7-17-2013

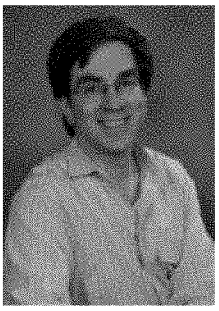
Review: Assessing Agency Legitimacy

Jonathan Weinberg
Wayne State University, weinberg@wayne.edu

Assessing Agency Legitimacy

http://adlaw.jotwell.com/assessing-agency-legitimacy/

David Markell and Emily Hammond Meazell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 **Harv. Envtl. L. Rev.** (forthcoming 2013), available at SSRN.



Jonathan Weinberg

The great question underlying American administrative law is that of agency legitimacy. Administrative agencies, whose heads don't answer to the voters and whose decisions for the most part are not subject to effective popular checks, have dubious democratic bona fides. Where do they get off, then, mandating rules of conduct and imposing punishments backed up by the coercive power of the state? A crucial part of the answer, in American administrative-law thinking, has rested on the institution of judicial review: We can trust agencies to exercise their delegated authority, the classic argument runs, and we can treat that authority as legitimate, because we can rely on courts to take action if the agencies step out of line.

But as administrative-law scholars well know, the judicial-review focus has limitations. David Markell and Emily Hammond Meazell, in their paper *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, note that few administrative decisions ever go before a court. Judicial review of most agency decisions is neither cost-effective nor practical; review of others is precluded by law. This, the authors urge at the beginning of their paper, is one of the "great paradoxes of administrative law," raising the question, "What else is there to legitimize unreviewable agency action?"

Markell and Meazell respond by studying the universe of 58 citizen petitions, filed over the past quarter-century, asking that EPA withdraw a state's authorization to administer a federal environmental-law program. There's reason to believe that these petitions would be ineffective, and that the agency's response typically would be desultory. For one thing, it would be impractical—almost unthinkable—for the agency ever to grant such a petition: if EPA ever actually withdrew state authority to administer a regulatory program, it would have to take over administration of the program itself. The agency doesn't have the resources to do that sort of thing. For another, a decision by EPA to ignore such a petition, or to investigate it only half-heartedly before moving on to other concerns, wouldn't be subject to judicial review. *Heckler v. Chaney* provides secure protection against judicial oversight in these cases, and leaves the agency free to do what it will.

But that's not what the authors found. Their study finds that interested parties have filed petitions at a steady pace of about three per year for the past 16 years; the typical petition is attorney-written and legally sophisticated, and includes a local environmental nonprofit among its signatories. EPA during the study period "virtually never simply denied a petition or ignored it." Rather, it responded by launching an informal investigation into the concerns the petition raised. With respect to more than 80% of those concerns, EPA generated some document or set of documents acknowledging the concern and describing the outcome it

reached. With respect to about 70%, it explained its decision in light of the relevant legal standards and the data available to it. And with respect to just over half of the concerns raised by the petitions, EPA's process (informal investigation, followed by negotiations with the state) resulted in a formal commitment by the state to make measurable responsive changes in its program administration. The authors identify all of these (responsiveness, reason-giving, and results) as key internal metrics for agency legitimacy.

There are limits to Markell and Meazell's data, and the authors acknowledge them. They code, for example, whether the agency negotiated an agreement with the state; they were unable to code whether it was a *good* agreement. The findings are nonetheless important.

What has caused EPA to internalize legitimacy principles as well as it has, engaging in public, reasoned decision-making coupled with reason-giving even in the absence of statutory constraint or judicial review? And why do withdrawal petitions work at all, given that actual withdrawal isn't a credible threat? The authors suggest tentative answers. They note EPA's agency culture, its network of regional offices (so that petitions are filed against a backdrop of relationships with local actors), and EPA's need to support its political legitimacy in the eyes of local stakeholders. The petition mechanism puts local environmental actors at the table with governments; it gives EPA political cover, and targets of opportunity, in its dealings with state actors; and it gives actors inside state government political cover in their dealings with each other, so that state-government actors seeking change can point to the EPA investigation as forcing it. (The withdrawal proceeding thus has a lot in common with the AALS re-accreditation process, including the opportunity for the accreditor to exert useful pressure even though ultimate denial is implausible.)

Markell and Meazell's paper is better at raising questions than at providing answers, but two things make it a thought-provoking and admirable one. One is the set of questions it addresses: What makes agency action legitimate? How can we work our way through to new thinking about agency legitimacy? What makes some agency processes work better—or less well—than others? The second is its eagerness to connect theory with practice. Rather than articulating a theoretical framework and stopping there, the authors use their framework to structure their examination of actual agency process, to see how well the data fits the theory. This is good work. We need more of it.

Cite as: Jonathan Weinberg, *Assessing Agency Legitimacy*, JOTWELL (July 17, 2013) (reviewing David Markell and Emily Hammond Meazell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 **Harv. Envtl. L. Rev.** (forthcoming 2013), available at SSRN), http://adlaw.jotwell.com/assessing-agency-legitimacy/.