Can the Government Govern?

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identical factions against one another in a battle for partisan leadership. The point here is that the equilibrium between strong leaders and strong members is vulnerable to perturbations in the circumstances supporting it.

The next few years will be an institutionally messy period during which Speaker Wright and whoever succeeds Senate Majority Leader Robert Byrd have some time to solidify the coordinating power of the central leadership. I would be surprised if the power survived without some major institutional reorganization, perhaps the restoration of some power to committee chairs or the renovation of the budget process. The member enterprises, however, will not go away. Members will never again be as specialized, as deferential, as willing "to go along to get along" as in the textbook Congress of the 1950s. For better or worse, we are stuck with full-service members of Congress. They are incredibly competent at representing the diverse interests that geographic representation has given them. But can they pass a bill or mobilize a coalition? Can they govern?

45. Might this be reminiscent of the late nineteenth century conflict, when "party government" in the legislature was at something of a high-water mark, between Republican President William McKinley and Republican Speaker Thomas Reed, not over the issue of party government, but rather over the location of party leadership—White House or Speaker’s chair? The conflict ended with Reed’s resignation from the Speakership. A classic treatment of conflict between presidential and congressional wings of American parties is James MacGregor Burns, The Deadlock of Democracy (Prentice-Hall, 1965).

The Politics of Bureaucratic Structure

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American public bureaucracy is not designed to be effective. The bureaucracy arises out of politics, and its design reflects the interests, strategies, and compromises of those who exercise political power.

This politicized notion of bureaucracy has never appealed to most academics or reformers. They accept it—indeed, they adamantly argue its truth—and the social science of public bureaucracy is a decidedly political body of work as a result. Yet, for the most part, those who study and practice public administration have a thinly veiled disdain for politics, and they want it kept out of bureaucracy as much as possible. They want presidents to stop politicizing the departments and bureaus. They want Congress to stop its incessant meddling in bureaucratic affairs. They want all politicians to respect bureaucratic autonomy, expertise, and professionalism.¹

The bureaucracy’s defenders are not apologists. Problems of capture, inertia, parochialism, fragmentation, and imperialism are familiar grounds for criticism. And there is lots of criticism. But once the subversive influence of politics is mentally factored out, these bureaucratic problems are understood to have bureaucratic solutions—new mandates, new rules and procedures, new personnel systems, better training and management, better people. These are the quintessential reforms that politicians are urged to adopt to bring about effective bureaucracy. The goal at all times is the greater good: “In designing any political structure, whether it be

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the Congress, the executive branch, or the judiciary, it is important to build arrangements that weigh the scale in favor of those advocating the national interest.2

The hitch is that those in positions of power are not necessarily motivated by the national interest. They have their own interests to pursue in politics—the interests of southwest Pennsylvania or cotton farmers or the maritime industry—and they exercise their power in ways conducive to those interests. Moreover, choices about bureaucratic structure are not matters that can be separated off from all this, to be guided by technical criteria of efficiency and effectiveness. Structural choices have important consequences for the content and direction of policy, and political actors know it. When they make choices about structure, they are implicitly making choices about policy. And precisely because this is so, issues of structure are inevitably caught up in the larger political struggle. Any notion that political actors might confine their attention to policymaking and turn organizational design over to neutral criteria or efficiency experts denies the realities of politics.

This essay is an effort to understand bureaucracy by understanding its foundation in political choice and self-interest. The central question boils down to this: what sorts of structures do the various political actors—interest groups, presidents, members of Congress, bureaucrats—find conducive to their own interests, and what kind of bureaucracy is therefore likely to emerge from their efforts to exercise political power? In other words, why do they build the bureaucracy they do?

The analysis is divided into two parts. The first outlines a theoretical perspective on the politics of structural choice. The second puts this perspective to use in exploring the structural politics of three modern bureaucracies: the Consumer Product Safety Commission, the Occupational Safety and Health Administration, and the Environmental Protection Agency.

**A Perspective on Structural Politics**

Most citizens do not get terribly excited about the arcane details of public administration. When they choose among candidates in elections, they pay attention to such things as party or image or stands on policy. If pressed, the candidates would probably have views or even voting records on structural issues—for example, whether the Occupational Safety and Health Administration should be required to carry out cost-benefit analysis before proposing a formal rule or whether the Consumer Product Safety Commission should be moved into the Commerce Department—but this is hardly the stuff that political campaigns are made of. People just do not know or care much about these sorts of things.

Organized interest groups are another matter. They are active, informed participants in their specialized issue areas, and they know that their policy goals are crucially dependent on precisely those fine details of administrative structure that cause voters’ eyes to glaze over. Structure is valuable to them, and they have every incentive to mobilize their political resources to get what they want. As a result, they are normally the only source of political pressure when structural issues are at stake. Structural politics is interest group politics.

**Interest Groups: The Technical Problem of Structural Choice**

Most accounts of structural politics pay attention to interest groups, but their analytical focus is on the politicians who exercise public authority and make the final choices. This tends to be misleading. It is well known that politicians, even legislators from safe districts, are extraordinarily concerned about their electoral popularity and, for that reason, are highly responsive to their constituencies.3 To the extent this holds true, their positions on issues are not really their own, but are induced by the positions of others. If one seeks to understand why structural choices turn out as they do, then, it does not make much sense to start with politicians. The more fundamental questions have to do with how interest groups decide what kinds of structures they want politicians to provide. This is the place to start.

In approaching these questions about interest groups, it is useful to begin with an extreme case. Suppose that, in a given issue

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area, there is a single dominant group (or coalition) with a reasonably complex problem—pollution, poverty, job safety, health—it seeks to address through governmental action, and that the group is so powerful that politicians will enact virtually any proposal the group offers, subject to reasonable budget constraints. In effect, the group is able to exercise public authority on its own by writing legislation that is binding on everyone and enforceable in the courts.

The dominant group is an instructive case because, as it makes choices about structure, it faces no political problems. It need not worry about losing its grip on public authority or about the influence of its political opponents—considerations which, as I will later show, would otherwise weigh heavily in its calculations. Without the usual uncertainties and constraints of politics, the group has the luxury of concerning itself entirely with the technical requirements of effective organization. Its job is to identify those structural arrangements that best realize its policy goals.4

It is perhaps natural to think that, since a dominant group can have anything it wants, it would proceed by figuring out what types of behaviors are called for by what types of people under what types of conditions and by writing legislation spelling all this out in the minutest detail. If an administrative agency were necessary to perform services, process applications, or inspect business operations, the jobs of bureaucrats could be specified with such precision that they would have little choice but to do the group’s bidding.

For simple policy goals—requiring, say, little more than transfer payments—these strategies would be attractive. But they are quite unsuited to policy problems of any complexity. The reason is that, although the group has the political power to impose its will on everyone, it almost surely lacks the knowledge to do it well. It does not know what to tell people to do.

In part, this is an expertise problem. Society as a whole simply has not developed sufficient knowledge to determine the causes of or solutions for most social problems; and the group typically knows much less than society does, even when it hires experts of its own. These knowledge problems are compounded by uncertainty about the future. The world is subject to unpredictable changes over time, and some will call for specific policy adjustments if the group’s interests are to be pursued effectively. The group could attempt to specify all future contingencies in the current legislation and, through continuous monitoring and intervention, update it over time. But the knowledge requirements of a halfway decent job would prove enormously costly, cumbersome, and time-consuming.

A group with the political power to tell everyone what to do, then, will typically not find it worthwhile to try. A more attractive option is to write legislation in general terms, put experts on the public payroll, and grant them the authority to “fill in the details” and make whatever adjustments are necessary over time. This compensates nicely for the group’s formidable knowledge problems, allowing it to pursue its own interests without knowing exactly how to implement its policies and without having to grapple with future contingencies. The experts do what the group is unable to do for itself. And because they are public officials on the public payroll, the arrangement economizes greatly on the group’s resources and time.

It does, however, raise a new worry: there is no guarantee the experts will always act in the group’s best interests. Experts have their own interests—in career, in autonomy—that may conflict with those of the group. And, due largely to experts’ specialized knowledge and the often intangible nature of their outputs, the group cannot know exactly what its expert agents are doing or why. These are problems of conflict of interest and asymmetric information, and they are unavoidable. Because of them, control will be imperfect.

When the group’s political power is assured, as we assume it is here, these control problems are at the heart of structural choice. The most direct approach is for the group to impose a set of rules to constrain bureaucratic behavior. Among other things, these rules might specify the criteria and procedures bureaucrats are to use in making decisions; shape incentives by specifying how bureaucrats are to be evaluated, rewarded, and sanctioned; require them to

collect and report certain kinds of information on their internal operations; and set up oversight procedures by which their activities can be monitored. These are basic components of bureaucratic structure.

But some slippage will remain. The group's knowledge problems, combined with the experts' will and capacity to resist (at least at the margins), make perfect control impossible. Fortunately, though, the group can do more than impose a set of rules on its agents. It also has the power to choose who its agents will be—and wise use of this power could make the extensive use of rules unnecessary.

The key here is reputation. Most individuals in the expert market come with reputations that speak to their job-relevant traits: expertise, intelligence, honesty, loyalty, policy preferences, ideology. "Good" reputations provide reliable information. The reason is that individuals value good reputations, they invest in them—by behaving honestly, for instance, even when they could realize short-term gains through cheating—and, having built up reputations, they have strong incentives to maintain them through consistent behavior. To the group, therefore, reputation is of enormous value because it allows predictability in an uncertain world. And predictability facilitates control.

To see more concretely how this works, consider an important reputational syndrome: professionalism. If individuals are known to be accountants or securities lawyers or highway engineers, the group will immediately know a great deal about their "type." They will be experts in certain issues. They will have specialized educations and occupational experiences. They will analyze issues, collect data, and propose solutions in characteristic ways. They will hew to the norms of their professional communities. Particularly when professionalism is combined with reputational information of a more personal nature, the behavior of these experts will be highly predictable.

The link between predictability and control would seem especially troublesome in this case, since professionals are widely known to demand autonomy in their work. And, as far as restrictive rules and hierarchical directives are concerned, their demand for autonomy does indeed pose problems. But the group is forced to grant experts discretion anyway, owing to its knowledge problems. What professionalism does—via reputation—is allow the group to anticipate how expert discretion will be exercised under various conditions; it can then plan accordingly as it designs a structure that takes best advantage of their expertise. In the extreme, one might think of professionals as automatons, programmed to behave in specific ways. Knowing how they are programmed, the group can select those with the desired programs, place them in a structure designed to accommodate them, and turn them loose to exercise free choice. The professionals would see themselves as independent decisionmakers. The group would see them as under control. And both would be right.

The purpose of this illustration is not to emphasize professionalism per se, but to clarify a general point about the technical requirements of organizational design. A politically powerful group, acting under uncertainty and concerned with solving a complex policy problem, is normally best off if it resists using its power to tell bureaucrats exactly what to do. It can use its power more productively by selecting the right types of bureaucrats and designing a structure that affords them reasonable autonomy. Through the judicious allocation of bureaucratic roles and responsibilities, incentive systems, and structural checks on bureaucratic choice, a select set of bureaucrats can be unleashed to follow their expert judgment, free from detailed formal instructions.

Interest Groups: The Political Problem of Structural Choice

Political dominance is an extreme case for purposes of illustration. In the real world of democratic politics, interest groups cannot lay claim to unchallenged legal authority. Because this is so, they face two fundamental problems that a dominant group does not. The first I will call political uncertainty, the second political compromise. Both have enormous consequences for the strategic design of public bureaucracy—consequences that entail substantial departures from effective organization.

Political uncertainty is inherent in democratic government. No

5. On the rationality and consequences of reputations, see especially Kreps, "Corporate Culture and Economic Theory."

one has a perpetual hold on public authority nor, therefore, a perpetual right to control public agencies. An interest group may be powerful enough to exercise public authority today, but tomorrow its power may ebb, and its right to exercise public authority may then be usurped by its political opponents. Should this occur, they would become the new "owners" of whatever the group had created, and they could use their authority to destroy—quite legitimately—everything the group had worked so hard to achieve.

A group that is currently advantaged, then, must anticipate all this. Precisely because its own authority is not guaranteed, it cannot afford to focus entirely on technical issues of effective organization. It must also design its creations so that they have the capacity to pursue its policy goals in a world in which its enemies may achieve the right to govern. The group's task in the current period, then, is to build agencies that are difficult for its opponents to gain control over later. Given the way authority is allocated and exercised in a democracy, this will often mean building agencies that are insulated from public authority in general—and thus insulated from formal control by the group itself.

There are various structural means by which the group can try to protect and nurture its bureaucratic agents. They include the following.

—It can write detailed legislation that imposes rigid constraints on the agency's mandate and decision procedures. While these constraints will tend to be flawed, cumbersome, and costly, they serve to remove important types of decisions from future political control. The reason they are so attractive is rooted in the American separation-of-powers system, which sets up obstacles that make formal legislation extremely difficult to achieve—and, if achieved, extremely difficult to overturn. Should the group's opponents gain in political power, there is a good chance they would still not be able to pass corrective legislation of their own.

—It can place even greater emphasis on professionalism than is technically justified, since professionals will generally act to protect their own autonomy and resist political interference. For similar reasons, the group can be a strong supporter of the career civil service and other personnel systems that insulate bureaucratic jobs, promotion, and pay from political intervention. And it can try to minimize the power and number of political appointees, since these too are routes by which opponents may exercise influence.

—It can oppose formal provisions that enhance political oversight and involvement. The legislative veto, for example, is bad because it gives opponents a direct mechanism for reversing agency decisions. Sunset provisions, which require reauthorization of the agency after some period of time, are also dangerous because they give opponents opportunities to overturn the group's legislative achievements.

—It can see that the agency is given a safe location in the scheme of government. Most obviously, it might try to place the agency in a friendly executive department, where it can be sheltered by the group's allies. Or it may favor formal independence, which provides special protection from presidential removal and managerial powers.

—It can favor judicialization of agency decisionmaking as a way of insulating policy choices from outside interference. It can also favor making various types of agency actions—or inactions—appealable to the courts. It must take care to design these procedures and checks, however, so that they disproportionately favor the group over its opponents.

The driving force of political uncertainty, then, causes the winning group to favor structural designs it would never favor on technical grounds alone: designs that place detailed formal restrictions on bureaucratic discretion, impose complex procedures for agency decisionmaking, minimize opportunities for oversight, and otherwise insulate the agency from politics. The group has to protect itself and its agency from the dangers of democracy, and it does so by imposing structures that appear strange and incongruous indeed when judged by almost any reasonable standards of what an effective organization ought to look like.

But this is only part of the story. The departure from technical rationality is still greater because of a second basic feature of American democratic politics: legislative victory of any consequence almost always requires compromise. This means that opposing groups will have a direct say in how the agency and its mandate are constructed. One form, that this can take, of course, is the classic compromise over policy that is written about endlessly in textbooks and newspapers. But there is no real disjunction between policy and structure, and many of the opponents' interests will also be pursued through demands for structural concessions. What sorts of arrangements should they tend to favor?
—Opponents want structures that work against effective performance. They fear strong, coherent, centralized organization. They like fragmented authority, decentralization, federalism, checks and balances, and other structural means of promoting weakness, confusion, and delay.

—They want structures that allow politicians to get at the agency. They do not want to see the agency placed within a friendly department, nor do they favor formal independence. They are enthusiastic supporters of legislative veto and reauthorization provisions. They favor onerous requirements for the collection and reporting of information, the monitoring of agency operations, and the review of agency decisions—thus laying the basis for active, interventionist oversight by politicians.

—They want appointment and personnel arrangements that allow for political direction of the agency. They also want more active and influential roles for political appointees and less extensive reliance on professionalism and the civil service.

—They favor agency decisionmaking procedures that allow them to participate, to present evidence and arguments, to appeal adverse agency decisions, to delay, and, in general, to protect their own interests and inhibit effective agency action through formal, legally sanctioned rules. This means that they will tend to push for cumbersome, heavily judicialized decision processes, and that they will favor an active, easily triggered role for the courts in reviewing agency decisions.

—They want agency decisions to be accompanied by, and partially justified in terms of, “objective” assessments of their consequences: environmental impact statements, inflation impact statements, cost-benefit analysis. These are costly, time-consuming, and disruptive. Even better, their methods and conclusions can be challenged in the courts, providing new opportunities for delaying or quashing agency decisions.

Political compromise ushers the fox into the chicken coop. Opposing groups are dedicated to crippling the bureaucracy and gaining control over its decisions, and they will pressure for fragmented authority, labyrinthine procedures, mechanisms of political intervention, and other structures that subvert the bureaucracy’s performance and open it up to attack. In the politics of structural choice, the inevitability of compromise means that agencies will be burdened with structures fully intended to cause their failure.

In short, democratic government gives rise to two major forces that cause the structure of public bureaucracy to depart from technical rationality. First, those currently in a position to exercise public authority will often face uncertainty about their own grip on political power in the years ahead, and this will prompt them to favor structures that insulate their achievements from politics. Second, opponents will also tend to have a say in structural design, and, to the degree they do, they will impose structures that subvert effective performance and politicize agency decisions.

Legislators and Structural Choice

If politicians were nothing more than conduits for political pressures, structural choice could be understood without paying much attention to them. But politicians, especially presidents, do sometimes have preferences about the structure of government that are not simple reflections of what the groups want. And when this is so, they can use their control of public authority to make their preferences felt in structural outcomes.

The conduit notion is not so wide of the mark for legislators, owing to their almost paranoid concern for reelection. In structural politics, well-informed interest groups make demands, observe legislators’ responses, and accurately assign credit and blame as decisions are made and consequences realized. Legislators therefore have strong incentives to do what groups want—and, even in the absence of explicit demands, to take entrepreneurial action in actively representing group interests. They cannot satisfy groups with empty position taking. Nor can they costlessly “shift the responsibility” by delegating tough decisions to the bureaucracy.

Interest groups, unlike voters, are not easily fooled.

7. For a perspective on delegation that centers on the calculus of legislators rather than interest groups—and that leads, as a result, to very different conclusions about the politics of structural choice—see Morris P. Fiorina, “Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?” Public Choice, vol. 39 (September 1982), pp. 33-66; “Group Concentration and the Delegation of Legislative Authority,” in Roger G. Noll, ed., Regulatory Policy and the Social Sciences (University of California Press, 1982), pp. 175-97; and “Legislator Uncertainty, Legislative
This does not mean that legislators always do what groups demand of them. Autonomous behavior can arise even among legislators who are motivated by nothing other than reelection. This happens because politicians, like groups, recognize that their current choices are not just means of responding to current pressures, but are also means of imposing structure on their political lives. This will sometimes lead them to make unpopular choices today in order to reap political rewards later on.\(^8\)

It is not quite right, moreover, to suggest that legislators have no interest of their own in controlling the bureaucracy. The more control legislators are able to exercise, the more groups will depend on them to get what they want; and this, in itself, makes control electorally attractive. But the attractiveness of control is diluted by other factors. First, the winning group—the more powerful side—will pressure to have its victories removed from political influence. Second, the capacity for control can be a curse for legislators in later conflict, since both sides will descend on them repeatedly. Third, oversight for purposes of serious policy control is time-consuming, costly, and difficult to do well; legislators typically have much more productive ways to spend their scarce resources.\(^9\)

The result is that legislators tend not to invest in general policy control. Instead, they value "particularized" control: they want to be able to intervene quickly, inexpensively, and in ad hoc ways to protect or advance the interests of particular clients in particular matters.\(^9\) This sort of control can be managed by an individual legislator without collective action; it has direct payoffs; it will generally be carried out behind the scenes; and it does not involve or provoke conflict. It generates political benefits without political costs. Moreover, it fits in quite nicely with a bureaucratic structure designed for conflict avoidance: an agency that is highly autonomous in the realm of policy yet highly constrained by complex

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the presidential agenda. Others are important because they deal with sensitive issues that can become political bombshells if something goes wrong. But most all agencies impinge in one way or another on larger presidential responsibilities—for the budget, for the economy, for national defense—and presidents must have the capacity to direct and constrain agency behavior in basic respects if these larger responsibilities are to be handled successfully. They may often choose not to use their capacity for administrative control; they may even let favored groups use it when it suits their purposes. But the capacity must be there when they need it.

Presidents therefore have a unique role to play in the politics of structural choice. They are the only participants who are directly concerned with how the bureaucracy as a whole should be organized. And they are the only ones who actually want to run it through hands-on management and control. Their ideal is a rational, coherent, centrally directed bureaucracy that strongly resembles popular textbook notions of what an effective bureaucracy, public or private, ought to look like.

In general, presidents favor placing agencies within executive departments and subordinating them to hierarchical authority. They want to see important oversight, budget, and policy coordination functions given to department superiors—and, above them, to the Office of Management and Budget and other presidential management agencies—so that the bureaucracy can be brought under unified direction. While they value professionalism and civil service for their contributions to expertise, continuity, and impartiality, they want authority in the hands of their own political appointees—and they want to choose appointees whose types appear most conducive to presidential leadership.

This is just what the winning group and its legislative allies do not want. They want to protect their agencies and policy achievements by insulating them from politics, and presidents threaten to ruin everything by trying to control these agencies from above. The opposing groups are delighted with this, but they cannot always take comfort in the presidential approach to bureaucracy either. For presidents will tend to resist complex procedural protections, excessive judicial review, legislative veto provisions, and many other means by which the losers try to protect themselves and cripple bureaucratic performance. Presidents want agencies to have discretion, flexibility, and the capacity to take direction. They

...do not want agencies to be hamstrung by rules and regulations—unless, of course, they are presidential rules and regulations designed to enhance presidential control.

Legislators, Presidents, and Interest Groups

Obviously, presidents and legislators have very different orientations to the politics of structural choice. Interest groups can be expected to anticipate these differences from the outset and devise their own strategies accordingly.

Generally speaking, groups on both sides will find Congress a comfortable place in which to do business. Legislators are not bound by any overarching notion of what the bureaucracy as a whole ought to look like. They are not intrinsically motivated by effectiveness or efficiency or coordination or management or any other design criteria that might limit the kind of bureaucracy they are willing to create. They do not even want to retain political control for themselves.

The key thing about Congress is that it is open and responsive to what the groups want. It willingly builds, piece by piece—however grotesque the pieces, however inconsistent with one another—the kind of bureaucracy interest groups incrementally demand in their structural battles over time. This "congressional bureaucracy" is not supposed to function as a coherent whole, nor even to constitute one. Only the pieces are important. That is the way groups want it.

Presidents, of course, do not want it that way. Interest groups may find them attractive allies on occasion, especially when their interests and the presidential agenda coincide. But, in general, presidents are a fearsome presence on the political scene. Their broad support coalitions, their grand perspective on public policy, and their fundamental concern for a coherent, centrally controlled bureaucracy combine to make them maverick players in the game of structural politics. They want a "presidential bureaucracy" that is fundamentally at odds with the congressional bureaucracy everyone else is busily trying to create.

To the winning group, presidents are a major source of political uncertainty over and above the risks associated with the future power of the group’s opponents. This gives it even greater incen-
tives to pressure for structures that are insulated from politics—and, when possible, disproportionately insulated from presidential politics. Because of the seriousness of the presidency’s threat, the winning group will place special emphasis on limiting the powers and numbers of political appointees, locating effective authority in the agency and its career personnel, and opposing new hierarchical powers—of review, coordination, veto—for units in the Executive Office or even the departments.

The losing side is much more pragmatic. Presidents offer important opportunities for expanding the scope of conflict, imposing new procedural constraints on agency action, and appealing unfavorable decisions. Especially if presidents are not entirely sympathetic to the agency and its mission, the losing side may actively support all the trappings of presidential bureaucracy—but only, of course, for the particular case at hand. Thus, while presidents may oppose group efforts to cripple the agency through congressional bureaucracy, groups may be able to achieve much the same end through presidential bureaucracy. The risk, however, is that the next president could turn out to be an avid supporter of the agency, in which case presidential bureaucracy might be targeted to quite different ends indeed. If there is a choice, sinking formal restrictions into legislative concrete offers a much more secure and permanent fix.

Bureaucracy

Bureaucratic structure emerges as a jerry-built fusion of congressional and presidential forms, their relative roles and particular features determined by the powers, priorities, and strategies of the various designers. The result is that each agency cannot help but begin life as a unique structural reflection of its own politics.

Once an agency is created, the political world becomes a different place. Agency bureaucrats are now political actors in their own right. They have career and institutional interests that may not be entirely congruent with their formal missions, and they have powerful resources—expertise and delegated authority—that might be employed toward these selfish ends. They are new players whose interests and resources alter the political game.

It is useful to think in terms of two basic types of bureaucratic players: political appointees and careerists. Careerists are the pure bureaucrats. As they carry out their jobs, they will be concerned with the technical requirements of effective organization, but they will also face the same problem that all other political actors face: political uncertainty. Changes in group power, committee composition, and presidential administration represent serious threats to things that bureaucrats hold dear. Their mandates could be restricted, their budgets cut, their discretion curtailed, their reputations blemished. Like groups and politicians, bureaucrats cannot afford to concern themselves solely with technical matters. They must take action to reduce their political uncertainty.

One attractive strategy is to nurture mutually beneficial relationships with groups and politicians whose political support the agency needs. If these are to provide real security, they must be more than isolated quid pro quos; they must be part of an ongoing stream of exchanges that give all participants expectations of future gain and thus incentives to resist short-term opportunities to profit at one another’s expense. This is most easily done with the agency’s initial supporters. Over time, however, the agency will be driven to broaden its support base, and it may move away from some of its creators—as regulatory agencies sometimes have, for example, in currying favor with the business interests they are supposed to be regulating.12 All agencies will have a tendency to move away from presidents, who, as temporary players, are inherently unsuited to participation in stable, long-term relationships.

Political appointees are also unattractive allies. They are not long-term participants, and no one will treat them as though they are. They have no concrete basis for participating in the exchange relationships of benefit to careerists. Indeed, they may not want to, for they have incentives to pay special attention to White House policy, and they will try to forge alliances that further those ends. Their focus is on short-term presidential victories, and relationships that stabilize politics for the agency may get in the way and have to be challenged.

As this begins to suggest, the strategy of building supportive relationships is inherently limited. In the end, much of the environment remains out of control. This prompts careerists to rely on a second, complementary strategy of uncertainty avoidance: insu-

dration. If they cannot control the environment, they can try to shut themselves off from it in various ways. They can promote further professionalization and more extensive reliance on civil service. They can formalize and judicialize their decision procedures. They can base decisions on technical expertise, operational experience, and precedent, thus making them “objective” and agency-centered. They can try to monopolize the information necessary for effective political oversight. These insulating strategies are designed, moreover, not simply to shield the agency from its political environment, but also to shield it from the very appointees who are formally in charge.

All of this raises an obvious question: why can’t groups and politicians anticipate the agency’s alliance and insulationist strategies and design a structure ex ante that adjusts for them? The answer, of course, is that they can. Presidents may push for stronger hierarchical controls and greater formal power for appointees than they otherwise would. Group opponents may place even greater emphasis on opening the agency up to political oversight. And so on. The agency’s design, therefore, should from the beginning incorporate everyone’s anticipations about its incentives to form alliances and promote its own autonomy.

Thus, however active the agency is in forming alliances, insulating itself from politics, and otherwise shaping political outcomes, it would be a mistake to regard the agency as a truly independent force. It is literally manufactured by the other players as a vehicle for advancing and protecting their own interests, and their structural designs are premised on anticipations about the roles the agency and its bureaucrats will play in future politics. The whole point of structural choice is to anticipate, program, and engineer bureaucratic behavior. Although groups and politicians cannot do this perfectly, the agency is fundamentally a product of their designs, and so is the way it plays the political game. That is why, in our attempt to understand the structure and politics of bureaucracy, we turn to bureaucrats last rather than first.

Structural Choice as a Perpetual Process

The game of structural politics never ends. An agency is created and given a mandate, but, in principle at least, all of the choices that have been made in the formative round of decisionmaking can be reversed or modified later.

As the politics of structural choice unfolds over time, three basic forces supply its dynamics. First, group opponents will constantly be on the lookout for opportunities to impose structures of their own that will inhibit the agency’s performance and open it up to external control. Second, the winning group must constantly be ready to defend its agency from attack—but it may also have attacks of its own to launch. The prime reason is poor performance: because the agency is burdened from the beginning with a structure unsuited to the lofty goals it is supposed to achieve, the supporting group is likely to be dissatisfied and to push for more productive structural arrangements. Third, the president will try to ensure that agency behavior is consistent with broader presidential priorities, and he will take action to impose his own structures on top of those already put in place by Congress. He may also act to impose structures on purely political grounds in response to the interests of either the winning or opposing group.

All of this is going on all the time, generating pressures for structural change that find expression in both the legislative and executive processes. These are potentially of great importance for bureaucracy and policy, and all the relevant participants are intensely aware of it. However, the choices about structure that are made in the first period, when the agency is designed and empowered with a mandate, are normally far more enduring and consequential than those that will be made later. They constitute an institutional base that is protected by all the impediments to new legislation inherent in separation of powers, as well as by the political clout of the agency’s supporters. Most of the pushing and hauling in subsequent years is likely to produce only incremental change. This, obviously, is very much on everyone’s minds in the first period.

Self-Interest and the New Social Regulation

I now want to make the argument a bit more concrete by exploring several interesting cases in American structural politics. I cannot, as a practical matter, entertain the full range of issues that the
theory touches upon, nor, in any rigorous sense, test its validity. My intention is simply to help illustrate, clarify, and lend plausibility to what it has to say about structural choice.

It is widely remarked that one of the most fundamental—and welcome—of recent developments in American bureaucracy is the shift from "old-style" forms of regulatory organization to the innovative forms characteristic of the "new social regulation." The stereotypical old-style agencies were the independent regulatory commissions set up during the New Deal. They were staffed by experts who presumably knew best how to deal with complex, specialized problems of particular industries; they were granted substantial discretion via broad, vague mandates to regulate in the public interest; and yet, over time, they appeared to use their discretion to serve the interests of the regulated sector. Independent agencies with vague mandates came to represent a formula for regulatory capture by business.14

By the late 1960s, much of the scholarly debate centered not on whether the independent commissions tended to become captured, but on why. Marvin Reiner popularized the argument that independence and vague mandates contribute to a regulatory life-cycle, in which youthful vigor gives way over time to capture.15 For Reiner, independence cuts the agencies off from important sources of political support and invigoration, and vagueness gives agency officials the discretion to serve regulated interests. For other scholars, notably Theodore J. Lowi and Kenneth Culp Davis, independence is perhaps less worrisome than broad delegations of legislative authority: bureaucrats who have substantial discretion tend to fall under the influence of their organized clienteles.16

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The prevailing view is that this body of research had a major influence on the design of American bureaucracy. Congress learned its lesson.

The authors of the regulatory statutes passed in the late 1960s and 1970s attempted to meet criticisms aimed at traditional regulation and to instill in regulators an enduring sense of mission. Lectured incessantly about its failure to provide regulators with specific standards, Congress wrote lengthy statutes that did far more than tell administrators to grant licenses "in the public interest" or to guarantee "fair and reasonable rates." Many of the laws passed during this period included relatively specific standards, deadlines, and procedures. . . . To increase the efficiency with which administrators carry out these statutory mandates, Congress and the president usually created single-headed agencies located squarely within the executive branch rather than multimember independent commissions.17

This account implicitly takes politicians, particularly members of Congress, as public-spirited prime movers who are free to make whatever decisions they like about the structure of government. Convinced by academic research that they mistakenly made "bad" choices in the past, legislators acted upon a new theory that promised to create better bureaucracy. The modern agencies of the 1970s are accordingly different in conception from the traditional agencies of the 1930s, so the story goes, and they have to be explained and understood differently.

My own view is that the explanation is fundamentally the same for both. Congress did not make horrible mistakes in creating the New Deal commissions. Nor were its structural choices motivated by grandiose theories about how government is best designed. Nor were legislators really free to act on such theories. They were politicians sensitive to the interests of powerful groups, and their structural choices were shaped by what those groups wanted.

Consider the Civil Aeronautics Board (CAB), created in 1938 with the passage of the Civil Aeronautics Act. The purpose of this legislation was to set up a structural framework to protect, nurture, and regulate the nation’s fledgling airline industry. The bill was unabashedly designed to serve the best interests of the airlines, and, as Bradley Behrman notes in his historical assessment of the CAB, “There was little the airlines wanted to have in the new legislation but did not get.”19 It was actually drafted in rooms 212 and 214 of the Carlton Hotel in Washington, D.C., by lawyers representing the Air Transport Association and five of the trunk airlines.20

So what kind of agency did they design for themselves and induce Congress to legislate on their behalf? An independent commission with a broad, vague mandate. This was not a "bad" choice on the part of Congress. It was a politically astute choice. Nor, of course, was it a "bad" choice for the airlines. They chose structural features that would keep politicians and potential enemies at arm's length, ensuring that the agency they were creating would stay theirs. And for the next forty years it did.

Independent commissions, vague mandates, and capture by business were not the product of poor choices. They were symptomatic of very smart ones. In the CAB's case, certainly, they were also symptomatic of something more fundamental: an unbalanced interest group system in which the industry group went largely unopposed in the politics of structural choice. The dominant group simply exercised public authority to put its creation out of reach. Independence and vagueness were not the causes of regulatory capture. It was the industry's desire to capture the agency that prompted them to opt for independence and vagueness in the first place.

The relevant players and the underlying balance of power may vary from agency to agency, but the driving force of their politics is the same: players try to impose structures that will protect and advance their own best interests. And what was true during the New Deal is just as true in more recent times. The "innovative" bureaucratic designs of the new social regulation are due not to some abstract theory of good government, but to changes in the distribution of political power that have thrust new players and interests into prominent roles in the the politics of structural choice.

To suggest what the substance of all this looks like, and, more generally, how well it seems to fit with the broader theory I elaborated earlier, I will now take a brief look at three agencies paradigmatic of the new social regulation: the Consumer Product Safety Commission (CPSC), the Occupational Safety and Health Administration (OSHA), and the Environmental Protection Agency (EPA).21

The Consumer Product Safety Commission

When Richard Nixon assumed the presidency in 1969, consumerism was a political power of the first magnitude, and all politicians were scrambling to convince voters that they were champions of the consumer cause. The new president was slow to jump on the bandwagon. During his first several months in office, he failed to appoint a consumer adviser within the White House and had no announced intention of presenting a consumer message to Congress. But when roundly criticized for these shortcomings, Nixon the pragmatic politician joined the scramble.22

By 1971 it was clear to political insiders that some sort of legislation on product safety was in the cards. A special commission on

21. I deal with the three agencies in this order, rather than (say) according to their "importance" or the chronology of their creation, because it allows me to proceed from reasonably simple cases in the politics of structural choice, the CPSC and OSHA, to one that is complex indeed, the EPA.
product safety had recently focused public attention on the issue, calling for comprehensive national regulation and the creation of a new agency to set and enforce standards. This was popular stuff that no politician could resist. As a result, the policy issue—whether the federal government should regulate consumer products—was not the subject of controversy. However, it was also symbolic and quite devoid of meaningful content, for, depending on the structural choices that attached to the policy, regulation might run the gamut from vigorously strict to hopelessly ineffective. The real political battle took place over structure.

In his 1971 consumer address to Congress, Nixon championed the consumer cause by making a showy appeal for product safety legislation. His structural proposals, however, were clearly not designed to provide for vigorous regulation. They reflected the underlying interests of business and the institutional presidency. What business wanted was a weak, ineffective agency—although, for the public record, they too “supported” the idea of product safety regulation. What the president wanted, aside from making business happy, was to enhance his managerial capacity through presidential bureaucracy.

Among other things, the administration proposal called for a new Consumer Safety Administration to be located within the Department of Health, Education, and Welfare (HEW), with authority not only for product safety but also for food and drugs. The Food and Drug Administration would be dismantled, its personnel and functions transferred to the new agency. The agency’s powers would be weak. Standard setting would give primacy to voluntary codes developed by industries and independent standard-setting organizations. The agency would be dependent on the Justice Department for its enforcement actions.23

In Congress, consumer groups were dominant. Business groups, always a powerful force, were strong enough to put up a stiff fight. But consumers largely had their way. What they wanted, above all else, was for their agency to be insulated from politics. Their strategy was to opt for the classic, allegedly much-despised form of regulatory organization: the independent regulatory commission. In the words of the Consumer Federation of America’s Martha Robinson, “Independent structure lessens the possibility of political interference.”24 So much for the capture theory and academic ruminations on the independent commission.25

The battle in Congress centered on agency independence. Consumer groups firmly rejected the notion that their new agency should be placed within HEW and thus within the hierarchy of presidential authority. They also feared merger with the FDA, which had a reputation for excessive sensitivity to industry. In the end, consumerists got everything they wanted in these respects. The new Consumer Product Safety Commission was made formally independent, its five commissioners appointed for fixed, staggered, seven-year terms. The president would designate the chair, as he does for all the independent commissions, but consumerists were able to win an “innovative” twist to enhance agency autonomy: the chair would not serve in that position at the president’s discretion, but would remain chair throughout his entire term as commissioner. Consumer groups tried to distance the agency still further from presidential control by directing it to submit its budget proposals simultaneously to both the OMB and Congress.

In addition, they were able to scuttle all attempts to merge components of the FDA into the new agency. The CPSC was kept pristine—and totally theirs. All presidential concerns for consolidation and coordination of governmental functions—concerns that were genuine, not just facades for business influence—were given short shrift. No one but the president cared in the slightest about these sorts of administrative niceties. The consumerists did not want their agency integrated into the organization of government. They were doing precisely what the airlines had done in designing the CAB. They were trying to build an agency that would stay theirs.

Independence was crucial, but it was only the beginning; for

consumerists could not assume that even a pristine, well-insulated agency would aggressively pursue its mandate. Their task was to design and impose a set of structural constraints to ensure that bureaucrats would do what they were supposed to do. In practice, this concern led them to favor specific limitations on bureaucratic discretion, time requirements for agency action, procedural requirements, massive opportunities for consumer participation and input, and judicial checks on agency misbehavior. In these regards, too, they largely dominated the political struggle with business. Among their more notable achievements were the following.

—Rulemaking for the purpose of developing a product safety standard would be initiated by petitions from any interested individual or group, with the agency required to respond within 120 days. Petitioners whose petitions were rejected could seek review in federal district court.

—The CPSC was not simply to develop standards on its own, but to rely instead on the “offeror” process, whereby outside groups could offer to develop standards in regard to a certain product and the commission would consider the resulting proposals.

—Private parties were permitted to go to court to enforce safety standards if the agency did not enforce them. They were also permitted to sue for damages when injured by products not meeting safety standards—another form of enforcement. Any person affected by a commission rule was granted standing.

Business participation in agency proceedings was a fact of life, since regulated firms and industries would inevitably have opportunities—and strong incentives—to make arguments, present evidence, provide information and technical advice, and appeal agency decisions to the courts. Consumerists tried to counter this by imposing a set of rules that would guarantee active, influential participation by consumer groups as well. The petition and offeror processes guaranteed them roles in the development of standards, and provision for legal suits by private parties ensured that agency misbehavior or lax enforcement could be countered in the courts.

Business groups were not entirely shut out. They got the usual procedural protections—the right to judicial review, for instance. And they, along with the president, won the important battle over agency enforcement: the CPSC had to rely upon the Justice Department for virtually all of its legal actions against violators of its standards. In addition, it received only a three-year authorization, rather than the open-ended authorization bestowed upon virtually all the other regulatory agencies. This guaranteed that, just three years later, business would have an opportunity to launch a new political attack on the agency.

Consumer groups therefore had two basic problems. First, the fight was not really over; and, since it was unclear how long consumer dominance was going to last, the next fight might well come out differently. Second, precisely because they anticipated this, they loaded the agency down with cumbersome procedural requirements and checks on its behavior and discretion. These structural choices made it difficult for the agency to do anything very effectively. Political uncertainty—and political fear—drove them to do this. To protect themselves, they created a structure that did not work very well. It was, however, theirs.

When the CPSC came up for reauthorization in 1975, business was still out to cripple the agency by any means available. But consumers were unhappy too. Their agency was doing a frustratingly poor job, and they wanted some statutory changes that would beef up its capacity for effective action. They also wanted to insulate it further from presidential control. Thus the battle lines were drawn. The CPSC, however, was no longer anyone’s darling. Even its ostensive supporters had lots of critical things to say about it.  

The House and Senate Commerce committees reported bills that were strongly proconsumer, imposing several important structural changes on the agency. They granted it substantial independence from the Justice Department in enforcing injunctions and conducting its own civil actions generally. They also stipulated that top commission staff could not be appointed subject to White House or executive branch approval, contravening a practice that had developed under Nixon.

The House bill was ambushed on the floor by business and its legislative allies, the Republicans and southern Democrats. The major proconsumer changes were defeated in close votes. In their

place was added a legislative veto of commission rules, the point of which, of course, was to politicize agency rulemaking and give business an open shot at every major decision the CPSC might take. It is worth emphasizing, given the way the legislative veto tends to be characterized in the academic literature, that this veto provision had nothing to do with a post-Watergate resurgent Congress flexing its muscles in opposition to the imperial presidency, nor did it reflect a partisan battle between a Democratically controlled Congress and a Republican president. The legislators imposing the veto provision were allies of the president on most issues, including the CPSC battle, and most were members of his own party. The veto was nothing more than another structural means of getting at an agency belonging to the other side. Conservatives and liberals alike have incentives to use the legislative veto. It all depends on whose ox is being gored.

In the end, the Senate and consumer groups won almost total victory in conference, a testament to the power of authorizing committees in ultimately having their way over insurgents from the floor. All the original structural changes were enacted. The House revolt produced one significant compromise: although the legislative veto provision was dropped in the final bill, the CPSC was hereafter required to submit all its proposed rules to Congress thirty days before adopting them, thus giving business and its allies a chance to respond. All in all, however, consumers came out of the 1975 battle with notable victories under their belts.

But from this point on, things began to fall apart. President Ford and the Appropriations committees kept the CPSC’s budgets well below the levels authorized by the supportive Commerce committees. And President Carter, an ally of consumer causes, did not turn matters around—indeed, he seriously considered abolishing the agency, for two reasons. First, not only did consumers continue to be dissatisfied, but separate studies by the General Accounting Office, the House Commerce Committee, the Civil Service Commission, and even a task force within the CPSC itself had suggested that dissatisfaction was amply justified by the facts.


The second reason for abolishing the CPSC was entirely presidential: its formal independence was inconsistent with the president’s managerial responsibilities.

Carter ultimately sided with the moderate views of his consumer adviser, Esther Peterson. For the 1978 CPSC reauthorization, he requested several changes in agency procedures, but his major request was that the commission chair serve at the pleasure of the president. This then became the major bone of contention in congressional debate over CPSC reauthorization. Consumer advocates, dedicated as always to the political insulation of their agency, succeeded in having this provision deleted in the House bill, but not in the Senate version. The Senate—and the administration and business—won in conference. Consumerists now found themselves looking ahead to a future of more defeats and more structural changes designed to take their agency away from them.

Granted only a three-year authorization, the CPSC had the misfortune in early 1981 to be the first major regulatory agency to come up for reauthorization during the Reagan presidency. The new administration, dedicated to deregulation, cuts in government expenditures, and the causes of business, went for the throat. Initially, the administration wanted the CPSC abolished. When this appeared infeasible, it recommended that the agency be placed in the Commerce Department and its budget be cut by 30 percent from the Carter estimate. If successful, this would subject the agency to presidential authority, surround it with bureaucratic and legislative enemies, and destroy its resource base.

short. The Senate Consumer Subcommittee, under the probusiness leadership of Republican Robert Kasten, could not quite muster the support for a bill transferring the agency to the Commerce Department; it also tried and failed to impose a one-year authorization. The House subcommittee, led by staunchly proconsumer Democrat Henry Waxman, deadlocked 10-10 on these issues; and, because conservatives claimed to have the votes in full committee, Waxman refused to allow the full committee to consider the bill at all. The CPSC would lose its independence, he claimed, "over my dead body." 30 Ultimately, he succeeded in getting his subcommittee's legislation past the House by means of a crafty parliamentary maneuver: he managed to have it incorporated in a reconciliation bill.

The compromise legislation to come out of this, however, was a major defeat for consumers. Far-reaching structural changes that business had been demanding for many years were imposed on the CPSC.

—All CPSC rules were now subject to congressional veto.
—The agency was directed to give precedence to voluntary over mandatory standards when the former would adequately reduce the risk of injury and when substantial compliance could be expected.
—The agency was required to issue standards in terms of performance requirements rather than product design (or other) requirements, leaving the means of compliance, therefore, up to business.
—Strict new guidelines for rulemaking were imposed. In developing rules, the agency was required to invite proposals for voluntary standards, which, if shown to be acceptable, must put an end to the rulemaking. Three findings were required for the issuance of a rule: any existing voluntary standards must be inadequate, benefits must bear a reasonable relationship to costs, and the rule must impose the least burdensome requirement on business.

These structural changes redirected CPSC regulation toward voluntary standards, made rulemaking more complex and time-consuming, and opened the agency up to political intervention by its enemies. In addition, business and the Reagan administration won a 25 percent reduction from the Carter budget request and a mere two-year authorization. After its restructuring of 1981, the CPSC swung into a Reagan-era equilibrium of meager budgets, spartan staffing, "unenlightened" appointees, poor performance, and voluntarism. Political battles continued in subsequent years without significant alteration of the structural status quo.

The CPSC is still a young agency, but it never really had a chance to perform effectively. It was not designed to be effective. Consumers were concerned with the technical requirements of effective performance, but their organizational designs were driven in large part by political uncertainty: they had to protect themselves and their agency from business. This explains why they so strongly favored an independent regulatory commission and why they imposed restrictive procedures, criteria, and time limits that weighed the agency down. Meanwhile, business was strong enough to lay claim to some portion of public authority, and it too was able to participate in structuring the agency—except that it was dedicated to crippling its capacity for effective performance. At its birth and throughout its life, then, the CPSC was a structural reflection of competitive politics. Structure was not a means to effective pursuit of the symbolic mandate. It was a means of political attack and defense.

Occupational Safety and Health Administration

Until the creation of OSHA, federal regulation of occupational safety and health amounted to little more than an uncoordinated patchwork of laws dealing with special problems in particular industries. For the AFL-CIO and most unions, it had never been a priority item, and politicians therefore had little incentive to pursue it.

This began to change in the late 1960s, when the surging popularity of the consumer and environmental movements imparted a new symbolic significance to the protection of workers from hazards in the workplace. Lyndon Johnson, looking ahead to the 1968 election, packaged it as a "quality of life" issue, which, like pollution control, automobile safety, and consumer product safety, signaled his commitment to the new reformist movements. Despite the AFL-CIO's lack of enthusiasm at the outset, a broad coalition of labor, consumer, and environmental groups eventually formed behind a strong administration proposal that concentrated new stan-

standard-setting and enforcement powers in the Department of Labor. This first major effort at federal regulation stimulated fierce opposition from business groups and their legislative allies, however, and it died in the House.31

By 1969 the political context was much more favorable. During Richard Nixon’s first year in office, the consumer and environmental movements continued to amass political power, and the new president sought not only to gain their support, but also to broaden his and the Republican party’s electoral coalitions by appealing to blue-collar workers. Occupational safety and health regulation was a natural under these conditions, and some sort of regulatory program was inevitable. Business groups, seeing the writing on the wall, announced that a policy of federal safety and health regulation was a good idea. Privately, they worked with the Nixon administration to design a bureaucratic structure that would make effective regulation impossible.32

In this case, unlike that of the CPSC, Nixon was in a bind in seeking a compromise between presidential bureaucracy and the demands of business. If a new agency were to be neatly fitted into the executive hierarchy, then it would clearly belong in the Department of Labor. But that, of course, was the last place business wanted the agency to be, since the department was traditionally a bastion of union control. Forced to choose, Nixon threw his lot in with business.

The administration proposed to delegate standard-setting authority to an independent five-member board, which was encouraged to adopt “national consensus standards” (standards devised within the private sector). The secretary of labor would have limited enforcement authority; he would encourage voluntary compliance with the board’s standards and, upon evidence of noncompli-


33. Note that neither business (as an opposing group) nor the president would normally be in favor of formal independence. Here it serves their purposes by providing an alternative to placement in the Department of Labor and by helping to fragment the regulatory structure.
both houses, and the committees lost control. In the House, conservatives won a major victory. They voted to exclude the secretary of labor completely from both the setting and enforcement of standards by creating two separate independent agencies, one to develop standards and one to enforce them. This was the ultimate in fragmentation and labor weakness, a business dream come true.34

A similar bill was narrowly voted down in the Senate, leading to a compromise offered by Jacob Javits: the secretary of labor would have the authority to set standards, but enforcement power would be delegated to a three-member independent commission. This was similar to the fragmented scheme proposed by Nixon, but the functions were reversed—Nixon had wanted a commission to set standards and the secretary to enforce. Although the Javits compromise was hardly ideal from the unions’ standpoint, its way of fragmenting authority was certainly preferable to Nixon’s, and they had little choice but to accept it. In the subsequent House-Senate conference, the Senate mostly had its way, and the Javits compromise became law, adding yet another bizarre bureaucratic arrangement to the structure of American government.

The Occupational Safety and Health Act was a multidimensional compromise. On many issues, labor got what it wanted. OSHA would set standards and be located within the Department of Labor. Uncertainty about how the new agency would behave, given the dangers of everyday contact with regulated firms as well as the business orientation of safety professionals, was countered in various ways. On important matters, agency discretion was virtually eliminated: OSHA was required to promulgate consensus standards within two years; it was required to respond to employee petitions for inspections; its inspectors were forced to issue citations and penalties for violations; and it had to follow certain procedures, criteria, and time requirements in developing standards. Also, the decisionmaking and appeals processes were designed to ensure that the creators—workers, unions, and their allies—could participate and impose checks on agency behavior, ensuring that OSHA could not settle into a cozy relationship with the firms it was to regulate.


Labor also won a big victory on the issue of whether economic costs should be a criterion in the formulation of rules. The statute vaguely required only that OSHA’s rules be “feasible,” leaving the term undefined. This might appear to be a textbook example of congressional unwillingness to face up to difficult decisions: seeking to avoid conflict, Congress shifted the responsibility by delegating the tough choices to the agency and the courts. But this is not what happened. Organized labor wanted nothing in the act that could be construed as requiring some sort of cost-benefit calculation. Business strongly demanded that cost be included as an explicit criterion of choice. The result was a compromise heavily weighted in favor of the unions. As Mendeloff observes, “a sufficient explanation for the absence of any mention of costs was that organized labor did not want any.”35

Business did win a few battles. It succeeded in imposing a fragmented structure that labor had staunchly resisted from the beginning. While the secretary did get the authority to set standards, he was hemmed about by other players with important roles to play. The Occupational Safety and Health Review Commission made final decisions on enforcement actions (subject to court appeal) and, in practice, it would later reverse or reduce a large percentage of penalties assessed by OSHA against business. The National Institute for Occupational Safety and Health (NIOSH), located within HEW, was to carry out research, survey the professional literature, and provide the “criteria documents” on which OSHA standard development was to be based. OSHA and the secretary of labor could not control NIOSH, and its delays, research interests, and very different political concerns would later cause many problems for them. The courts would also become actively involved, as business exercised its statutory rights to challenge virtually every decision OSHA made.

Business was also successful in securing a major role for the states, which were encouraged to submit regulatory plans that would preempt federal regulation by OSHA. This, of course, was not just a way of returning democracy to the people. It was a potent means of fragmenting government regulation. It was also a means of ensuring that regulatory decisions would be made in

35. Mendeloff, Regulating Safety, p. 21. For further details on the politics surrounding the “feasibility” language, see Noble, Liberalism at Work, p. 98 and note 53.
arenas more sympathetic to business interests, since business has historically done well at the state level. Labor knew all this and fought against "cooperative federalism" as it applied to OSHA. And after the act went into effect, labor continued to resist state regulation by pressuring governors and state legislatures not to participate. Many of these battles were lost, as about half of the states eventually submitted acceptable regulatory plans, leaving OSHA with only the remaining states.

The regulatory scheme that labor did "win," then, left much to be desired. OSHA itself was burdened with all sorts of structural constraints imposed by friend and foe alike, and, to make matters worse, the agency was but one component of a vast, byzantine structure, much of which was designed to ensure that the regulatory policy everyone agreed upon in principle would be a miserable failure in practice. And so it was.36

The troubles started right away. True to its agency-forcing mandate, OSHA immediately acted to promulgate over 4,000 consensus standards as mandatory rules—many of them later turning out to be trivial, absurd, or hopelessly complex. Small business, especially, became apoplectic as thousands of penalties were issued by discretionless inspectors compelled to enforce a ridiculous body of rules. OSHA tried to develop its own standards, but the procedural and research requirements slowed the process down to a snail's pace. Health regulation, far more complex and technically demanding than safety regulation, seemed to be going nowhere. The states were biting off bigger and bigger chunks of OSHA's jurisdiction—prodded by the Nixon administration, which, through its appointees in the Department of Labor, acted to weaken and decentralize OSHA's regulatory capacity. This was a problem labor had not seriously anticipated from its own department. It did not take long before the unions began training political fire on their own bureaucratic creation. OSHA found itself under attack from both sides.


Labor held one crucial card. By placing OSHA in the Department of Labor, it guaranteed a virtual monopoly of political jurisdiction for the Labor committees, which it dominated. This did not allow labor to make the kinds of changes it thought necessary for truly effective regulation, since the committees tended to lose control of legislation on the floor. But it did allow labor to throttle any business attempts to change the act. It could even prevent public hearings for debates about change. And, over the years, this negative power has worked like a charm. To date, there has not been a single major change in the act.

This did not put an end to OSHA politics. Efforts to shape the direction and efficacy of OSHA regulation were forced into other channels.37 Since OSHA's creation, it has become an annual tradition for business to try to limit OSHA's powers by attaching riders to appropriations bills. Now and then, business has done the same with legislation coming out of the Small Business committees. These guerrilla attacks have sometimes been successful, and they have not resulted in permanent changes of OSHA's role in the structure of the agency.

Far away the most important channel of business influence has been presidential bureaucracy. This has occurred not simply because presidents have been responsive to business, although Republican presidents clearly have, but because all presidents since OSHA's creation have pursued larger goals and strategies that have dovetailed nicely with business's attack on OSHA. Throughout the 1970s the continuing problem of inflation, aggravated by the energy crisis, drove presidents to attach increasing importance to the scrutiny and control of agency rule-making processes, particularly when they entailed decisions with far-reaching consequences for the economy.38

The institutionalization of a review capacity in the OMB began in the Nixon administration and developed steadily over the enu-

37. Efforts of various sorts occur every year and are described in the annual Congressional Quarterly Almanac, 1974 to the present.

38. The most detailed treatment of presidential control of OSHA can be found in Noble, Liberalism at Work, For overviews of presidential control of the regulatory agencies more generally, see George C. Eads and Michael Fix, eds., The Reagan Regulatory Strategy: An Assessment (Washington, D.C.: Urban Institute, 1984); Michael D. Reagan, Regulation: The Politics of Policy (Little, Brown, 1987); and Bryner, Bureaucratic Discretion, chap. 4.
ing years. Meanwhile, the OMB's efforts were supplemented by other managerial mechanisms that were created to respond quickly and flexibly to presidential needs. In 1974 the Council on Wage and Price Stability (COWPS) was created to ride herd on the anti-inflation effort, and Ford issued an executive order requiring all agencies to submit inflation impact statements along with their proposed rules to the OMB for review. The OMB and COWPS monitored and assessed agency compliance with the new requirements, and COWPS's formal comments became part of agency rulemaking processes. Carter continued along similar lines. He created the Regulatory Analysis Review Group and, through executive order, required agencies to submit economic impact statements that provided comprehensive analytical arguments for regulatory rules.

Because OSHA was widely regarded as a major offender in the imposition of costly, unreasonable rules on business, there was no escape. All of this had pervasive consequences for OSHA's rulemaking processes—complicating and encumbering them, introducing new external controls and veto points, and forcing OSHA to take economic costs and consequences into account as decision criteria. This was true even under a Democratic president concerned about maintaining strong ties with labor, consumer, and environmental groups.

But this was nothing compared with what happened during the Reagan years. Regulatory review was centralized in the OMB, which exercised close, comprehensive control over agency rulemaking. In his now-famous Executive Order 12321, Reagan required all agencies to submit regulatory impact analyses along with their proposed rules to the OMB. The new requirements, which included strict new criteria and procedures for cost-benefit analysis, imposed onerous constraints on rulemaking and, by forcing agencies to get OMB approval before publishing proposed rules, gave the administration an effective veto. The impact on OSHA was magnified by sagacious use of the presidential appointment power. Reagan appointed Thorne Auchter, a construction industry executive, as the assistant secretary in charge of OSHA. Under his leadership, the agency pursued a policy of voluntary compliance, cooperation with business, and—despite the wording of the act—rulemaking processes that attached primary salience to economic costs.

Business could not have hoped for a better outcome. Denied access to congressional Labor committees and forced to snipe at OSHA from the legislative fringes, it found a powerful ally in presidents of both parties who, driven by strong, institutionally based incentives of their own to control the regulatory process, imposed massive structural and policy changes through presidential bureaucracy.

The larger point, however, is that OSHA was a victim of American democracy—just as the CPSC was. The politics of structural choice endowed them both with organizational designs entirely ill suited to the effective pursuit of their policy goals. The specifics of their stories are different, but the consequences for public bureaucracy are essentially the same.

Consumer groups, driven by political uncertainty and forced to compromise with business, created an independent commission with limited enforcement powers and hemmed about by a variety of agency-forcing rules and procedures. They also lacked an iron grip on the relevant congressional committees, and, as the political struggle continued over the years, business was able to impose new structural burdens through formal legislation. Presidents did not play major roles, in part because the CPSC's independent status placed legal restrictions on the use of presidential management and appointment powers and in part because CPSC rules were not of sufficient economic consequence to merit aggressive presidential action. The CPSC's structural incapacities were legislative in origin, a reflection of political uncertainty and political compromise.

OSHA was burdened at the outset with awkward agency-forcing mechanisms imposed by labor in response to political uncertainty, as well as by an ingeniously fragmented set of bureaucratic arrangements imposed by business through political compromise. In subsequent years, it was successfully insulated from its enemies in Congress, thanks to union dominance of the House and Senate Labor committees. But it was not safe from presidents. Because OSHA's activities were of great economic consequence and because it was squarely located in the executive branch, presidents had strong incentives and ample opportunities to get at it—and they got at it with a vengeance. So, as a result, did business, whose priorities were nicely furthered through presidential bureaucracy.

Neither OSHA nor the CPSC was ever designed to do its job.
And things went from bad to worse over time as presidents and business opponents found ways of imposing bureaucratic arrangements that suited their own rather than the legislated purposes.

The Environmental Protection Agency

The EPA is often held up as the quintessential agency of the new social regulation. But its case is far more complex than those of OSHA or the CPSC, and in important respects it is unusual. In first place, the EPA did not emerge from the legislative process, as major agencies within government typically do. It was created through presidential reorganization. During the year its creation, 1970, the politics of structural choice focused not on what kind of agency was to be created or where it was to be located, but on the bureaucratic powers, procedures, restrictions, and deadlines that would be written into the Clean Air Act.

The reason for this points to the fundamental distinguishing feature of the EPA’s story: the federal government had been addressing the problems of water and air pollution on a nationwide basis for some twenty years before the EPA’s creation, and, in the process, had created, funded, and overseen a rich network of bureaucratic institutions to administer its antipollution policies. By 1970 these institutions were widely criticized for being cumbersome and ineffective, but they were also deeply entrenched and politically protected. This ensured that the politics of structural choice would not be a struggle over the design of entirely new institutions, as it had been for OSHA and the CPSC. It would be a struggle over adjustments to existing arrangements—and thus, for environmentalists, a struggle to impose mechanisms that might force these holdover institutions into doing what they wanted them to do.

The EPA’s Institutional Heritage

In gaining perspective on the EPA’s institutional heritage, it is important to realize that environmental groups were not the driving force behind early federal legislation in this area. Until environmentalism caught on among the public during the mid-1960s, these groups—the Sierra Club, the Izaak Walton League, the Wildlife Management Institute, and others—were neither very active nor very powerful. The compelling pressure for governmental action came instead from organizations representing state and local government—the American Municipal Association (later the National League of Cities), the Conference of Mayors, and myriad professional associations (state health officials, sanitary engineers). These interest groups, their appetites whetted by New Deal public works assistance for the construction of waste treatment plants, lobbied Congress hard for larger, more permanent infusions of federal funds and for antipollution programs that the states and localities could operate and control.39

The opponents were business groups, particularly those representing industries that did most of the polluting. They feared vigorous enforcement of strict pollution standards. Yet they had little to fear from toothless regulatory schemes, and they often had much to gain from the construction grant programs. As a result, business had a good deal in common with the state and local interest groups that largely dominated the preregulation side of the political struggle. The state and local groups were not zealots intent on cleaning up the environment at any price. They wanted to build political economies attractive to industry. They resisted strict, nondiscretionary enforcement, particularly if federal in origin. They sought regulation that would be sensitive to local conditions. And this, by and large, is what business wanted.

This happy confluence of interests was strongest in the formative period, which began with the Water Pollution Control Act of 1948. But as pollution began to attract more public attention and as new research began to shed troubling light on its severity, environmental groups slowly gained clout in the political process. With the balance of power shifting incrementally in their favor, they were better able to pressure for the kind of regulatory scheme they wanted: a politically autonomous agency, a strong, centralizing

role for the federal government, rigorous national standards, strict and swift enforcement. Environmental forces won concessions with each modification of the water and air pollution acts throughout the 1950s and 1960s. But as their power increased, the institutions of pollution control—designed, for the most part, by other groups with quite different interests—became increasingly entrenched. The environmentalists were never in a position to design their own arrangements.

Consider the institutions for water pollution control. The 1948 act authorized money for research, loans for construction, and federal enforcement powers so weak and procedure-bound that they were never exercised. Water pollution was defined as a health problem and assigned to the Public Health Service, which was run by medical professionals with no interest in economic regulation. Their approach to water pollution was to study it and to work cooperatively with state health agencies in discovering and implementing solutions. This was consistent with the designers' intent.

When the act came up for renewal in 1956, it was beefed up considerably. Two innovations were to leave an indelible mark on future regulation. First, the federal government would now provide grants to local communities for the construction of waste treatment plants. This strategic wedding of pollution control to pork barrel politics was enormously popular with groups and politicians of all kinds—except President Eisenhower, who opposed it on budgetary grounds (and as a threat to independent local government). From this point on, the grant program would make water pollution policy a universal favorite among members of Congress. It would also constrain the path of institutional development by anchoring federal regulation in local agencies and decisionmaking.

The second innovation took the form of stronger federal enforcement powers and new, less cumbersome procedures for taking action against polluters. These procedures, however, were designed to protect the interests of business and state and local governments—and, not surprisingly, they proved so unwieldy and complex that enforcement was virtually impossible. Despite this, or presumably because of it, they provided the basic procedural framework for water pollution regulation for many years. Moreover, because similar group forces were at work in the politics of air pollution, this same framework served as a model for that area as well.

As environmentalism grew rapidly in public support, politicians of all stripes grew increasingly sensitive to its concerns and those in positions of decisionmaking power began to endorse bolder policies in support of the environmental cause. Throughout the 1960s, however, much of this was symbolic. When it came to the crucial structural choices, choices of little salience to the broader public, politicians were not nearly so bold.

The environmentalists' organizational options were severely limited. State and local agencies were dug in. This was destined to be a federal-state-local "cooperative" effort no matter what. One goal within the realm of feasibility, however, was to push for more suitable bureaucratic arrangements at the national level. Historically, water and air pollution programs had been assigned to agencies buried deep within the Public Health Service, one of many units reporting to the secretary of health, education, and welfare. The environmentalists had no hope whatever of killing these agencies, creating new ones in some other location, and laying exclusive claim to them. But they could at least try to release them from the PHS, whose medical orientation and preference for state-local cooperation were most unwanted. They could also try to lift these agencies out of bureaucratic obscurity into a place of greater prominence and perhaps consolidate antipollution programs into one organization. Even these limited objectives, however, met with pervasive resistance.

Before 1970, progress on reorganization was limited and haphazard. In the 1965 Water Quality Act, environmentalists succeeded in lifting the water pollution agency out of PHS and making it a separate entity reporting to the secretary of HEW. In 1966, however, President Johnson transferred the Federal Water Pollution Control Agency (FWPCA), as it was called, out of HEW and into the Interior Department. This move was greeted with skepticism by environmentalists, who feared placing the FWPCA in a department with responsibilities for natural resource development. But the administration persisted, driven by characteristic concerns of presidential bureaucracy: President Johnson wanted to pull together the various federal water programs into one department, and Interior, with its already substantial responsibilities for water resources, was the logical candidate. From a purely organizational standpoint, HEW never should have had them in the first place.
Environmentalists’ success in relocating the air pollution agency was even less noteworthy. While its name was changed several times, winding up as the impressive-sounding National Air Pollution Control Administration (NAPCA), and while its status was upgraded a bit within HEW when the department was reorganized in 1968, NAPCA remained a part of the Public Health Service until the EPA was created.

The EPA and Its Agency-forcing Mandate

By 1970, things were ripe for major reform. The popularity of environmental issues was at an all-time high, having jumped dramatically in the space of just a year or two. Environmentalists had virtually laid claim to the Democratic party, whose leaders in Congress “pledged a costly all-out assault on pollution problems and chided the Republicans for inaction.”

Republicans looked for ways to jump on the bandwagon, and President Nixon, slow to take the bait, was now clearly intent on demonstrating his commitment to the environmental cause. His motivation was heightened considerably by the looming electoral contest in 1972: his Democratic challenger would most likely be “Mr. Environment,” Edmund Muskie, chair of the Senate Subcommittee on Air and Water Pollution. Nixon and Muskie both knew that this was to be a showdown of enormous political consequence for their political futures.

The opportunities for action were obvious enough. The 1967 Clean Air Act was due to be reauthorized in 1970, and, as its institutions were widely regarded as failures, this was the occasion for major overhaul. Analogous circumstances obtained in the area of water pollution. A fascinating series of moves and countermoves, sparked by intense competition and one-upmanship between President Nixon and Senator Muskie, ultimately led to the Clean Air Amendments of 1970, the Federal Water Pollution Control Act Amendments of 1972, and the creation of the Environmental Protection Agency. Structural choices proceeded along two paths, one legislative and the other executive. The legislative process dealt sequentially with the air and water pollution laws, taking up the Clean Air Act first. The Muskie subcommittee, which

assumed the congressional lead in all this, could not handle both at the same time owing to the formidable complexity of the issues. The executive process occurred within the larger framework of the President’s Advisory Council on Executive Organization, known popularly as the Ash Council, which was set up by Nixon to devise a plan for reorganizing the entire federal bureaucracy. The EPA emerged from this executive process.

Nixon’s grand reorganization project was the ultimate exercise in presidential bureaucracy. Federal agencies and even whole departments were to be shuffled and rationalized to produce a hierarchy conducive to effective presidential management and the comprehensive, coordinated administration of federal programs. Task forces were set up to study various parts of the problem and make recommendations. One such group had responsibility for considering how the various environmental programs and agencies should be fitted into a larger department pulling together all the government’s natural resource functions.

The people involved in this White House group were quite responsive to environmental concerns. At this stage of the game, this was the way Nixon wanted it. They sought to give the president a capacity for taking a systematic, comprehensive approach to the nation’s environmental and natural resource problems. But, like the environmentalists, they feared putting environmental agencies into a department that also had responsibilities for resource development programs and was likely to be responsive to progrowth, prof businessman interests. They concluded, accordingly, that the government’s far-flung environmental programs should be brought together within an independent organization, the Environmental Protection Agency. It should be headed by a single administrator, appointable and removable by the president and directly subordinate to him in the bureaucratic hierarchy.


Their recommendation artfully furthered both presidential and environmental interests. The president got comprehensiveness, coordination, and control—presidential bureaucracy. The environmentalists, who had consistently run up against stone walls in trying to reorganize environmental institutions, were suddenly the recipients of a tremendous windfall: a single agency, high in status and visibility, distanced from competing and hostile interests, with comprehensive responsibility for a full range of environmental programs. The proposed EPA was not ideal. It was subject to presidential control, as all executive agencies were, and, for the time being, the programmatic structures it inherited were placed side by side rather than integrated. But, even so, it was the nearest thing to an answer to environmentalists' prayers.

With politicians of both parties predisposed to favor environmental reforms, the administration’s reorganization plan was submitted to Congress on July 9, 1970, and sailed through with no concerted opposition. Business, in fact, had actually welcomed the idea after years of frustration with the hodgepodge of state regulations, which were gradually becoming strict enough to cause problems and confusion. If regulation was unavoidable, better for it to be comprehensive and consistent.\(^{42}\)

Within Congress, environmental action centered on the Clean Air Act.\(^{43}\) In late 1969 and early 1970, it appeared that the 1967 arrangements would be streamlined and beefed up to enhance their effectiveness, but that they would basically be left intact. This was Muskie’s original intention. He had a stake in demonstrating that it could work, and he seemed unwilling to provoke a political fight by pushing for more. His bill maintained the 1967 act’s regional standards rather than asking for national standards, required that standards be economically feasible, and kept the basic


mentalists were forced to accept in delegating authority—namely, NAPCA and its counterpart agencies in the states and localities. None of this would or could be destroyed. Like the agencies responsible for water pollution and a number of other environmental programs, they would simply be relocated under the organizational rubric of the Environmental Protection Agency. Thus environmentalists were constrained to work through the same basic set of institutions and personnel that had failed them in the past. With so many of the usual design options foreclosed, environmentalists were compelled to channel their reforms into the kinds of agency-forcing restrictions the Clean Air Act is known for.

The Senate, its agenda skillfully controlled by Muskie and his subcommittee, was a bastion of environmentalist power and the chief institutional proponent of agency-forcing legislation. The House, where the environmentalists also had pervasive influence, was a more receptive arena for the interests of business and state and local governments. The bill that passed the House, accordingly, was different from the Senate’s in ways one would expect. It shifted standard-setting and enforcement power less drastically in favor of the federal government. It gave bureaucrats discretion rather than binding their decisions by procedural restrictions and deadlines. It forced the EPA to rely on justice rather than authorizing autonomous legal action. It made no allowance for citizen suits against violators or the EPA in cases of nonenforcement. It cut the auto companies more slack in forcing a timely reduction in emissions.

The Senate and its environmentalist supporters, however, won out in conference, and their strikingly tough set of particulars became law with only minor amendment in late December 1970. The EPA, which had begun its bureaucratic life only a few weeks earlier, would have to hit the ground running. It had deadlines to meet. As its new administrators and everyone else were soon to find out, however, there was no way the new agency could run fast enough to meet the crushing burden of its legal obligations.

Meanwhile, Congress turned its attention to the Water Quality Act. As it did, it braced for a new political firestorm. Due to the wildly popular construction grant program, the water bill stood to be “the most expensive environmental protection legislation ever contemplated by Congress.” It also threatened to impose extraordinary pollution control costs on business, making it “the most significant legislative test to date between the goals of environmental quality and economic development.”

Nixon again tried to get out front. In his February 1971 message to Congress, he outlined his own proposal for a much stronger, procedurally streamlined system of federal-state regulation of water pollution; it even included a limited provision for citizen suits. While this was a genuine proposal for major change, environmentalists found it weak in predictable ways: it gave bureaucrats too much discretion and granted too much power to the states. Its $6 billion authorization request, moreover, was skimpy.

The Muskie subcommittee did not disappoint. Before 1971 was out, it had come up with an extremely ambitious bill. Among other things, it set national policies of making all navigable waters safe for fish, wildlife, and recreation by 1981 and eliminating all discharges of pollutants into the water by 1985; required polluters to adopt the “best practicable” technology by 1976 and the “best available” technology by 1981; established a state-run permit program for regulating discharges and authorized the EPA to set guidelines and exercise permit-by-permit veto power over state decisions; and authorized any citizen to sue polluters or the EPA to demand enforcement of the act.

The administration charged “that the bill set technologically impossible goals, that it was too costly, and that it would destroy the states’ role.” It had plenty of support. William Ruckelshaus, first administrator of the EPA, had tried to convince senators from the beginning that their strict goals and deadlines, while politically attractive, were impossible to achieve and would lead to administrative nightmares. Lobbyists representing the states were livid

about the bill’s unrealistic goals and its encroachment on state powers. Industry opposition focused primarily on the tremendous costs the bill would impose on the private sector, and they were particularly bitter about the environmental fantasy of zero discharge. As one Harvard economist put it, “There isn’t a single respectable economist in the country who would back the no-discharge goal adopted by the Senate.” All of this fell on deaf ears. Environmental interests were dominant in the Senate, and it did not matter much what others had to say.

The administration took the lead in mobilizing a coalition to wring concessions out of the House Public Works Committee. To the environmentalists’ credit, the committee still produced a strong bill. But they did lose ground on a number of structural issues, including each of those listed above, and the House bill proved to be so different from the Senate’s that the conference committee had to meet forty times before the necessary compromises could be hammered out. In the final bill, the Senate’s safer-water and no-discharge “policies” were transformed into purposely vaguer “goals.” The deadline for installation of “best practicable” technology was pushed back to 1977 and that for “best available” technology to 1983, and a national commission was set up to study the costs and benefits of achieving those deadlines. The EPA’s permit-by-permit authority was revoked, reserving greater control for the states. Citizen were allowed to sue for enforcement only if their interests were directly affected. Finally, there was a nice bonus for state-local interests, courtesy of the House’s voracious appetite for pork barrel legislation: multiyear funding authorization was raised from an already astounding $20 billion to an unbelievable $24.6 billion. President Nixon, outraged by the bill’s budgetary excesses and concerned about its consequences for economic growth, vetoed it—only to have it overridden by huge bipartisan majorities in both houses. The combination of environmentalist power and pork barrel politics was unbeatable.

Structure, Performance, and the Recurrent Battle

In the air and water pollution struggles, environmentalists had won smashing legislative victories. But these victories did not translate automatically into effective policy. Their victories were structural, and they translated into a forbidding maze of detailed instructions, procedures, requirements, criteria, and deadlines—all of them tacked onto entrenched institutions inherited from a powerless past. There were compelling political reasons for burdening the EPA with all this baggage, but, as the young agency struggled to pursue its mandate, the load would take a heavy toll on its capacity for effective performance.

The EPA was plagued by several different kinds of structural problems. In the first place, the agency was never designed as a coherent organization. Its presidential creators pulled together disparate programmatic units under one roof, viewing this as a first step toward a coherent organizational structure; but because the White House and the EPA were not willing to waste time and political capital on a reorganization fight, these units were left separate and largely unintegrated, wedded to their own norms, cultures, and characteristic ways of doing things. The situation has never been corrected. Throughout its life, the EPA has been hobbled by its programmatic inheritance.

Second, the EPA neither inherited nor was able to amass the scientific knowledge necessary to formulate well-conceived standards in a timely fashion. Punctuality was mandated, scientific validity was not. All too often this would cause the EPA to rush to judgment on the basis of sketchy evidence that even its own people did not find adequate. This began to happen immediately after the Clean Air Amendments went into effect, as Ruckelshaus, required to issue national ambient air standards within thirty days, promulgated standards that neither he nor his chief scientific adviser thought were technically justified. As the EPA’s head economist was to put it years later, “The ultimate difficulty lay in the law. EPA was forced by legislative deadlines, often imposed on the administrator by court decisions in response to citizen suits, to act on the basis of weak technical knowledge.”

Third, EPA’s rulemaking procedures—variously imposed to protect business, to ensure environmentalist participation, to satisfy the courts and, of course, to ensure that scientific evidence is somehow taken into account—are so tortuously complex it is a wonder

40. Quoted in ibid., p. 144.

50. Marcus, Promise and Performance.
51. Ibid.
anything at all emerges from them. In great measure, they provide a framework of rules within which the political battle continues, whatever science might appear to require. As the EPA’s own frustrated leaders have acknowledged, environmental problem solving is often not the essence of what is going on.

Fourth, the institutional legacy of American environmental policy has forced the EPA to rely on a complicated, confusing diversity of state and local agencies. Effective coordination and control are extremely difficult under the best of circumstances and are worsened by legislative design: the EPA is not supposed to have sufficient authority to take charge. The opponents of effective regulation and the protectors of state and local interests have seen to it over the years that this is so. This pervades the EPA’s regulatory organization.

Finally, the EPA has been hemmed about by the judiciary. Virtually every decision the agency has made has been subject by legislative design to judicial review. Business has consistently attacked agency standards for being too restrictive, environmentalists have attacked them for being too lax, and both have pressed whatever arguments the courts might respect: that proper procedures were not followed, that decisions were not based on the record, that scientific evidence was lacking, that the agency exceeded or failed to exercise its authority. Decisionmaking, as a result, has dragged on in a continual state of uncertainty until judicial approval finally has been granted. Moreover, the EPA has been forced to build a host of complications into its decision procedures to ensure that their results would stand up under judicial scrutiny, adding heavy bureaucratic baggage to an already overloaded system.

While the EPA was struggling under the weight of its own structure, the politics of structure raged on in Congress. It has never really ended. Some of these battles arose from environmentalist efforts to grant the EPA new authority over more specialized problem areas: toxic chemicals, hazardous wastes, noise, radiation, pesticides. With environmentalist successes came not only new authority, but also new procedures, new deadlines, new organizational headaches—and new regulated interests sharpening their knives for the administrative fights ahead.

Legislatively, however, the greatest attention centered on the core of the EPA’s environmental mandate, the Clean Air Amendments of 1970 and the Federal Water Pollution Control Act Amendments of 1972. From the moment these bills passed into law, business desperately wanted to eviscerate them, environmentalists wanted to protect and strengthen them, and states wanted greater autonomy from EPA oversight, control, and maddening red tape. Episodic fights aside, all looked ahead to 1976–77, when both acts came up for reauthorization. A major conflagration was unavoidable.

The economic context had changed since the 1970 and 1972 battles. The nation was plagued by serious economic problems; considerations of cost, economic growth, and international competitiveness were now far more politically potent. And the energy crisis gave rise to strong pressures for relaxing environmental standards in the interests of fuel economy and lessened dependence on foreign oil. All of this played into the hands of industry and the opponents of strict regulation. But the major difference in legislative politics was not economic: the structural status quo had shifted. The acts of 1970 and 1972, the environmentalist triumphs, were the new status quo—and, as always in the American separation-of-powers system, any major change would be extremely difficult to achieve by either side. Since the two sides were now better balanced in political power, the inevitable war was not likely to produce much. And indeed, when the dust cleared, the 1977 amendments to both acts left the core legislation intact. Deadlines were extended, and exceptions and conditions were introduced to soften the rigid, infeasible requirements of the earlier legislation. Business won additional procedural protections. The EPA would have a bit more discretion.

After the 1977 adjustments, legislative politics surrounding the air and water acts remained just as intense and explosive, but for

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53. Bryner, Bureaucratic Discretion, especially chap. 5; and National Academy of Sciences, Decision Making in the Environmental Protection Agency (National Academy of Sciences, 1977).
54. Bryner, Bureaucratic Discretion; and Marcus, Promise and Performance.
55. Bryner, Bureaucratic Discretion.
the next decade the contending forces were in total deadlock. The election of Ronald Reagan and the resurgence of business political power did not shift the political balance sufficiently to shatter the status quo. Both acts were due for reauthorization in 1982. The legislative machinery cranked up, the inevitable fights broke out, but 1982 came and went with Congress incapable of passing new legislation. So did 1983. Finally, in 1986, Congress coughed up amendments to the water act, which “merely fine-tuned and updated the basic law.”

Presidential Bureaucracy

In the environmental politics of structural choice, the major force for change since the statutory breakthroughs of 1970 and 1972 has not been legislative. It has been presidential. The EPA is the largest federal regulatory agency; it regulates the whole economy; it controls a huge budget; and it imposes enormous costs on American industry, with real consequences for inflation, unemployment, trade, and the nation’s general economic well-being. Because presidents are held directly responsible for all these things, they have had strong incentives to try to exercise control over the EPA. And that is precisely what they have done, Republican and Democrat alike.

Presidential control began even before the EPA was created. The Nixon people knew that their environmental agency would generate costly rules, and they took steps to ensure its decisions could be moderated and controlled in the interests of competing presidential concerns. As a countervailing force, they created a new advisory committee of business executives within the Commerce De-


partment to provide input on EPA initiatives. They also added an enhanced environmental research and analysis component to Commerce for challenging EPA rules on scientific and economic grounds. Once EPA was up and operating, they set up a formal review process through the OMB for assessing the broader economic effects of EPA rules and forcing it to justify its decisions.

The EPA was at a serious disadvantage. It lacked the capacity to carry out sophisticated economic analysis and could not justify its decisions. It responded by building its own team of economic analysts, allowing it to play the game on a more equal footing. But the combination of OMB review and economic analysis had the presidentially intended effect: the EPA now took economic costs into account in formulating rules. This was not contemplated by either the air or water acts and appeared to violate their intent. The presidential hierarchy had imposed a new structure, and it was working to redirect agency behavior.

This continued under Ford and Carter, both of whom were seriously concerned with inflation, unemployment, the energy crisis, and related economic problems of enormous national significance. As outlined in the discussion of OSHA above, both presidents took various steps to bring rulemaking by federal agencies under presidential control. The EPA was an integral part of this, but in practice it was regarded as being in a class by itself. Its rules were likely to be the most costly and far-reaching in their economic impact, and they were given especially critical scrutiny.

During the Reagan administration, the EPA found itself constrained ever more tightly by presidential control as the review process became increasingly strict and centralized in the OMB. At least for the first few years, however, much of this hierarchical direction was unnecessary—for Reagan had used his appointment power to install a team of policymakers at the EPA who were far more dedicated to the president’s mission than the agency’s. The tension that had always existed between White House and EPA officials essentially disappeared.

The president’s agent was EPA administrator Anne Gorsuch, who immediately began to change the EPA’s regulatory strategy to one of cooperation with business and delegation of enforcement responsibilities to the states. Under Gorsuch, the EPA shelved virtually all rules except those designed to reduce the costs of current regulations, abolished the Office of Enforcement to pave the way
have exacted structural concessions that promoted fragmentation, decentralization, procedural complexity, and delay. Presidents have targeted the EPA for strict hierarchical control, layering rules and procedures of their own on top of the already unwieldy hodgepodge of congressional bureaucracy.

The resulting set of arrangements conforms to no one's idea of what an effective bureaucracy ought to look like. However popular the EPA might be with the public, and despite the fact that air and water pollution have been reduced over the years, few would claim the EPA has done an effective job of pursuing its mandate. Deadlines go unmet. Standards are slow in coming and often inappropriate. Enforcement is spotty. Coordination and coherence are intractable problems. But, then, what else should one expect? The EPA is a creature of politics—and in politics, organizations are not designed to be effective.

Conclusion

The Consumer Product Safety Commission, the Occupational Safety and Health Administration, and the Environmental Protection Agency are all prime examples of the new social regulation. In each case, a coalition of groups representing broad social interests triumphed over the narrower, more concentrated interests of business in committing the nation to bold new policies and creating bureaucratic arrangements for carrying them out.

The policies, however, were never explicitly fought over. They were broadly popular among the electorate, and political elites of all stripes, including leaders within the business community, were quick to voice support for governmental action. All this was symbolic. The real battles over policy took place within an arcane realm of politics remote from the concerns of ordinary citizens: the politics of structural choice. The struggles of genuine consequence were about bureaucratic arrangements, about powers and procedures and criteria. These were the choices that would determine whether the bold new policies of social regulation would mean anything at all in practice. Interest groups speaking for the consumer, labor, and environmental movements were counted as victorious not because they committed government to laudable social goals, but because they won most of the battles over structure.

Conclusion: The EPA and the Politics of Structure

From its creation in 1970 to the present, then, the EPA has had to struggle against overwhelming disadvantages in seeking to engineer a better environment. Its supporters, driven by political uncertainty and forced to build on failed institutions, have responded by burdening the EPA with goals and deadlines impossible to meet and procedures so complex little could be done. Its opponents—including, in effect, the defenders of its institutional inheritance—

The bureaucracies of the new social regulation are the products of these battles over structure, and they have to be understood as such. Popular academic theories—whether about regulatory capture or about the technical requirements of organizational effectiveness—doubtless entered the thinking of various participants as they settled on the structures most conducive to their own interests. But by no stretch of the imagination was there any substantial coherence, theoretical or otherwise, to the bureaucracies they created. Nor is there reason to expect any. Bureaucracies do not emerge from analytical exercises in applied theory, nor do they emerge from public-spirited efforts to find the most effective structural means for achieving the goals of public policy. Politics has a way of overwhelming these sorts of “good government” concerns and driving them out—even when the major interest groups claim to be forces for good government themselves.

The three modern agencies explored here were endowed with very different designs. The CPSC is an independent regulatory commission, a structural form that consumerists pressured strongly for, despite their rhetoric over the years about the vulnerability of commissions to capture. Things somehow looked a little different to them once they got in the driver’s seat. OSHA is safely (or so labor expected) located within the Labor Department. But enforcement responsibilities quite central to OSHA’s regulatory functions were delegated to a separate independent agency, the Occupational Safety and Health Review Commission. This was done, quite deliberately, to undermine the effectiveness of OSHA regulation, not to enhance it. The EPA is not within a department at all and is headed by a single administrator rather than a commission, making it fundamentally different from both OSHA and the CPSC. Any notion that these agencies were all crafted according to some coherent body of modern ideas about bureaucratic organization needs a lot of explaining.

Much the same applies if these structural arrangements are assessed one at a time: each is a grotesque combination of organizational features that clearly are not conducive to effective performance. Each sports its own peculiar set of complicated, cumbersome, time-consuming procedures for rulemaking. Each is burdened by a distinctive and troublesome array of judicial checks on its decisions. The EPA suffers from a motley assortment of programmatic structures it inherited from its institutional past and can do little about. OSHA and the EPA are forced into a clumsy, fragmenting reliance on disparate state agencies. And, as components of the executive branch, they are also drawn tightly into the hierarchy of presidential bureaucracy and forced to comply with rules and procedures that fit awkwardly, if at all, with those imposed by Congress.

This is basically what one ought to expect from American government. At the risk of oversimplifying, there are three major reasons that help explain why this is so and thus why public bureaucracy cannot be organized for effective performance. First, even the group that successfully pressures for the creation of a public agency—consumers for the CPSC, labor for OSHA, environmentalists for the EPA—will not demand an effectively designed organization. While it certainly wants a bureaucracy that will do the best job possible, it must also reckon with political uncertainty: its political enemies may soon gain sufficient power to exercise legitimate authority over the winning group’s agency. Something must therefore be done to protect the group’s accomplishments from being captured or destroyed.

Consumers were responding to political uncertainty when they chose an independent commission, a form they had loudly damned in earlier days. Perhaps the most pervasive examples, though, are the host of agency-forcing mechanisms that all the winning groups employed in imposing detailed and onerous requirements on their agencies, the EPA being the extreme case. There is little doubt that these formal constraints were debilitating and a direct cause of ineffective performance. There is also little doubt, especially in the EPA’s case, that many of these agency-forcing requirements were technically unjustified. The experts clearly could have done a much more competent job if they had been granted the discretion to put their expertise to proper use. But the groups had no intention of granting them discretion. By directing bureaucratic behavior themselves via detailed formal requirements—even if these requirements were technically ill advised and took a toll on agency performance—the groups were removing crucial decisions from the realm of future influence by business. This was tremendously valuable, and they were willing to pay a price for it. As a result, they purposely created bizarre

61. For a discussion of this point in application to the EPA, see Ackerman and Hassler, Clean Coal/Dirty Air.
posed layer, and they will be even less well suited to the achievement of congressionally ordained goals.

This is a sorry picture. But if the basic institutions of American democracy are taken pretty much as given, along with the characteristic ways in which they structure the incentives and opportunities of the influential players in and out of government, then there appears to be little that can be done about it. Politicians will be responsive to group interests and demands in making choices about the structure of public bureaucracy. Because democratic politics, by its very nature, raises uncertainties about who will control public bureaucracy, winning groups will have strong incentives to demand protective structures they know are impediments to effective performance. Because American politics, by its very nature, makes compromise a virtual necessity in the legislative process, losing groups will have opportunities to impose structures fully intended to promote failure and conflict. And because presidents are constitutionally empowered and politically induced to control executive agencies, they cannot be stopped from acting to impose structures of their own that may be quite incompatible with those prescribed by Congress.

There is some reason to believe, in fact, that the current administrative tangle may actually get worse over time. Consider the following.

—The kinds of socioeconomic problems government is called upon to address seem to be growing increasingly interdependent and complex. Even reasonably adequate bureaucratic solutions require extensive technical knowledge and professionalism—and the discretion necessary for their productive employment. Yet, in a democratic system fraught with political uncertainty, enemy designers, and contending institutional authorities, severe constraints tend to be placed on bureaucratic discretion for political reasons, and these constraints directly undermine the technical capacity so necessary for effective performance. The greater the technical requirements of society’s problems, the more poorly designed American bureaucracy is likely to prove as it struggles to address them.

—Politics has become much more competitive in the last decade or two, as an interest group system heavily weighted in favor of business has been transformed by groups representing consumers,
women, blacks, environmentalists, and other broad social interests. For good reason, scholars have regarded this as a healthy development for American democracy. As it affects bureaucracy, in particular, group competition has worked against capture, iron triangles, and other monopolistic arrangements, freeing public administration from the grip of business. In all likelihood, however, it has also contributed to the structural disarray that plagues American government: for as the group system has become more competitive, political uncertainty and political compromise have dramatically increased, and, in the politics of structure, both generate a proliferation of structural forms ill suited to effective organization. It is well known that public agencies have become increasingly formalized and proceduralized during the 1970s and 1980s, in part because of restrictions imposed by the courts.\textsuperscript{62} Group competition may well have been at least as consequential. And the more vital and competitive American democracy becomes in the future, the worse its “bureaucracy problem” will get.

—The intrusive structural designs of presidents are only going to become more intrusive over time. The development of an institutional capacity to control the bureaucracy is not something peculiar to Republican presidents, nor is the aggressive use of this capacity going to fade into the past with the Reagan presidency. All modern presidents have strong political incentives to bring the federal bureaucracy under their control, and future presidents of both parties can be expected to protect and elaborate upon the managerial institutions that their predecessors have built.\textsuperscript{63} The layering of presidential bureaucracy upon congressional bureaucracy, then, will continue apace, and will likely become a still more consequential—and organizationally disruptive—feature of American government in the future.

It would be nice to say that there is an easy way out of all this, that the nation can have an effective public bureaucracy if only it wants one. But this is probably not so. A bureaucracy that is structurally unsuited for effective action is precisely the kind of bureaucracy that interest groups and politicians routinely and deliberately create. Most of them, taken singly, would not want it that way. Each actor, if able to design and control a bureaucracy without interference by opposing interests, would create the most effective

\textsuperscript{62} Melnick, \textit{Regulation and the Courts}; and Bryner, \textit{Bureaucratic Discretion}.

\textsuperscript{63} Moe, “The Politicized Presidency.”