

CONTROLLING REGULATORY SPRAWL

PRESIDENTIAL STRATEGIES
FROM NIXON TO REAGAN

HOWARD
BALL



★ ★ ★ ★ **CONTROLLING REGULATORY SPRAWL**

**PRESIDENTIAL STRATEGIES
FROM NIXON TO REAGAN**

**HOWARD
BALL**

Contributions in Political Science, Number 105



GREENWOOD PRESS

Westport, Connecticut • London, England

Library of Congress Cataloging in Publication Data

Ball, Howard, 1937–

Controlling regulatory sprawl.

(Contributions in political science, ISSN 1047-1066 ;
no. 105)

Bibliography: p.

Includes index.

1. Administrative agencies—United States.

2. Administrative procedure—United States. 3. Trade
regulation—United States. 4. Presidents—United
States. 5. United States—Politics and government—
1945– . I. Title. II. Series.

JK469 1984 353'.075 83-8541

ISBN 0-313-23525-2 (lib. bdg.)

Copyright © 1984 by Howard Ball

All rights reserved. No portion of this book may be
reproduced, by any process or technique, without the
express written consent of the publisher.

Library of Congress Catalog Card Number: 83-8541

ISBN: 0-313-23525-2

ISSN: 1047-1066

First published in 1984

Greenwood Press

A division of Congressional Information Service, Inc.

88 Post Road West

Westport, Connecticut 06881

Printed in the United States of America

10 9 8 7 6 5 4 3 2 1

Preface

Numerous scholars, administrators, and politicians have expressed great concern about the recent efforts of the White House to assume greater control over the federal regulatory bureaucracy by providing direction and oversight to the careerists managing the federal agencies. These critics, along with a hostile Congress, have argued that the various regulatory control actions taken by the Nixon, Ford, Carter, and Reagan administrations have deprived midlevel managers in the federal agencies of "significant policymaking discretion."¹ Generally these critics argue that the presidential efforts are unconstitutional actions in violation of the separation-of-powers concept.

There are others, myself included, who strongly believe that federal managers of regulatory agencies should operate with a diminished expectation of power over the direction of national goals and policies, and that national political actors, especially the President, should act aggressively and continuously to ensure that this diminution comes to pass.

At issue is the fundamental question of accountability in a democratic political system. Federal agency managers understand this to mean "answerability and willingness to take responsibility for the broad principles and initiatives set forth by the President."² But practical experience has led the White House to develop mechanisms to ensure that the regulatory agencies are indeed acting in a manner consistent with national policy as established by the Congress and the President.

Congress cannot, and will not, develop the ability to oversee their surrogates, generally due to "poor congressional leadership and factional discipline."³ The federal courts do not have the necessary jurisdictional capability to deal with this essentially "political question." The President and his political appointees heading the federal agencies must

become the critical linkage between the policy formulated by the Congress and the White House and its actual implementation by the federal administrative managers. The executive branch political leadership must coordinate and direct the federal bureaucracy in order to "transform the shadow of the policy into the substance of the program."⁴

The President and his political appointees must balance agency concerns and actions in light of the national agenda that the incumbent is responsible for developing and implementing. Without this type of supervision and control over agency policymaking by the President, there is no assurance that the chief executive and career civil servants (his subordinates) will be moving on the same track relative to national goals and priorities. Without such oversight, the outcome is an insidious transfer of power to nonelected policymakers and a "stunning loss of governmental accountability."⁵

This book examines the character of the shift of power from political policymaking to administrative policymaking and the consequences of this development in American politics over the past three decades. After discussing reasons for the inability of the national legislature to deal with the problem of regulatory sprawl, the book examines the nature of presidential power and the basic strategies and tactics (procedural, substantive, personnel) available to the President in the effort to lead the federal bureaucracy. Finally, the book examines the specific strategies of the presidencies of Richard Nixon, Gerald Ford, Jimmy Carter, and, especially, Ronald Reagan.

Although all four presidents were different in terms of style, personality, and policy orientations, all four have seen the problem of regulatory control by the White House "in remarkably similar terms."⁶ All have tried to walk "the fine line between continual oversight and arbitrary intervention."⁷ Their administrations attempted to oversee federal agency activity through personnel control, deregulation, reorganization efforts, and forms of centralized review of agency actions by voluntary and mandatory oversight machinery.

This last strategy, oversight of agency activity from within the White House, is the most radical of the tactics developed by the White House, especially the Reagan administration's effort to use the Office of Management and Budget (OMB)'s Office of Information and Regulatory Affairs (OIRA) as a formal "preclearer" of all major federal executive agency regulatory proposals. (Chapter 5 focuses on the nature of the controversy that develops, over the toxic chemical labeling standard in this case study, between OMB and the adversely affected federal agency—the Occupational Safety and Health Administration [OSHA].)

The President is obligated to "take care that the laws be faithfully executed." The President, in this regard, must "properly supervise and guide their [executive department agency managers'] construction of the

statutes under which they act to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general power in the President alone."⁸ Neglect of this enduring, continuing responsibility will ultimately allow the "professional crowd in Washington to smother the President."⁹

The President cannot let this happen; the oath of office requires the incumbent to pursue strategies, in the face of heavy criticism and condemnation, that enable the White House to have the final word on major regulatory policies that affect national economic and social life. The occupant of the White House must assume the final responsibility for those agency decisions that will have a major impact on our nation. To allow federal regulatory managers to act in an unchecked manner is to court constitutional disaster.

NOTES

1. Kathryn Newcomer and Glenn Kamber, "Changing the Rules of Rule-making," 11 *Bureaucrat*, Summer 1982, p. 12.
2. Warren Lasko, "Executive Accountability: Will SES Make a Difference," 9 *Bureaucrat*, Fall 1980, p. 4.
3. Robert Gilmour, "Congressional Oversight," 10 *Bureaucrat*, Fall 1981, p. 18.
4. Richard P. Nathan, *The Plot That Failed: Nixon and the Administrative Presidency*, New York: John Wiley and Sons, 1975, p. viii.
5. Gilmour, "Congressional Oversight," p. 18.
6. George Eads, testifying before Dingle Committee Hearings on *The Role of the OMB in Regulatory Control*, March 1981, p. 38.
7. Ibid.
8. *Meyers v. United States*, 272 U.S. 52 (1926).
9. Richard Neustadt, *Presidential Power*, rev. ed., New York: John Wiley and Sons, 1980, p. 26.

Acknowledgments

Many people have assisted me in the development of this book. Staff members on the congressional committees that have been involved in substantive examinations of the role of the White House in regulatory reform have been extremely helpful, in particular Rick Grawey, on the staff of the House Subcommittee on Manpower and Housing, Government Operations Committee. Anonymous officials in OMB and OSHA gave me needed assistance at critical times, as did personnel in the General Accounting Office.

Jane Simpson was extremely valuable to me in bibliographic work on the manuscript. Barbara Sessions did an outstanding job typing the manuscript. I appreciate the assistance of both women very much.

I have had a number of discussions with academic peers, at professional meetings and in numerous offices and coffee shops, on this matter of regulatory oversight. I wish to thank all of them, especially Phil Cooper, Georgia State; Tom Lauth, University of Georgia; Lee Fritschler, Brookings Institution; Jerry Gabris and Ed Clynch, Mississippi State; and Bob Gilmour, University of Connecticut. There were many interesting conversations, some heated, on the question of managing the bureaucracy; I appreciated all these words—some more than others.

Finally, I want to acknowledge the love and support I have received from my wife, Carol, and from my daughters, Sue, Sheryl, and Melissa.

Abbreviations

AEI	American Enterprise Institute
APA	Administrative Procedure Act
CAB	Civil Aeronautics Board
CEA	Council of Economic Advisers
COWPS	Council on Wage and Price Stability
DOJ	Department of Justice
EIS	Economic Impact Statement
EO	executive order
EPA	Environmental Protection Agency
FCC	Federal Communications Commission
FEA	Federal Energy Administration
FMC	Federal Maritime Commission
FPC	Federal Power Commission
FTC	Federal Trade Commission
FY	fiscal year
GAO	General Accounting Office
ICC	Interstate Commerce Commission
IIS	Inflation Impact Statement
IRC	independent regulatory commission
MSDS	material safety data sheet
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OPM	Office of Personnel Management
OSHA	Occupational Safety and Health Administration
OSH Act	Occupational Safety and Health Act
PPM	parts per million
RARG	Regulatory Analysis Review Group

RIA	regulatory impact analysis
SEC	Securities and Exchange Commission
SES	senior executive service
USDA	United States Department of Agriculture
ZBB	zero based budgeting

Contents

Figures and Tables	ix
Preface	xi
Acknowledgments	xv
Abbreviations	xvii
1. Controlling Regulatory Sprawl: Stage Setting	3
2. Curbing Regulatory Sprawl: Some Presidential Problems and Strategies	21
3. Presidential Efforts to Control the Bureaucracy: From Nixon to Carter, 1969-1981	46
4. President Reagan's Strategy for Curbing Regulatory Sprawl	64
5. Implementing EO 12,291: The Politics of the Toxic Chemical Labeling Standard	103
6. Conclusion: On the Need for Continuous Presidential Oversight	124
Appendix A. The Chemical Labeling Controversy: A Chronology of Events, 1971-1982	131
Appendix B. OMB-OSHA Toxic Chemical Controversy: Documents, 1976-1982	133
Bibliography	197
Index	203

Figures and Tables

FIGURES

1. Bureau Chiefs and Their World	14
2. EO 12,291: OMB and Agency Rulemaking	75

TABLES

1. Political Relationships for Policymaking	4
2. Federal Executive Departments and Independent Agencies, 1981-1982	10
3. Major Regulatory Programs by Year of Birth, 1863-1975	30
4. Personal Characteristics and Political Skills of an Effective President	36
5. Change in Employment for Twenty-eight Regulatory Agencies	77
6. Cost Comparison of the January Proposal and the Current Proposal: Total Initial, Annual, and Present Value Costs	109
7. Cost Comparison of Basic Components of the January and Current OSHA Proposals	110

★ ★ ★ ★ **CONTROLLING
REGULATORY
SPRAWL**

1

Controlling Regulatory Sprawl: Stage Setting

Often we didn't know where to put a program—in which agency—and we didn't particularly care where it went, we just wanted to make sure it got enacted.

—Joseph Califano, President Johnson's Domestic Adviser, 1964-1969

One department's watershed project threatens to slow the flow of water to another department's reclamation project downstream.

—Richard M. Nixon, 1970

There are too many agencies, doing too many things, overlapping too often, coordinating too rarely, wasting too much money—and doing too little to solve real problems.

—Jimmy Carter, 1978

In our democratic polity, the Congress and the White House form the core of the policymaking process. "Policy making is made up of several stages of decision making: problem identification; policy formulation; policy adoption; then implementation, evaluation, and, possibly, policy termination."¹ Once a problem has been identified—a very basic political process involving no fewer than five clusters of political actors: interest groups, agencies, subcommittee staffs, the President and his staff, and Congress—policy must then be formulated by the various actors in the political process. The actor's participation in this process will vary according to the type of policy determined to be appropriate to the problem. (Table 1 illustrates the various mixes in the policy formulation process.) Invariably, however, both the White House and the Congress, and the staffs who work in these institutions, are intimately involved in most types of policy formulation; democratic theory and practice call for their involvement.

Table 1
Political Relationships for Policymaking

Policy Type	Primary Actors	Relationship among Actors	Stability of Relationship	Visibility of Decision
Distributive (1)	Congressional subcommittees and committees; executive bureaus; small interest groups	Logrolling (everyone gains)	Stable	Low
Protective regulatory (2)	Congressional subcommittees and committees; full House and Senate; executive agencies; trade associations	Bargaining; compromise	Unstable	Moderate
Redistributive (3)	President and his appointees; committees and/or Congress; largest interest groups (peak associations); "liberals, conservatives"	Ideological and class conflict	Stable	High
Structural	Congressional subcommittees and committees; executive bureaus; small interest groups	Logrolling (everyone gains)	Stable	Low
Strategic	Executive agencies; President	Bargaining; compromise	Unstable	Low until publicized; then low to high
Crisis	President and advisers	Cooperation	Unstable	Low until publicized; then generally high

- (1). Distributive policymaking is that policy that distributes goods and services to specific constituencies in the society.
- (2). Regulatory policymaking includes those programs that limit various forms of activity—commercial and noncommercial. Regulatory policymaking may limit entrance into business or professions; set rates and routes; establish health and safety standards for the workshop; and so forth. It is, essentially, coercive.
- (3). Redistributive policymaking aims at rearranging basic social and economic rewards, for example, the progressive income tax.

Table 1—Continued

Influence of:				
President, Presidency, and Centralized Bureaucracy	Bureaus	Congress as a Whole	Congressional Subcommittees	Private Sector
Low	High	Low (supports sub- committees)	High	High (subsidized groups)
Moderately high	Moderate	Moderately high	Moderate	Moderately high (regulated interests)
High	Moderately low	High	Moderately low	High ("peak associations" representing clusters of interest groups)
Low	High	Low (supports sub- committees)	High	High (subsi- dized groups and corpo- rations)
High	Low	High (often responsive to executive)	Low	Moderate interest groups, corporations)
High	Low	Low	Low	Low

Sources: Randall B. Ripley and Grace A. Franklin, *Congress, the Bureaucracy, and Public Policy*; Homewood, IL: Dorsey Press, 1980, pp. 22-23; and Phillip Cooper, *Public Law and Public Administration*, Palo Alto, CA: Mayfield Publishing Co., 1983, pp. 244-245.

It is in this intimate involvement with policymaking that both the Congress and the President come into direct and continued contact with the federal bureaucracy. For the national legislators, the federal agents and their agencies, created by Congress and directed to exercise delegated powers on behalf of the national legislature, are their surrogates. "Agencies," said the Supreme Court in 1961, "are creatures of Congress. . . . The determinative question is not what an agency thinks it should do but what Congress has said it *can* do."² These surrogates of the Congress should take cues from the legislators and their staffs in order to carry out the policy formulated in the political arena.

The President and his staff have maintained that, given the responsibility of the chief executive to "take care that the laws be faithfully executed," these administrative agents and agencies are under White House control and direction. The President staffs executive agencies with loyal supporters; names the chairpersons of the independent regulatory commissions; has general control over the budgeting and litigation that arises from agency activity; has limited impoundment authority; has reorganization powers; can intervene in regulatory matters; and has general informal powers.³

In recent years, especially since the Nixon administration (1969-1974), there has been a hard struggle between Congress and the President for control of the federal bureaucracy. "As a source of executive-legislative friction, it would be difficult to select an issue more deep-rooted than control of the bureaucracy. . . . Both have claims to a general supervisory power."⁴ In recent decades, however, neither the Congress nor the President has done a substantive job in overseeing and controlling the federal bureaucracy. Lee Witter wrote in 1980 that "unless congressional oversight capability improves, bureaucracies created to administer legislation could readily go their own way, unchecked by the very people who created them."⁵ During the Nixon administration, on the executive side, there was noncompliance with more than half of the President's orders, commands, requests, and directives to the executive branch in 1969-1970. For Presidents who have come into office in recent years, the federal bureaucracy is "the hated enemy yet it is a potential source of power and influence."⁶

One or both of these major political actors must be involved in effective leadership of the federal agencies. There are a wide variety of management techniques available to both the Congress and the President in order to ensure administrative accountability: the Administrative Procedure Act; OMB budget control; OMB legislative clearance; presidential appointment powers; senatorial appointment powers (advise and consent); Department of Justice (DOJ) lawsuit powers; and congressional definition of office and bureaus, definition of powers in the organic statute, determination of compensation for administrative agents, investigatory powers, appropriation powers,