

How Agencies Rule Their Turf

OR, THE REAL LIMITS ON AGENCY POWER

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WE HAVE HAD administrative agencies on the legal scene for a long time. Some, like the Interstate Commerce Commission, were perceived to have outlived their usefulness and were put to rest by Congress. (Much of the original jurisdiction of the ICC continues to exist under new and different agency auspices, however.) Some, like the Postal Rate Commission, are autonomous. Others, like the U.S. Advisory Commission on Public Diplomacy, are virtually anonymous. But all of them have several overseers that they must answer to. In the end their power, while hard to overestimate, is cabined not only by the other branches but more generally by the realities of the political process.

The first limit on the agencies, of course, is the chief executive who appoints their officials. There has been a lot of law review literature (and some landmark cases) about whether an

administrative agency can be truly independent of the executive branch and still pass muster under the Constitution. The late and not-at-all lamented Independent Counsel statute probably carried the concept to the max. Justice Scalia was quite prescient when he dissented from the decision upholding the Independent Counsel statute. He wrote, “[t]he mini-Executive that is the independent counsel, ... operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide. ... How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.”¹

Whether the Court will ever revisit the *Morrison* case, there aren’t many examples of

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1 *Morrison v. Olson*, 487 U.S. 654, 732 (1988) (Scalia, dissenting).

that degree of agency separation from the stewardship of some branch of government. One fascinating variation is the General Accounting Office, headed by the Comptroller General. The Comptroller General is appointed by the President for a ten year, non-renewable term. From there on in, however, the GAO has no relationship with the President or the executive branch. But it is completely under the control of the Congress, which has much to do with setting the GAO agenda and all to do with providing the agency's funding.

The political fact of life is that, these odd instances aside, the President has so much influence over the administrative agencies because he is the appointer of all of the agencies' officials. Congress sometimes imposes qualifications in the statute creating an agency (usually political: so many Democrats and so many Republicans), and sometimes the confirmation requirement allows the Senate to play a role in the selection process. But even so the President greatly influences the conduct of the agencies by who he appoints.

A striking example of this presidential influence over agency policy occurred in the automobile safety field during the Carter and Reagan administrations. The National Highway Traffic Safety Administration (NHTSA) was chock full of new ideas during the Carter administration. Everything from speed limits to air bags was on the front burner, and cooking fast. Ronald Reagan was elected partly with the mandate of "getting government off our backs." Simply by putting in new people at NHTSA, President Reagan was able to reverse the Carter agenda and undo much of the regulatory scheme imposed by the agency during his term. While the courts slowed down the pace of reversal to some degree (I claim credit for some of the slowing, see *State Farm Insurance Co. v. Department of Transportation*²), there is no question that the

actions of NHTSA were dramatically different in the 1980's than in the 1970's.

I watched the appointment process close-up when I was at the White House. Given the number of agencies and the myriad of activities, the President was not as personally involved with the selection of agency officials as he was with judicial appointments. But I was impressed with how closely the appointments made nonetheless ended up reflecting his view of what the agencies should be doing. That result occurred for a number of reasons. Part of it was self-selection: A would-be appointee would more likely pursue the office if the President were known to be sympathetic to that person's agenda. In other words, A Robert Pitofsky would more likely seek appointment from a President Clinton than would a Robert Bork – not just because of political preferences, but because of the goals to be pursued. Part of it was the influence of the interest groups: Appointees to the important agencies have many promoters (and detractors) among the lobbyists and other people with access to the appointment process. Sometimes it was the President himself who had specific people and agendas in mind: Jeff Gearan was appointed to head the Peace Corps because the President knew him and his enthusiasm for the agency, and wanted the agency run by someone with that enthusiasm.

I also saw the occasional instance where the confirmation requirement clearly limited the President, and sometimes the point-counterpoint pressures resulted in the positions staying vacant for unconscionable periods. For a period of time the National Labor Relations Board had trouble providing a workable majority on any important issue because the President and the majority in the Senate (read the unions and the business community) could not agree on the

² 680 F.2d 206 (D.C. Cir. 1982).

filling of two vacancies that occurred on the Board at the same time.

An equally potent source of oversight of the agencies is the Congress. Part of that oversight takes place during hearings conducted by the various congressional committees that authorize the agency's existence in the first place and authorize money for the continued existence of the agency. Sometimes those oversight hearings occur yearly; sometimes less often. But since the committees are the specialists in Congress for the particular agency involved, the oversight is usually intense. The Legal Services Corporation, for example, routinely gets a thorough (and somewhat hostile) review of the manner in which it provides grants to the various local and state groups that actually provide legal services to those unable to afford the private bar. Because it is the Judiciary Committee of the House and Senate doing the oversight the review is sharp and informed, and substantive restrictions have often been placed on the way the LSC performs its functions. The agency can no longer fund class actions, for example, nor fund actions against local authorities. None of its funds can be used to represent immigrants contesting any application of the immigration laws, nor, of course, can they be used in any legal activity dealing with abortions.

Even more important to the manner by which Congress indirectly limits the way the agencies conduct themselves is the oversight that goes on in the appropriation process itself. The agencies have to obtain funding on a yearly basis, and the appropriations committees of the House and Senate replicate the process that occurs in the authorization process. Even if the authorizing committee envisioned broader and more expensive programs for an agency, the appropriations committees can and do curtail those visions by providing

less funds – or additional direct restrictions on the jurisdiction and operation of the agency. The purse strings remain the most effective control over the performance of any federal agency, whether it be the Pentagon or the Federal Maritime Commission. Any administrator that fails to recognize the power of the appropriators soon gets a short course in the ways of Congress.

Last but not least, the federal courts have as much to do with how the federal agencies administer their turf as do either of the other branches. Chief Justice Marshall never envisioned the real impact that *Marbury v. Madison* would have on the way the courts interacted with the executive branch. He was concerned about cabining the power of the President and Congress to ignore the Constitution (or place their own interpretation on it) in carrying out their functions. The advent of the administrative state was well over a century away, and he could not have imagined federal judges reviewing the operations of the Social Security Administration, or the granting of broadcast licenses by the Federal Communications Commission. While cases like *Chevron* have attempted to limit the intensity of judicial review of agency decisions, their effect has not been as far-reaching as the language of *Chevron* would indicate. Reviewing courts may no longer use the “hard look” language that they did before *Chevron*, but there is still a lot of room for federal judges to perform the same intensive oversight as before.

Depending on what the Supreme Court does with the D.C. Circuit's decision in *American Trucking Associations v. EPA*,³ in which it recently granted *certiorari*, the federal courts could soon play an even greater role in overseeing decisions than pre-*Chevron*. If the Court upholds the lower court's decision reinvigorating the non-delegation doctrine, the

³ 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, (May 22, 2000) (No. 99-1257), and *cert. granted*, (May 30, 2000) (No. 99-1426).

courts will have a field day picking over what the agencies do. And if the Court accepts the notion that agencies must apply a cost-benefit analysis to regulatory decisions – a position that even the very activist panel of the D.C. Circuit rejected, but as to which the Court specifically granted *cert.* – the agencies might as well set up full-time offices in the Court of Appeals' courthouses.

Critics of the administrative state often complain that the agencies are allowed to run wild. As often as not those critics are really complaining about the policy decision that Congress made to provide for regulation of

the particular activity in the first place. Sometimes a complaint is bottomed on the decision that the people made in their selection of a President. Harry Truman's Vice-President, Alban Barkley, once defined a bureaucrat as "A Democrat who has a job that some Republican wants." While that dismissal of the complaints about bureaucracy may be too pat, it has a kernel of truth. Dealing with federal agencies may not be as much fun as a day at the beach, but an agency that does indeed forget the limits on its powers will get a sharp refresher course on how many and varied are its fences. *gm*