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052166960X - Delegating Powers: A Transaction Cost Politics Approach to Policy Making
under Separate Powers

David Epstein and Sharyn O'Halloran

Excerpt

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Paths of Policy Making

No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.

James Madison, *Federalist 44*

THE POLITICS OF MILITARY BASE CLOSINGS

In 1988 the U.S. Congress established a blue-ribbon Base Realignment and Closure (BRAC) Commission. Its powers were broad: to recommend a list of military establishments to be closed, which would become law unless Congress voted to override the commission's decision. Its impact was immense, with foreseen economic consequences, calculated in terms of lost jobs and economic growth, that could devastate the local communities surrounding targeted military bases. Why would Congress delegate authority over a policy area so obviously vital to constituents? And why did delegation take the shape of an independent commission?

Let us examine the problem from legislators' point of view. They have three choices: (1) ignore the issue entirely and close no bases; (2) pass a law listing which bases will be closed; or (3) delegate this decision to the executive. Congress had taken the first option after a round of base closings following the Vietnam War, nearly five hundred in all, had left members unhappy both over the loss of jobs in their districts and with the perception that the cuts were politically motivated, coming largely at the expense of Democrats. In retaliation, Congress in 1976 imposed the requirement that any base closings be preceded by a full environmental impact statement (EIS), which promptly put an end to further military closings for the next dozen years.

A typical case was the Loring Air Force Base in Maine. Once a vital outpost for B-52 bombers that could reach Russia from the mainland,

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Loring's strategic importance declined with the increasing range of modern aircraft and the advent of nuclear submarines. Accordingly, the Defense Department planned to reduce Loring from a Strategic Air Command base to a military airfield with a minimal crew. However, the process of obtaining the necessary environmental clearances gave opponents time to marshal their forces, bringing "enormous political pressure to bear on the Congress and the Department," according to Frank Carlucci, secretary of defense under Reagan. A "Save Loring Committee" was formed, after which the Senate passed a bill prohibiting the downgrading of the base. Before the House had a chance to act, the Defense Department abandoned its plan to scale down the base altogether.

In the late 1980s, however, the political climate began to change. The combination of lessening cold war tensions and a budget crunch made base closings, with an estimated savings of between \$2 and \$5 billion a year, politically attractive. Then Rep. Dick Arme (R-Tex.) offered a floor amendment to the 1988 Defense Authorization bill to make base closing easier, which surprised observers by coming within seven votes of passage. It was now clear that the idea of closing at least some bases had considerable support among rank-and-file members.

If base closings were to happen, though, some institutional mechanism had to be devised to select which bases would be targeted. Choosing a list of bases by enacting a law through the normal legislative process seemed both technically and politically unattractive. To preserve the benefits of unified decision making and action, the details of defense policy have usually been left to the executive branch, which has subsequently acquired a considerable degree of expertise in these matters. Given the complexity of the task and the possible consequences of ill-considered policy – namely, a reduction in the nation's capacity for self-defense – legislators had an understandable desire to delegate the task to experts.

It is also true that legislators feel much more comfortable passing bills that distribute benefits widely rather than bills that take benefits away from a few districts. Thus, highway bills are legislative perennials, but bills proposing selective cuts are seldom introduced. Even when some cuts are necessary, members fear that the legislative process will give extra weight to those in key positions, such as party and committee leaders, rather than distribute burdens fairly. As a result, legislation singling out one or a few districts is rarely passed.

Consider, for example, the fate of the Staten Island Home Port. In 1990, with the navy shrinking, the House Armed Services Committee proposed closing down the Staten Island naval base. The port had long been considered superfluous, and Defense Secretary Dick Cheney had recently ordered a freeze on any further construction there, pending a

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report from the navy defining its priorities. The committee also knew that many liberal Democrats from surrounding New York districts opposed the base. However, then-freshman representative Susan Molinari (R-NY) staged a counterattack, claiming that she had been unfairly singled out and lining up support among Republicans and other representatives with bases in jeopardy, warning, "Your military installation could be next." In the end, Molinari was able to pass a substitute amendment that gutted the proposal and saved the base from closure.

In the face of these difficulties, delegation became an attractive alternative, much as Congress has delegated authority to the executive to overcome its logrolling tendencies in the area of trade policy. This option had its drawbacks as well, however, as delegation to executive officials with political appointments might lead to politically targeted reductions, which majority Democrats, recalling the events of the early 1970s, wanted to avoid at all costs.¹ Hence, both traditional legislative action and wholesale delegation to the Department of Defense (DoD) were seen as unappealing. This left Congress with the possibility of delegating to an independent commission whose suggestions would receive minimal political interference from either the legislative or executive branches. Policy made this way would be unpredictable, but at least the process would be fair *ex ante*, allowing legislators to escape their own logrolling dilemma without surrendering control to executive agencies with contrary partisan aims.

The final delegation regime balanced these concerns. First, a twelve-member commission was to be chosen by the secretary of defense in consultation with Congress. In fact, Congress was so eager to make the BRAC Commission independent that the enacting legislation included the unusual stipulation that no more than half of the commission's staff could have been previously employed by the Defense Department. The commission was to recommend a set of military bases to be closed or downsized, provided that the expected savings from the closure would exceed the associated costs in six years or less.² These recommendations were not subject to the requirement of an environmental impact statement, and although actual base closings would have to be accompanied

¹These fears were not necessarily ill founded. Two years later, Dick Cheney, President Bush's secretary of defense, proposed a list of potential base closings in which over 99% of the lost jobs would come from Democratic House districts. He accompanied this list with the suggestion that Democrats clamoring for defense cuts should start by sacrificing obsolete bases in their hometowns.

²This provision was added to the bill at the behest of Rep. Herbert Bateman (R-VA), whose Fort Monroe base was at risk. However, the base was laden with so many years of refuse – it still contained unexploded Confederate artillery shells – that the cleanup costs would have outstripped savings for at least twenty-five years. The plan worked; Fort Monroe was spared in the final list.

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by an EIS, legal challenges to these statements had to be filed within sixty days.

The commission's list would have to be accepted or rejected by the secretary of defense in its entirety, without the possibility of amendment, within fifteen days. If the secretary accepted it, the list would then go to Congress, which had forty-five working days to pass a joint resolution of disapproval. This resolution had to be enacted by both houses, with the possibility of a presidential veto, and again they could not amend the list of bases. Thus, both the executive and legislative branches were faced with a closed rule; that is, an up-or-down decision. If no disapproval resolution was passed, then the list of closings would automatically go into effect.

Events proved the efficacy of this procedure: The commission recommended that eighty-six bases be closed and a further fifty-four be realigned, and a disapproval motion was overwhelmingly defeated in the House. In fact, Congress used a nearly identical procedure for subsequent base closings in 1991, 1993, and 1995, resulting in overall estimated savings of \$5.6 billion a year.

In the end, then, most of the crucial policy decisions regarding base closings were made by an independent commission, with relatively little room for political interference. It is possible, indeed likely, that in this case the decision-making structure coincided quite closely with one whose sole objective would be the making of good public policy. However, the commission structure was not chosen primarily for its policy benefits; otherwise, Congress could have established such a commission anytime in the previous twelve years. Neither would it have included the provision that all closings pay for themselves within six years, thus exempting those bases that were in the worst shape.

Rather, the commission structure was adopted because it best served legislators' need to close some bases without handing over too much power to the Defense Department. Congress examined its expected costs and benefits under alternative policy-making structures and selected the one that provided the most possible expected net political benefits, allocating decision-making authority across the branches and constraining it in such a way as to reap the benefits of delegation while minimizing the associated political costs. It is this type of choice over alternative policy-making procedures, and their impact on policy outcomes, that this book will explore.

DELEGATING POWERS: THE PUZZLE

The United States Constitution divides the responsibilities of policy making among the various branches of government: Congress writes the

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laws, the executive branch implements them, and the courts interpret them. While the Constitution provides a general framework for government, though, many of the details concerning the interaction among the branches and the daily functioning of the state were left unresolved. In many ways, the history of American political development from 1789 to the present can be viewed as an attempt to arrive at a manageable arrangement that allows government to be effective yet responsive.

We see this inherent tension between effectiveness and responsiveness most clearly in the dramatic changes in the structure of government and the powers and functions of the bureaucracy that have arisen since the New Deal. What divides the modern administrative state from its predecessors is the delegation of broad decision-making authority to a professional civil service. But this delegation of authority from Congress to the executive has never been monolithic; it has varied over time, by issue area, and with national political and economic trends.

Consider Figure 1.1, for example, which examines a set of 257 important laws enacted in the postwar era.³ The vertical axis represents the number of provisions in a given law that delegate policy-making authority to the executive, as a proportion of the total number of provisions in that law. The horizontal axis identifies the committee in the House of Representatives that considered and reported the bill that eventually became law.

What is most striking about the figure is the considerable amount of variation across the different issue areas. Predictably, Congress delegates least authority in bills reported out of Ways and Means, Budget, Rules, and the House Administration Committees. But perhaps counter to intuition, bills reported from the Agricultural and Public Works Committees, usually considered “pork-barrel” policy areas that legislators jealously guard, do in fact delegate significant authority to the executive. Finally, the Armed Services Committee delegates the most.

Or take a few specific examples. In many cases, we observe Congress delegating broad mandates to executive agencies. The 1934 Reciprocal Trade Agreements Act, for instance, gave the president authority to reduce tariffs unilaterally by up to 50 percent, and the 1970 Clean Air Act required that industries use the “best available control technology” to reduce emissions but left the definition of the crucial term “best” to the EPA’s discretion. These decisions on the structure of policy making have cleared the way for a sharp reduction in trade barriers in the former case and tough environmental standards in the latter.

³These comprise the enactments included in Mayhew’s (1991) analysis of important postwar legislation, updated through the 102d Congress. Chapter 5 describes these data in detail.

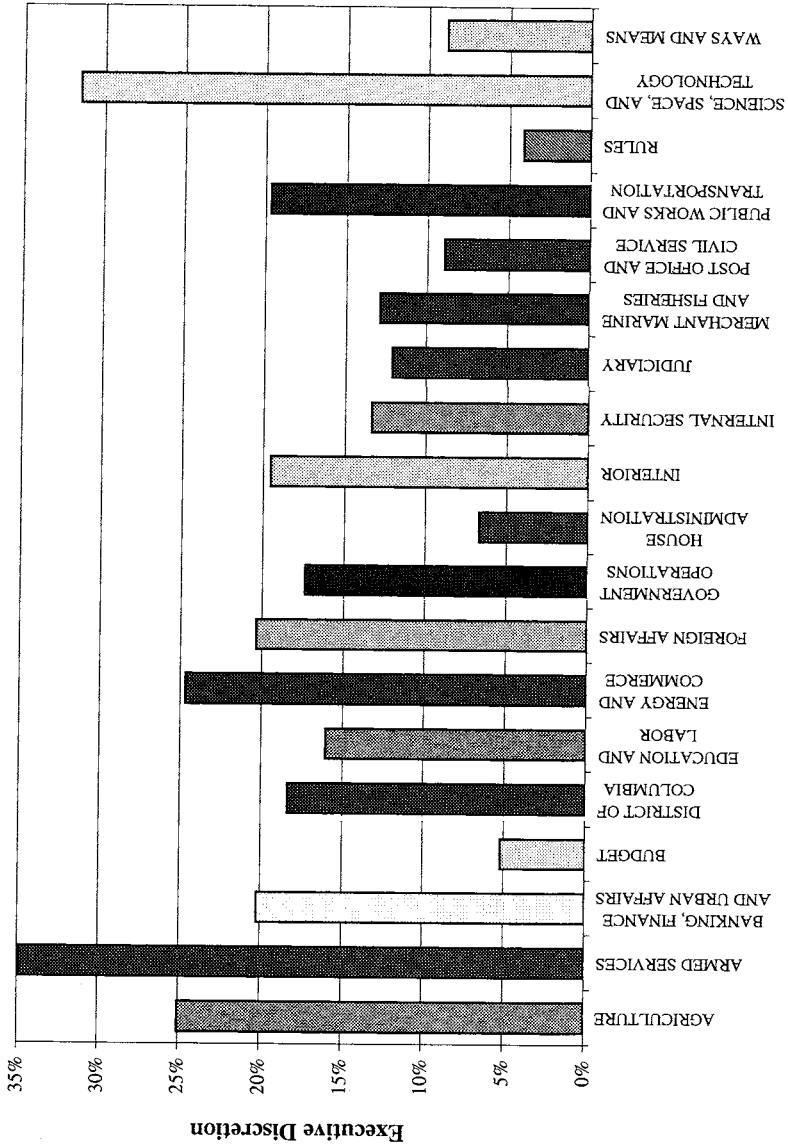


Figure 1.1. Average Discretion by Reporting Committee

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In other cases, Congress enacts painfully detailed legislation, leaving administrative agencies with little or no leeway. For example, in 1973 Social Security benefits were increased by exactly 11 percent; in 1974 Congress increased the minimum wage to \$2.30 in three staged hikes; and in the Tax Reform Act of 1986 Congress specified that the existing fourteen tax brackets would be collapsed to two and mandated a sharp reduction in overall rates. In each of these instances, the executive branch was limited to carrying out Congress's explicitly stated wishes without having much independent impact on the content of these policies.

It is clear from these examples that where policy is made – in Congress or through delegation to the executive – has a significant impact on policy outcomes. The central puzzle to be explained, then, is why does Congress delegate broad authority to the executive in some policy areas but not in others? Does this delegation reflect the particularities of an issue area, such as who are its benefactors, who are adversely affected, and what are its complexities? Does it reflect deeper structural factors, such as legislative organization, committee composition, or congressional–executive conflict (divided government)? Is executive branch decision making different from the internal workings of Congress, and how does this affect the decision to delegate? Can Congress perfectly control delegated authority through administrative procedures, oversight, and administrative law? Does it want to? In the end, what are the implications of delegating discretionary authority for our separation of powers system and the incremental mode of policy making that it was meant to encourage? Can the virtues of separate powers intended by the Founders be maintained alongside significant delegation to the executive?

A TRANSACTION COST POLITICS APPROACH

Our approach to this question begins with the observation that policy can be made in Congress, through delegation of authority to executive agencies, or by some mixture of these two. Furthermore, the amount of discretionary authority delegated is a decision made by Congress, which can write either detailed legislation that leaves the executive with little latitude in implementation or vague laws that leave executive actors with broad discretionary powers. And when deciding where policy will be made, Congress trades off the internal policy production costs of the committee system against the external costs of delegation. Thus, Congress's decision to delegate is similar to a firm's make-or-buy decision; hence our usage of the term "transaction cost politics."

What are the costs associated with each alternative? Legislators can enact direct, detailed laws through normal congressional procedures, but

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the necessary information to make well-formed policy may be costly to obtain; bicameralism and supermajority requirements inhibit speedy, flexible action; and legislative logrolls tend to inflate the costs of even the simplest policy initiatives. Alternatively, Congress can delegate authority to the executive branch to escape this dilemma, but bureaucrats may be motivated as much by the desire to pursue their own policy goals, inflate their budgets, and increase their scope of control as by their desire to follow congressional intent. Neither option is without its faults, but in different circumstances one or the other may be relatively more attractive from legislators' point of view.

In some cases, delegation may offer legislators an appealing – or irresistible – alternative to making policy themselves. Consider the issue of airline safety, which is characterized on the one hand by the need for technical expertise and on the other by an almost complete absence of potential political benefits. That is, policymakers will get little credit if things go well and no airline disasters occur, but they will have to withstand intense scrutiny when things go wrong: Airline regulation is an issue with only a political downside, and failures tend to be spectacular and well publicized. Furthermore, legislative and executive preferences on this issue will tend to be almost perfectly aligned: have fewer accidents rather than more as long as the costs to airlines are not prohibitive. The set of individuals receiving benefits, the flying public, is diffuse and ill organized, while those paying the costs of regulation, the airline companies, are well organized and politically active. And, keeping in mind the easy observation of deficiencies in the system, delegated power is relatively simple to monitor. For all these reasons, even if legislators had unlimited time and resources of their own (which they do not), delegation to the executive would be the preferred mode of policy making.

By contrast, in other policy areas legislators will be loath to cede authority to the executive. Consider tax policy, where Congress uses considerable resources to write detailed legislation that leaves the executive branch with little or no leeway in interpretation.⁴ The political advantages of controlling tax policy come not from the duty of setting overall rates, which taxpayers tend to resent, but from the possibility of granting corporations and other well-organized lobby groups special tax breaks, so-called corporate welfare. If designed correctly, these benefits can target a specific industry or group and are paid for by the general public, either through taxes paid into general revenues or the decrease in

⁴The *Congressional Quarterly* summary of the Tax Reform Act of 1969, for instance, listed 136 major provisions, of which only 3 delegated substantive authority to the executive.

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revenue stemming from the tax break. Such political benefits are not lightly forgone, and they would be difficult to replicate through a delegation scheme with open-ended mandates. Thus, Congress continues to make tax policy itself, despite the demands of time and expertise that this entails.

Our theory predicts, then, that policy will be made in the politically most efficient manner, be it through direct legislative action, through delegation to executive branch agencies, or through some combination of these two. Note the term “politically” efficient; we make no claim that policy making under separate powers will be *technically* or *economically* efficient, allocating resources to their greatest advantage. Indeed, as some features of the base-closing case demonstrated, policy making may be quite inefficient according to a strict economic benchmark. Rather, we claim that policy will be made in such a way as to maximize legislators’ political goals, which we take to be reelection first and foremost. Legislators will prefer to make policy themselves as long as the political benefits they derive from doing so outweigh the political costs; otherwise, they will delegate to the executive.

DELEGATION AND BROAD THEMES
IN AMERICAN POLITICS

Our approach to delegation has significant implications for a number of issues in American politics, one of which is the debate over whether Congress can control unelected regulatory agencies when delegating authority. Some critics, most notably Lowi (1969), argue that congressional delegation of authority has become equivalent to an abdication of Congress’s constitutionally assigned policy-making role, in which legislators have over time surrendered their legislative powers to unelected bureaucrats. The result has been a system where special interests reign supreme, cozying up to the very bureaucrats set up to regulate them, as legislative actors turn a blind eye to the situation. Policy, then, reflects the demands of these interests at the expense of consumers and the public at large.

The counterargument, as posed for example by McCubbins and Schwartz (1984), McCubbins, Noll, and Weingast (1987; 1989) and Kiewiet and McCubbins (1991), is that legislators can control bureaucrats through oversight and administrative procedures such as congressional hearings, reporting requirements, and enfranchising third parties into the decision-making process. If Congress can curtail bureaucratic excesses through these means, then delegation need not be as deleterious as previously assumed.

Our perspective emphasizes that delegated authority cannot be judged

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in a vacuum: One must compare bureaucratic policy making with the next best alternative, which is policy making through committees. Indeed, special interests may receive protection through favorable agency regulations, but is this more widespread or morally more opprobrious than having them protected through a tax loophole or a targeted provision in a bill?

Or consider the other side of the coin: The proposal that Congress can control delegated authority through fire-alarm oversight and administrative procedures. In our model, Congress delegates those areas in which the legislative process is least efficient, and, accordingly, we should not expect oversight to be either perfect or desirable. Legislators lacking the time, expertise, and/or political will to make hard policy choices themselves in an issue area will not magically find these resources when it comes time to oversee the executive. Nor should we necessarily want them to try, if this would decrease agencies' incentives to invest in policy expertise. In essence, we claim that a selection bias is at work here: A theory of oversight divorced from a theory of delegation will overlook the fact that those issue areas in which the executive makes policy differ fundamentally from those in which Congress makes policy itself.

Legislative Organization and Delegation

We also address what has come to be known as the "information versus distribution" debate in the legislative organization literature; that is, whether committees primarily serve members' distributive, pork barrel needs or their desire to avoid the consequences of ill-formed policy. We assert that this question must be a false dichotomy: Some policy areas are characterized more by informational concerns, others by distributive, and still others by both. The right question to ask, from our perspective, is how the informational or distributive content of an issue area affects the types of procedures used to implement policy. Specifically, we shall argue that informationally intense policy areas will be good candidates for delegation, while distributive issues will tend to be made in Congress.

Along these lines, our analysis carries implications for the study of committee outliers and excessive legislative logrolling. In the congressional-organization literature, the cost of these committee-based pathologies is simply less efficient legislation. In our view, the poorer the performance of the committee system, the more likely it is Congress will delegate to the executive. So even though committees have monopoly power internally, they face external competition from the executive branch, and this may be sufficient to rein in committee excesses. Similarly, the possibility of delegating authority to executive actors affects