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Article

***2245** PRESIDENTIAL ADMINISTRATION

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A. Congressional Control

The rationale for strong congressional supervision of administrative action is straightforward. Congress is a democratically elected and accountable decisionmaking body, charged by the Constitution to make law for the nation. Congress, of course, must delegate certain tasks relating to the implementation of these laws to the administration. But administrative officials may exercise coercive powers only as authorized by and in conformity with legislative directives. In establishing mechanisms to secure agencies' compliance with legislative will, Congress does no more than assert its unquestioned constitutional primacy over the lawmaking function.

To the extent that Congress delegates specifically and clearly to administrative agencies, it performs this control function effectively. The agencies, as noted above, then function as little more than transmission belts for implementing legislative directives. The first generation of the nation's regulatory statutes--including preeminently the Interstate Commerce Act--largely followed this model (especially as these statutes were construed by the courts), containing detailed and limited grants of authority to administrative bodies. [\[FN18\]](#)

Congress, however, proved over time either unable or unwilling to legislate consistently in this manner. From the beginning of the twentieth century onward, many statutes authorizing agency action included open-ended grants of power, leaving to the relevant agency's discretion major questions of public policy. [\[FN19\]](#) The reasons for these broad delegations varied. Sometimes Congress legislated in this way because it recognized limits to its own knowledge or capacity to respond to changing circumstances; sometimes because it could not reach agreement on specifics, given limited time and diverse interests; and ***2256** sometimes because it wished to pass on to another body politically difficult decisions. But whatever the reasons--good, bad, or indifferent--sweeping delegations, of a kind utterly inconsistent with the classical "transmission belt" theory of administrative action, became many decades ago a simple, even if not

an inevitable, fact of regulatory legislation. [\[FN20\]](#)

For many years, political scientists and other observers of government agreed that once Congress made these delegations, it could not, or at the least did not, exercise any effective control over administrative policymaking. [\[FN21\]](#) Adherents to this view pointed to the rarity of any visible use by Congress of its remaining levers of control--its ability to revise statutory mandates, reverse administrative decisions, cut agency budgets, block presidential nominees, or even conduct serious oversight hearings. These scholars noted as well the widespread lack of knowledge and interest among members of Congress, evident in repeated surveys and actual cases, regarding obviously important administrative decisions.

***2257** Even when Congress adopted mechanisms to facilitate administrative control, it declined, in apparent accordance with this conventional view of legislative-agency relations, to make any real use of them. Prior to the Supreme Court's invalidation of the technique in *INS v. Chadha*, [\[FN22\]](#) Congress placed "legislative veto" provisions in nearly 300 statutes, allowing one or both houses or their relevant committees to overturn, without the President's approval, an agency's exercise of delegated authority. [\[FN23\]](#) Congress, however, invoked this power on only 230 occasions (an average of less than one use per statutory provision), of which 111 concerned suspensions of deportation for illegal aliens. [\[FN24\]](#) In partial compensation for the loss of the legislative veto, Congress passed in 1996 the Congressional Review Act (CRA), [\[FN25\]](#) which requires agencies to submit certain regulations to Congress sixty days prior to their effective date and prescribes expedited procedures for their disapproval (subject to presidential signature). Yet Congress has passed only a single resolution of disapproval under this statute in its five years of operation. [\[FN26\]](#)

A recent body of political science literature, however, argues, contrary to the conventional view, that Congress does effectively influence agency decisionmaking--even that the current system is one of "congressional dominance." [\[FN27\]](#) Two different arguments, in some tension with each other, have emerged to support this claim. One noted study by Joel Aberbach shows a large increase in formal methods of legislative oversight, such as committee hearings and investigations, in the 1970s and 1980s. [\[FN28\]](#) Although current statistics are hard to find, many observers believe such oversight has accelerated still further since that time. [\[FN29\]](#) By contrast, a mass of public choice scholarship assumes that Congress rarely takes overt measures to monitor or sanction agencies, but avers that this behavior is fully consistent with real control over ***2258** administration. [\[FN30\]](#) This work notes that perfect control of an institution is likely to be invisible: if the agencies always did what Congress wanted, Congress would have no need to hold oversight hearings, express disapproval, or impose sanctions. Several of these political scientists further claim, based principally on studies of the Federal Trade Commission, that the available empirical evidence supports the hypothesis of covert but effective legislative control of administrative policymaking. [\[FN31\]](#)

A primary mechanism of control, on either theory of congressional power, is a "fire alarm" system, backed by powerful legislative sanctions. [\[FN32\]](#) The fire alarm system is a set of procedures and practices that enable citizens and interest groups to monitor an agency and report any perceived errors to the relevant congressional committees. Such a system allows Congress to pass on many of the costs of monitoring administrative action to non-governmental entities. The legislative sanctions backing up the sys-

tem include new legislation, budget cuts, and embarrassing oversight hearings. If a fire alarm goes off, the committee can threaten and, if necessary, use one of these sanctions to bring the agency into submission. Through this mechanism, declares one political scientist, “the Congress controls the bureaucracy, and the Congress gives us the kind of bureaucracy it wants.” [\[FN33\]](#)

This claim of congressional dominance, however, likely errs as much in one direction as the conventional view of legislative impotence erred in the other. [\[FN34\]](#) The new scholarship indeed suggests that Congress possesses sufficient weapons, and sufficient will to use them, to make agencies sensitive to its preferences. The work of legal scholars on the legislative veto supports this view, finding that although Congress rarely used the veto, agencies negotiated and compromised *2259 with congressional committees in the shadow of that sanction. [\[FN35\]](#) But the evidence of dominance is doubtful at best. The empirical work of the public choice theorists, purporting to show that agencies routinely comply with legislative agendas, has come under sharp fire. [\[FN36\]](#) And although Aberbach showed increased use of hearings and other public oversight tools, he did not try to assess the real significance of this development. Indeed, if the public choice theorists are correct, an increase in formal oversight may suggest the decline rather than the rise of congressional power. Most important, all the claims of legislative control inadequately acknowledge the limits on Congress's ability to impose harsh sanctions. [\[FN37\]](#) Statutory (including most budgetary) punishments require the action of the full Congress--action which is costly and difficult to accomplish. And since the demise of the legislative veto, even majority support is not enough: to impose its most effective sanctions, Congress must gain the approval of either the President or two-thirds of both houses. [\[FN38\]](#) For these reasons, although agencies do not and cannot ignore Congress, they often can get their way regardless.

Further, to the extent that Congress influences agency behavior, two related features of the way it does so give cause for concern about this result. The first relates to the identity--more particularly, the factional characteristics--of the parties most engaged in Congress's oversight system. As the congressional dominance theorists point out, the fire alarms triggering congressional review of agency action go off in the committee and subcommittee rooms of Congress, not on the floor of the House or Senate. [\[FN39\]](#) Each of these committees disproportionately*2260 includes legislators whose constituents have a special interest in its jurisdiction: so, for example, agriculture committees attract representatives of farming districts, banking committees representatives of urban districts, and public lands committees representatives from western states. [\[FN40\]](#) And these legislators tend to develop strong ties to the set of organized interests that sound the fire alarms in the first instance. Even if the proliferation of both interest groups and committees has lessened the force of classic “iron triangle” relationships, [\[FN41\]](#) the administrative policy set by this confluence of players rarely will mirror the preferences of Congress as a whole or the general public.

The second notable aspect of congressional control, as described by this theory, lies in its reactive nature. Recall that the theory posits that congressional committees focus on administration primarily in response to complaints by outside parties. These complaints likely will arise more often when an agency changes than when it maintains existing policy. The resulting congressional oversight thus will tend to have a conservative (in the sense of status quo-preserving) quality. Moreover, these complaints often will present themselves as discrete problems even when they are aspects of broader regulatory issues. The

complaint-driven nature of congressional oversight, especially in combination with its reliance on committees, thus pushes toward the ad hoc rather than the systematic consideration of administrative policy.

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[\[FN18\]](#). See Interstate Commerce Act, 24 Stat. 379 (1887), repealed by Act of Oct. 17, 1978, [Pub. L. No. 95-473, § 4\(b\), 92 Stat. 1337](#), 1466-67; [ICC v. Cincinnati, New Orleans & Tex. Pac. Ry., 167 U.S. 479, 505-06 \(1897\)](#).

[\[FN19\]](#). A recent empirical study found that broad delegations are more common in some substantive areas than in others--for example, they are more common in education, environmental, and public health policy than in tax and fiscal policy. See David Epstein & Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers* 198-99 (1999). This Article concerns primarily the policy areas in which Epstein and O'Halloran found that broad delegations most often occur. Epstein and O'Halloran's study also showed a trend toward decreased delegation of discretionary authority in all areas. See *id.* at 115-17. But even given this trend, agencies continue to hold and exercise, under already enacted statutes, large amounts of discretion.

[\[FN20\]](#). The ubiquity of broad delegations forms the cornerstone of the claim that the administrative state, as presently constituted, violates the Constitution. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231, 1237-41 (1994). The question whether to revive the now practically defunct nondelegation doctrine, in response to this perceived constitutional crisis, lies beyond the scope of this Article, except as it relates, in the ways discussed in section V.A, pp. 2364-72, below, to the extent of presidential involvement in administrative action. My assumption here is that the Supreme Court will continue to permit exercises of agency discretion under broad delegations, as indicated in the Court's most recent statements on the issue. See, e.g., [Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903, 913 \(2001\)](#) (“[E]ven in sweeping regulatory schemes we have never demanded ...that statutes provide a ‘determinate criterion’ for saying ‘how much [of the regulated harm] is too much.’*cdq*); [Mistretta v. United States, 488 U.S. 361, 372 \(1989\)](#) (“[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, ...Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

[\[FN21\]](#). See, e.g., Lawrence C. Dodd & Richard L. Schott, *Congress and the Administrative State* 2 (1979) (“Although born of congressional intent, [the administrative state] has taken on a life of its own and has matured to a point where its muscle and brawn can be turned against its creator.”); James Q. Wilson,

The Politics of Regulation, in *The Politics of Regulation* 357, 391 (James Q. Wilson ed., 1980) (“Whoever first wished to see regulation carried on by quasi-independent agencies and commissions has had his boldest dreams come true. The organizations studied for this book operate with substantial autonomy, at least with respect to congressional ...direction.”). Administrative law scholars, to the limited extent they have addressed this question, generally have echoed the findings of these political scientists. See, e.g., Jerry L. Mashaw, Richard A. Merrill & Peter M. Shane, *Administrative Law: The American Public Law System* 160 (4th ed. 1998) (noting “doubt whether existing connections between Congress and administrative bodies are effective means for accomplishing any of several plausible objectives, including assuring fidelity to congressional intent, preserving the political responsiveness of administration, or dispassionately assessing the strengths and weaknesses of regulatory programs”); Stewart, *supra* note 13, at 1696 n.128 (questioning whether “Congress can responsibly accomplish through other means what it cannot achieve through legislation”).

[FN22]. [462 U.S. 919 \(1983\)](#).

[FN23]. [Id. at 944](#).

[FN24]. See Richard B. Smith & Guy M. Struve, *Aftershocks of the Fall of the Legislative Veto*, 69 *A.B.A. J.* 1258, 1258 (1983); see also Richard J. Pierce, Jr., [The Role of Constitutional and Political Theory in Administrative Law](#), 64 *Tex. L. Rev.* 469, 483 (1985) (“[T]he putatively systematic congressional review that the legislative veto power implies was chimerical; any such review inevitably was sporadic and haphazard.”).

[FN25]. [Pub. L. No. 104-121](#), tit. II, subtit. E, 110 Stat. 847, 868-74 (1996) (codified at [5 U.S.C. §§ 801-808 \(Supp. II 1996\)](#)).

[FN26]. See *Ergonomics Rule Disapproval*, [Pub. L. No. 107-5](#), 115 Stat. 7 (2001) (disapproving Ergonomics Program, 65 *Fed. Reg.* 68,261 (Nov. 14, 2000)); Morton Rosenberg, [Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform](#), 51 *Admin. L. Rev.* 1051, 1052 (1999) (noting prior history of the CRA).

[FN27]. Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 *J. Pol. Econ.* 765, 767 (1983).

[FN28]. See Joel D. Aberbach, *Keeping A Watchful Eye* 14, 34-37 (1990).

[FN29]. See, e.g., Alexis Simendinger, *The Paper Wars*, 30 *Nat'l J.* 1732, 1735-36 (1998).

[FN30]. See Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 *J.L. Econ. & Org.* 243, 274 (1987); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 *Am. J. Pol. Sci.* 165, 176 (1984); Weingast & Moran, *supra* note 27, at 768-69, 792-93.

[FN31]. See Weingast & Moran, *supra* note 27, at 791-92.

[FN32]. The public choice theorists claim that the fire alarm system “predominate[s]” in congressional oversight of administrative action. McCubbins & Schwartz, *supra* note 30, at 171; see McCubbins, Noll & Weingast, *supra* note 30, at 250. Joel Aberbach claims that Congress also increasingly engages in more direct oversight of administrative action, often called “police patrol” oversight, but agrees that the fire alarm mechanism is “important.” See Aberbach, *supra* note 28, at 101.

[FN33]. Morris P. Fiorina, *Congressional Control of the Bureaucracy: A Mismatch of Incentives and Capabilities*, in *Congress Reconsidered* 332, 333 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2d ed. 1981); See *id.* at 339-40 (arguing that in response to constituency pressure, members of Congress use the threat of sanctions to control agency decisions).

[FN34]. For a similar conclusion, see Epstein & O'Halloran, *supra* note 19, at 29. As Epstein and O'Halloran note, Congress's stepped-up efforts to limit statutory delegations betray a lack of confidence in its ability to control the recipients of delegated authority in the way the congressional dominance theorists posit. See *id.* at 74.

[FN35]. Harold H. Bruff & Ernest Gellhorn, [Congressional Control of Administrative Regulation: A Study of Legislative Vetoes](#), 90 *Harv. L. Rev.* 1369, 1410-12 (1977).

[FN36]. See James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* 254-56 (1989); Terry M. Moe, *An Assessment of the Positive Theory of ‘Congressional Dominance’*, 12 *Legis. Stud. Q.* 475, 513 (1987).

[FN37]. See Moe, *supra* note 36, at 486-90 (noting the significant difficulties involved in using legislative powers to influence agency action).

[FN38]. Congress may hold its strongest hand in the appropriations process, if for no other reason than that passage of a budget is an annual requirement. But as Terry Moe notes, “It is easy to exaggerate the power of the purse.” *Id.* at 488. Exercising this power requires the authorizing and appropriations committees of both houses to discover and agree on an effective budgetary sanction. Furthermore, as a Republican Congress often found during the Clinton Presidency, the President's veto power may be capable of forcing the deletion of riders and the return of monies. See David Baumann, *The Art of the Deal*, 39 *Nat'l J.* 2700, 2701 (1999) (noting that “[t]he conventional wisdom around town is that Clinton always wins these budgetary showdowns” and stating that he “has extraordinary leverage during ...end-of-year negotiations”); David E. Rosenbaum, *Bush Rules! It's Good To Be the President*, *N.Y. Times*, Jan. 28, 2001, § 4, at 16 (noting findings by the National Resources Defense Council that Clinton had succeeded in blocking more than seventy appropriations riders that aimed to relax regulatory requirements).

[FN39]. See, e.g., Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal-Agent Perspective (with Applications to the SEC)*, 44 *Pub. Choice* 147, 150 (1984) (“For any particular agency ...it is not the Congress as a whole that is relevant ...but rather the committee(s) with jurisdiction”); see also

Bruff & Gellhorn, *supra* note 35, at 1410 (finding that all of the bargaining done in the shadow of the legislative veto occurred in committees and subcommittees).

[FN40]. See Kenneth A. Shepsle, *The Giant Jigsaw Puzzle: Democratic Committee Assignments in the Modern House* 231-34 (1978); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 *J. Pol. Econ.* 132, 145-46, 150-52 (1988). But see Keith Krehbiel, *Are Congressional Committees Composed of Preference Outliers?*, 84 *Am. Pol. Sci. Rev.* 149, 149, 158-59 (1990) (challenging the “dominant view” of committee membership).

[FN41]. Douglass Cater, *Power in Washington* 17-48 (1964), and J. Leiper Freeman, *The Political Process* 22-31, 66-129 (rev. ed. 1965), discuss “iron triangles” (or “subgovernments”), which bind an agency tightly to a single congressional committee and organized interest. More recent scholarship expresses skepticism about the strength and stability of these relationships. See, e.g., Jeffrey M. Berry, *Subgovernments, Issue Networks, and Political Conflict*, in *Remaking American Politics* 239, 239-40 (Richard A. Harris & Sidney M. Milkis eds., 1989); Hugh Hecllo, *Issue Networks and the Executive Establishment*, in *The New American Political System* 87, 102-05 (Anthony King ed., 1978).