests of the current occupant of a federal office and the interests of future occupants of the same office. I will bracket that question for purposes of the discussion here, although it is an important one. Note, however, that even if the interest of current officeholders is not perfectly aligned with the interests of future officeholders, as a comparative matter it is probably true nonetheless that the current officeholder will better protect her successors' interests than would any other institution (the judiciary, for example) that might be licensed to intervene to prohibit bargains among current officeholders.

the agency will flip if even one partisan member defects to the other side, as recently happened on the Federal Communications Commission, and this risk affords a check on ex post presidential opportunism.

The significance of all this for law is that it sheds light on the question of optimal constitutional design. Presumptively, the appointment and removal powers should be distributed across branches in ways that allow presidential precommitments against ex post opportunism through appointments and removals, and that also permit the branches to cooperate on ex ante restrictions that dampen uncertainty about the preferences of agency appointees.⁸ To be sure, it is a separate question whether our constitution, written as it currently is, should be interpreted to permit these things. Our theory of interpretation will not necessarily track our theory of optimal constitutional design, because there may be political value in adhering to previously-established rules even if they are suboptimal, and because we may not trust the judges to think directly about optimal design in the first place. But an account of optimal design nonetheless supplies a valuable regulative ideal, even if our nonideal theory of interpretation constrains our ability to implement that design.

⁸ I assume here that joint maximization of legislative and executive preferences is good, absent some concern with third-party rights – a concern that seems irrelevant here. I will not attempt to defend the assumption, other than to suggest that any sensible critique of it must in my view appeal either to third-party effects or to the distinction between constitutional design and constitutional interpretation – both of which I mean to bracket for current purposes.