

CONGRESSIONAL ABDICATION: DELEGATION WITHOUT DETAIL AND WITHOUT WAIVER

C. BOYDEN GRAY*

There has been an abdication of sorts by Congress—too much delegation with too little guidance, too little oversight, and with unclear waiver authority, and this delegation has led to enormous uncertainty in the business community. This uncertainty, in turn, is deterring investment, which is a drag on our future economic growth.¹ Silicon Valley has been spared because regulators and Congress take time to catch up to the fast-moving industry. But they are catching up, beginning with privacy regulations.²

The following observations are based on two assumptions: a legislative body must delegate authority before an agency can have authority or an agenda; and, consequently, that neither the legislature nor the agency has complete and total authority. Practically, regulated entities often interact with either Congress or the agency, but there is a difference between interacting with a particular body and interacting with a body that also possesses the power originates with that body to control and create that very interaction. There has been gridlock on spending, with

* Founding Partner, Boyden Gray & Associates PLLC; Special Envoy for Eurasian Energy Diplomacy, 2008–2009; Special Envoy for European Union Affairs, 2008–2009; Ambassador to the European Union, 2006–2007; Counselor to the President, 1989–1993; Legal Counsel to the Vice-President, 1981–1989; former Counsel, Presidential Task Force on Regulatory Relief. This essay was adapted from panel remarks given at the 2012 Federalist Society Annual Student Symposium held March 3, 2012, at Stanford Law School in Palo Alto.

1. See, e.g., Scott Baker, Nick Bloom, & Steven J. Davis, *Has Economic Policy Uncertainty Hampered the Recovery?* 8–9 (Univ. of Chi. Booth Sch. of Bus. Initiative on Global Mkts., Working Paper No. 70, 2012).

2. See Jennifer Valentino-Devries, *Lawmakers Target Google's Tracking*, WALL ST. J., Feb. 18, 2012, <http://online.wsj.com/article/SB10001424052970204059804577229681587016516.html>; Rolfe Winkler, *Facebook and Google Are Risking an Invasion of Privacy From Regulators*, WALL ST. J., Feb. 17, 2012, <http://online.wsj.com/article/SB10001424052970204792404577229613295011198.html>.

Congress seemingly unable to handle long-term spending problems, but not regulation, where Congress has remained very active. Perhaps it should be the other way around.

Professor Barron suggested that the modern problem is “inverse delegation,” in which Congress promulgates comprehensive standards on its own, but then delegates to an agency the discretion to waive, nullify, or modify those standards.³ Perhaps there are examples of that, but certainly the dominant problem is traditional delegation: Too often, Congress over-delegates and provides no detail and no accountability, or an agency asserts delegation with no accountability. The following are just a few examples.

The Wall Street Reform and Consumer Protection (Dodd-Frank) Act⁴ is notoriously complex. In its final form upon Presidential signing, the bill was 848 pages long.⁵ That does not mean that every one of its Titles contains all that much guidance. Consider the Orderly Liquidation Authority (OLA)⁶ and the Consumer Financial Protection Bureau (CFPB).⁷ In the case of the OLA, the legislation provides very little guidance for its operation, such as determining which financial institutions can be placed into this new form of receivership,⁸ and in the case of the CFPB, the legislation offers no meaningful standards for the agency to follow in regulating.⁹ In the case of the OLA, the courts are basically cut out of meaningful review, retaining only very limited appellate review of agency decisions under the highly deferential arbitrary and capricious standard of re-

3. David Barron, Professor, Harvard Law Sch., Remarks at the Thirty-First Annual Federalist Society National Student Symposium (Mar. 2, 2012) (transcript on file with the Harvard Journal of Law & Public Policy).

4. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

5. *Id.*

6. Title II of the Dodd-Frank Act (to be codified in scattered sections of the U.S. Code), creates the OLA, granting the Federal Deposit Insurance Corporation (FDIC) broad powers to “liquidate” financial companies deemed to be in default or danger of default, posing systemic risk to the economy. *Id.* §§ 201–217.

7. Title X creates the CFPB and outlines its authority. *Id.* § 1001–1100H.

8. *See id.* § 203(b) (authorizing liquidation based on broad considerations, including whether the financial company is “in danger of default”).

9. *See id.* § 1031(a) (authorizing the CFPB to take any action to prevent a covered person or service provider from committing or engaging in “unfair, deceptive, or abusive” practices in connection with the provision or offering of a consumer financial product or service).

view.¹⁰ Even under that deferential standard, the court may review only the narrow questions of whether the company was in default or danger of default, and whether the company is a “financial company.”¹¹ It may not review the Treasury Secretary’s conclusion that default would actually threaten financial stability;¹² or whether that threat can be prevented by means other than compulsory liquidation;¹³ or whether liquidation’s effect on creditors and other stakeholders will be “appropriate.”¹⁴ Indeed, a court reviewing the Treasury Secretary’s liquidation decision would not even be able to review the fundamental question of whether the Secretary’s decision was “in accordance with law.”¹⁵

Similarly, Congress also unusually lacks meaningful authority over both the OLA and the CFPB, because both agencies receive independent, non-appropriated funding: the CFPB receives funding from the Federal Reserve,¹⁶ and the OLA receives funding from an internal tax assessment.¹⁷ Title X of the Dodd-Frank Act explicitly prevents Congress from exercising budgetary authority over funding provided by the Federal Re-

10. *See id.* § 202(a)(1)(A)(iii)–(iv), (2)(A)(iv), (2)(B)(iv).

11. *See id.* § 202(a)(1)(A)(iii); *see also id.* § 210(a)(8)(D) (“Except as otherwise provided in this title, no court shall have jurisdiction over—(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any covered financial company for which the Corporation has been appointed receiver, including any assets which the Corporation may acquire from itself as such receiver; or (ii) any claim relating to any act or omission of such covered financial company or the Corporation as receiver.”).

12. *See id.* § 203(b)(2).

13. *See id.* § 203(b)(3).

14. *See id.* § 203(b)(4).

15. *Cf.* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (articulating the typical grant of authority to courts to hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise *not in accordance with law.*”) (emphasis added).

16. Dodd-Frank Act, § 1017(a)(1) (“Each year (or quarter of such year), beginning on the designated transfer date, and each quarter thereafter, the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau . . .”).

17. *Id.* § 210(n)(2) (listing sources of internal funding, including assessments—taxes—of financial companies based upon the financial risk they create, obligation payments to the Treasury by companies that are being liquidated, interest and earnings from investments, and repayments by covered financial transactions).

serve.¹⁸ No enforcement mechanism is identified expressly to prevent the Appropriations Committee of the House or Senate from reviewing the CFPB's budget; an investigation would be unlikely to threaten the Chairmen of the Appropriations Committee in the House or Senate if either were to hold a hearing. Still, the total effect of subtitle E seems to contemplate the establishment of new federal agencies that are immune from interference by legislative or judicial actors under all but the most egregious circumstances.

Second, consider the Patient Protection and Affordable Care Act (PPACA).¹⁹ The Act's waiver provisions have been discussed extensively, but both the individual mandate²⁰ and the Independent Payments Advisory Board (IPAB), also known as the Independent Medicare Advisory Board,²¹ are key parts of the PPACA that have long-term implications, especially for the elderly. Congress's ability to revise the IPAB's recommendations is limited, and in many circumstances, revision requires a three-fifths vote.²² The courts are cut out of any kind of review of the IPAB's decisions.²³ On the whole, section 3403 of the Act is open-ended and concentrates a great deal of power in the IPAB with few checks by Congress and the judiciary.

The Sarbanes-Oxley accounting regulatory legislation,²⁴ probably more than anything else, has led to regulatory uncer-

18. *Id.* § 1017(a)(2)(C) (“[T]he funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.”).

19. Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in various sections of the U.S. Code).

20. 26 U.S.C. § 5000A.

21. *See* PPACA, *supra* note 19, § 3403 (establishing the Independent Medicare Advisory Board); *id.* § 10320(b) (stating that “Any reference . . . to the ‘Independent Medicare Advisory Board’ shall be deemed to be a reference to the ‘Independent Payment Advisory Board.’”).

22. *See* 42 U.S.C. § 1395K(d)(3)(B) (2010) (“It shall not be in order in the Senate or the House of Representatives to consider any bill, resolution, amendment, or conference report (other than pursuant to this section) that would repeal or otherwise change the recommendations of the Board if that change would fail to satisfy the requirements of subparagraphs (A)(i) and (C) of subsection (c)(2).”); *id.* § 3403(a)(1)(d)(3)(D) (codified at 42 U.S.C. § 1395K(d)(3)(D)) (requiring a three-fifths affirmative vote to waive this requirement in the Senate).

23. *See id.* § 1395K(e)(5) (“There shall be no . . . judicial review . . . of the implementation by the Secretary . . . of the recommendations [of the IPAB].”).

24. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.).

tainty and has contributed to a dramatic reduction in the number of initial public offerings (IPOs) in the United States.²⁵ This has not yet affected Silicon Valley, but it may soon. At risk is the post-IPO growth of small companies; cutting the IPOs out will mean that the only exit strategy for these small companies is to merge with a much bigger company. Thus, the opportunities for growth of small companies may be substantially reduced.²⁶

For some statutes, the delegation has been asserted by the agency. For example, the Environmental Protection Agency (EPA) has claimed vast authority over the regulation of greenhouse gases.²⁷ The Clean Air Act (CAA) provides no detail about EPA authority over greenhouse gases because climate change was not covered when the Clean Air Act was enacted and amended. Indeed, Congressman Dingell, who sponsored the Clean Air Act Amendments of 1990, has stated that “[t]he Clear Air Act was not designed to regulate greenhouse gases . . . I know what was intended when we wrote the regulation. I have said from the beginning that such regulation will result in a glorious mess . . .”²⁸ And he is right. Congress did briefly consider climate change in 1990—and it decided not to regulate.²⁹ Setting that question aside, the fact remains that the EPA

25. See, e.g., Rebecca Buckman, *Tougher Venture: IPO Obstacles Hinder Start-Ups*, WALL ST. J., Jan. 25, 2006, http://online.wsj.com/article/SB113815559899455519.html?mod=todays_us_money_and_investing; Alan Patricof, *It's Official: The IPO Market Is Crippled—And It's Hurting Our Country*, BUS. INSIDER, Jan. 12, 2011, <http://www.businessinsider.com/alan-patricof-greycroft-ipo-market-2011-1?op=1>; Sundeep Tucket & Andrew Parker, *Sarbanes-Oxley reforms 'go too far,' says author*, FIN. TIMES, July 8, 2005, <http://www.ft.com/intl/cms/s/0/f5431224-ef43-11d9-8b10-00000e2511c8.html>.

26. Recognizing this problem, Congress recently eased certain Sarbanes-Oxley regulations to encourage small businesses to provide IPOs. See Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306.

27. See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,527–95 (June 3, 2010) (to be codified in 40 C.F.R. pts. 51, 52, 70, and 71, et al.).

28. Press Release, Congressman Dingell, Dingell on EPA Action Concerning Greenhouse Gases (Dec. 7, 2009), available at <http://dingell.house.gov/press-release/dingell-epa-action-concerning-greenhouse-gases>.

29. See Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,926 (Sept. 8, 2003) (“A central issue . . . —whether binding [greenhouse gas] emission limitations should be set—was also considered in the context of the [1990] CAA [A]mendments. As several commenters noted, a Senate committee included in its bill to amend the CAA a provision requiring the EPA to set CO₂ emission standards for motor vehicles. However, that provision was removed from the bill on which the full Senate voted, and the bill eventually en-

has asserted a great deal of authority.³⁰ In order to make its assertion of authority work, the agency is waiving much that is in the statute—for example, converting thresholds of 100 to 250 tons per year, which were clearly not intended to cover carbon dioxide, into thresholds of 75,000 and 100,000 tons per year;³¹ maybe that is a waiver.

None of these examples counts as “inverse delegation” as Professor Barron described it.³² These are examples of congressional delegation with no detail and no waiver, followed by a significant degree of asserted delegation by an agency with no detail and a great deal of waiver. The EPA provides a good example of this asserted delegation model, considering what the EPA has done to twist the statute to regulate greenhouse gases.

Supporting that lack of accountability is the chilling effect that these regulations have had on asserting appellate rights. This chilling effect is really at the heart of the problem, and illustrates the enormous amount of authority that has been given to the executive branch. Consider the Dodd-Frank Act. There are many financial institutions throughout this country that have serious questions about parts of the Dodd-Frank Act and who are eager to challenge the Act on the grounds that it lacks not only judicial review and congressional review, as discussed above, but also Executive Branch review. Although the CFPB is housed in and financed by the Federal Reserve, the Federal Reserve is prohibited from interfering with the CFPB,³³ and the White House can-

acted was silent with regard to motor vehicle CO₂ emission standards. During this same time period, other legislative proposals were made to control [greenhouse gas] emissions, some in the context of energy policy, but none were passed.”) (citations omitted); *see also* 42 U.S.C. § 7403(g) (2006) (calling on EPA to develop “nonregulatory” strategies for reducing CO₂ emissions).

30. For example, in its reasoning for dramatically altering the tonnage controls stipulated in the CAA, the EPA “determined that each definition does not have a literal meaning with respect to the applicability of PSD or title V applies to all GHG sources.” *See id.* at 31,547–48 (refusing to apply the 100–250 ton per year requirement to greenhouse gases). Nevertheless, the EPA applied the Clean Air Act to greenhouse gases, arguing that “congressional intent is clear, and that is to apply PSD and title V to GHG sources generally . . . [because of] the broad phrasing of the applicability provisions.” *Id.* at 31,048.

31. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,520–23.

32. *See* Barron, *supra* note 3.

33. *See, e.g.,* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), at § 1017(a)(1) (mandating that Federal Reserve to accede to the CFPB’s budget request).

not exert control over the CFPB because the CFPB is an independent agency with a director appointed to a five-year term and only removable for cause.³⁴ As such, the Dodd-Frank Act would be subject to a robust constitutional challenge. But financial institutions, worried about agency retaliation, are afraid of being identified with such an effort. Finding private plaintiffs has not been easy. It is disturbing to think that people have been scared out of exercising their appellate rights.

There is a very long story in connection with climate change. The story is not just about climate change; it has to do with corporate average fuel economy and agencies competing over which one has the right to control the efficiency of automobiles. The long-standing delegation of authority has been to the Department of Transportation with the principal purpose of reducing oil imports.³⁵ These policy goals have been realized; the United States is importing considerably less now than it was just five years ago.³⁶ Part of reducing oil imports actually has been increased blending of ethanol,³⁷ which has been unduly criticized.³⁸ Simply getting rid of ethanol, according to some, could help the United States balance the budget and get rid of its debt.³⁹ Ethanol is even blamed for the Arab Spring.⁴⁰ Biofuels may not be all that bad, though. At east they have helped reduce the United States' imports of oil.⁴¹

Consider the effort to regulate carbon dioxide as a pollutant.⁴² The initial environmentalist litigation demanding greenhouse gas regulations and the subsequent regulatory program created by the Obama Administration required an immense

34. *Id.* at §§ 1011(a), 1011(c).

35. See Energy Policy and Conservation Act of 1975, 42 U.S.C. § 6201–6422 (2006).

36. Clifford Krauss & Eric Lipton, *U.S. Inches Toward Goal of Energy Independence*, N.Y. TIMES, Mar. 22, 2012, <http://www.nytimes.com/2012/03/23/business/energy-environment/inching-toward-energy-independence-in-america.html?pagewanted=all>.

37. *Id.*

38. See Editorial, *One Bad Energy Subsidy Expires*, N.Y. TIMES, Jan. 6, 2012, <http://www.nytimes.com/2012/01/07/opinion/one-bad-energy-subsidy-expires.html>.

39. See, e.g., 157 Cong. Rec. S4262–63 (daily ed. June 30, 2011) (statement of Sen. Benjamin Cardin).

40. William Pentland, *The Coming Food Crisis: Blame Ethanol?*, FORBES, July 28, 2012, <http://www.forbes.com/sites/williampentland/2012/07/28/the-coming-food-crisis-blame-ethanol/print/>.

41. Krauss & Lipton, *supra* note 36.

42. *Massachusetts v. EPA*, 549 U.S. 497, 502, 528–29 (2007).

amount of coordination among various stakeholder groups. Working out the relationship between California, which has its own separate Clean Air Act regime, Detroit, and Washington, D.C., required a grand bargain. Part of this bargain was that the automobile companies would not challenge whatever came out of the rulemaking process in court.⁴³ That is an unusual deal, which may not even be enforceable. If an automobile company tried to challenge the deal in court, they would probably succeed. But it is unclear what price they would pay for not abiding by their agreement. Here to, regulatory intimidation is at work, which, as I have noted, has evolved significantly in recent years.

Finally, consider some other elements of capture. First, the White House Counsel's Office once had a saying: "It is easy to rent a congressman, much harder to rent a subcommittee, very difficult to get a whole committee, and impossible to get the White House." Still, given the congressional turnover, the competing considerations, and that many congressmen go home whereas bureaucrats tend to stay in Washington, the problem of capture by the regulated interests is a bigger problem within agencies than within Congress. That is not to say that Congress is free of special interest influence, but that the problem of agency capture is real. This tendency demands more congressional oversight, and the courts must be very vigilant about this problem. In particular, the D.C. Circuit is good at ensuring a level procedural playing field, and that is one of the key roles the D.C. Circuit plays: avoiding procedural favoritism in the resolution of conflicts with federal agencies.⁴⁴ But the D.C. Cir-

43. See Letter from Michael J. Stanton, President & CEO, Global Automakers, to Ray LaHood, Sec'y, U.S. Dep't of Transp., & Lisa Jackson, Admin., EPA (July 29, 2011), available at <http://www.epa.gov/oms/climate/letters/global-automakers-commitment-ltr.pdf>.

44. See, e.g., Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look At Agency Policy Statements*, 31 WAKE FOREST L. REV. 667, 667 (1996) (asserting that "courts' reviewing power is the citizen's bulwark against improper and abusive agency actions."); Note, *Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A., Inc. v. NRDC*, 87 COLUM. L. REV. 986, 988 (describing the contention that judicial review is "necessary to check agency aggrandizement and insure the implementation of congressional will"). Given the outsized role the D.C. Circuit plays in the development of administrative law, see, e.g., Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L. REV. 779, 781 (2002), this role falls to the D.C. Circuit more than perhaps any other court.

cuit's caseload is falling,⁴⁵ despite the recent increase in regulation, raising questions about the chilling effect on the exercise of appellate rights.

Second, the problem with capture is the "revolving door." It is what happens in an agency with the people who hope to get jobs—not worked out in advance, of course, because that would be criminal—but worked out nevertheless with a particular industry or interest group.⁴⁶ As such, they favor the interest group with whom they hope to gain employment as they are on their way out or preparing their way out. Jack Abramoff, formerly the high practitioner of the revolving door, might be very unpopular, but he is beginning to make this point very forcefully in Washington now that he is out of jail.⁴⁷ As the Wall Street bailouts and the AIG bailout demonstrate, the problem of capture and the revolving door is very serious. Finally, the non-delegation doctrine is not completely dead. In *Whitman v. American Trucking Assns, Inc.*, 531 U.S. 457 (2001), Justice Scalia rewrote the Clean Air Act statute by interpreting what "requisite" meant based on a statement made by the Solicitor General during oral argument.⁴⁸ In his opinion for the Court, Justice Scalia quoted from the oral argument and said, in connection with the limits on setting national air standards, that "requisite" meant "sufficient, but not more than necessary."⁴⁹ In that respect, it was disappointing to see the White House pull the controversial ozone rule, because it would have made

45. See Hon. Douglas H. Ginsburg, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, 10 GEO. J. L. & PUB. POL'Y 1, 2 (2012) ("The number of cases filed in the D.C. Circuit has declined more or less continuously over the last twenty-five years. More surprisingly, the number of administrative law cases filed in our court has also declined over that period, again consistently.") (citations omitted).

46. See, e.g., Edna Earle Vass Johnson, *Agency "Capture": The "Revolving Door" Between Regulated Industries And Their Regulating Agencies*, 18 U. RICH. L. REV. 95 (1983); Robert H. Mundheim, *Conflict of Interest and the Former Government Employee: Rethinking the Revolving Door*, 14 CREIGHTON L. REV. 707 (1980).

47. Paul Blumenthal, *Jack Abramoff As Reformer Raises Caution In Former Foes*, HUFFINGTON POST, Nov. 16, 2011, http://www.huffingtonpost.com/2011/11/16/jack-abramoff-reform-lobbying-campaign-finance_n_1097267.html.

48. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001); Linda Greenhouse, *E.P.A.'s Right to Set Air Rules Wins Supreme Court Backing*, N.Y. TIMES, Feb. 28, 2001, <http://www.nytimes.com/2001/02/28/us/epa-s-right-to-set-air-rules-wins-supreme-court-backing.html?pagewanted=all&src=pm>.

49. *Am. Trucking Ass'ns*, 531 U.S. at 473 (quoting Transcript of Oral Argument at 7, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (No. 99-1257)).

a good test of these limits.⁵⁰ The EPA's estimates of the benefits for the lower end of the standards were admittedly speculative.⁵¹ This presents an interesting issue: how can something be speculative and also necessary?

In Dodd-Frank and other statutes, agencies enjoy too much authority, and too little accountability. Ultimately, this will strongly encourage "crony capitalism," undermining democratic values and the rule of law.

50. John M. Broder, *Obama Administration Abandons Stricter Air-Quality Rules*, N.Y. TIMES, Sept. 2, 2011, <http://www.nytimes.com/2011/09/03/science/earth/03air.html?pagewanted=all>.

51. EPA, *Regulatory Impact Analysis for the Proposed Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units 5-17* (2012).