Delegation and Accountability*

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Abstract

Critics of legislative delegation to the bureaucracy worry that delegation diminishes electoral accountability and exacerbates legislative shirking. This paper provides equilibrium foundations for such concerns in a model in which legislators are heterogeneous in their policy preferences and bureaucrats have expertise concerning the policies that best serve the public. We further use our model to address debates concerning the welfare consequence of judicial enforcement of the nondelegation doctrine. We find that when the risk of special-interest capture of incumbent legislators is high and bureaucratic expertise is limited, a ban on delegation would benefit our model's representative voter; otherwise, the representative voter gains from delegation despite the fact that it can be exploited by unscrupulous politicians.

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Can legislators control bureaucrats' exercise of delegated authority? This question has motivated the bulk of positive studies of congressional-bureaucratic relations published in the last 30 years.[1] But normative critiques of delegation evince a different concern. "When the lawmakers we elect have others make the law," writes David Schoenbrod (1993, 3), "the people lose." He claims that

> [d]elegation can shield our elected lawmakers from blame for harming the public not only when a regulatory program...serves no legitimate public purpose, but also when a regulatory program should serve an important public purpose. Then the consequences of delegation for the public can be even greater because lawmakers can use delegation to escape blame both for failing to achieve that purpose and for imposing unnecessary costs. (Schoenbrod 1993, 9)

For scholars such as Schoenbrod (1993), Aranson, Gellhorn, and Robinson (1982), Lowi (1979), Fiorina (1982, 1989), Ely (1993), and Redish (1995), the degree to which legislators have control over delegated policymaking is beside the point. What worries these writers instead is delegation's effect on the ability of citizens to control legislators and, by extension, the government as a whole. They argue that by delegating, legislators shield themselves from the risks associated with endorsing a particular course of action and mute the degree to which the public holds them accountable for policy outcomes.

Despite their neglect by modern political science, these critiques have been a vital element of American political debate since the beginning of the 20th century, and concerns about delegation's effects on accountability play a major role in debates over judicial control of the administrative state (Bressman 2000; Farina 1989; Lawson 2002; Schiller 2005; Stuart 1975). Most importantly, the claim that delegation diminishes electoral accountability has been a consistent element of arguments for judicial enforcement of the "nondelegation doctrine," whereby federal judges would strike down statutes that delegate important policy choices

[1]Examples include Calvert, McCubbins, and Weingast 1989, McCubbins, Noll, and Weingast 1987, and Epstein and O'Halloran 1999a.

to the executive without articulating meaningful restrictions on how those choices may be resolved.[2] Although most legal scholars argue that no such doctrine has been regularly enforced, nondelegation challenges to statutes reach the Supreme Court on a regular basis,[3] and calls for the doctrine's adoption continue to appear in popular rhetoric. For instance, columnist George Will, writing in the *Washington Post* in March 2009, proposed that a nondelegation challenge be made to the Troubled Assets Relief Program (TARP), as it makes "executive branch officials into legislators." Implementation of programs as ambitious as TARP, he claims, requires delegation to the executive, and delegation necessarily diminishes "legislative power and with it accountability."

Our goal in this paper is to clarify the compatibility of accountability-based critiques of delegation with current approaches to delegation and accountability in political science. The critiques on which we focus rest on extraordinarily strong positive claims. Legislators, the critics claim, are so assured of the inability of voters to recognize their influence on bureaucratic choices that they regularly enact vague mandates that delegate lawmaking authority to the bureaucracy precisely for the purpose of creating programs they know will transfer wealth from majorities of voters to special interests (Schoenbrod 1993). Moreover, according to these critiques, legislators employ this sleight-of-hand so frequently that a ban on broad delegation would substantially reduce the volume of transfers to special interests (Aaronson, Gellhorn, and Robinson 1982), as legislators would be unwilling to assume the political risks of mandating these transfers through specific legislation.

Though critiques like the above are common, they have not gone unchallenged (Epstein and O'Halloran 1999b; Mashaw 1985; Posner and Vermuele 2002). For instance, Posner and

[2]The nondelegation doctrine encompasses the principle that "Congress may not constitutionally delegate its legislative power to another branch of Government" – a principle derived from Article I, Section 1, of the U.S. Constitution (which states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States"). See pages 164-165 of *Touby v. United States*, 500 U.S. 160 (1990). While almost all legal experts interpret the Constitution to allow for some limited form of delegation, the dividing line between constitutionally permissible and impermissible delegation is a matter of great contention in the legal community.

[3]Most recently in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001). For a review of such nondelegation challenges, see Farina 1989, pages 476-488.

Vermuele (2002) question the extent to which politicians are able to abuse delegation yet escape responsibility for doing so, arguing that

> [w]hen Congress... delegates authority to an agency, the media should report to the public that Congress has created a mechanism that will make transfers to interest groups. Clearly, such a statute is bad – just as bad as a statute that directly makes a transfer to interest groups – and the public should punish Congress for delegating as much as it punishes Congress for enacting the direct transfer. (Posner and Vermuele 2002, 1746)

By extending a standard model of electoral agency, we are able to establish that there are in fact plausible assumptions under which legislators can use delegation to diminish the electoral consequences of policies that harm the public. Indeed, under some conditions, legislators in the model act just as the critics of delegation predict, using delegation to transfer wealth to special interests when they would not do so in the absence of the option to delegate. Further, we specify conditions under which the critics' call for a nondelegation doctrine is justified. Prohibiting delegation in these cases improves both the public's average payoff from policy *and* the public's ability to screen out incumbents who are captured by special interests.

While existing rational choice approaches to delegation and accountability explicitly assume that delegation diminishes the degree to which the public holds elected officials responsible for policy outcomes (e.g., Aranson, Gellhorn, and Robinson 1982; Fiorina 1982), our main results are derived within an equilibrium framework in which no such assumption is made. Instead, we examine a setting in which a representative voter's electoral responses to delegation are governed by beliefs consistent with correct conjectures about legislators' use of delegation. Indeed, in the model we study, legislators have complete control over bureaucratic choices *and the representative voter knows this.* Our conclusion that delegation enables incumbents to pursue policies contrary to the public interest with relative impunity, then, is not driven by voter beliefs assumed a priori to be incorrect and impervious to repeated

exploitation.

In our model, politicians must decide whether to pursue a policy that may or may not benefit a representative voter but that is known to benefit a special interest. Importantly, politicians in our setup vary in their policy goals: some are "captured" – i.e., they share the special interest's policy goals – while other are "public spirited" – i.e., they share the public's policy goals. A politician's true policy preferences, however, are private information. Politicians have no expertise regarding whether the policy in question benefits the public, but they can delegate to a bureaucrat who does. In an equilibrium, both public-spirited and captured incumbents delegate, the former to utilize the bureaucrat's expertise and the latter to make "stealth" transfers to the special interest.

Although delegation is often exploited by captured politicians in the models we study, restrictions on delegation would not always make voters better off. Indeed, we show that delegation can be exploited by legislators in equilibrium *only because it is sometimes used in equilibrium to make voters better off.* Hence, if a nondelegation doctrine would prevent exploitation by captured legislators, it would also prevent delegations by public-spirited legislators that improve voter welfare. Arguments for a nondelegation doctrine that appeal to considerations of voter welfare, then, must rely on claims about the relative magnitude of these two effects.

In the next section, we review the elements of the accountability-based critiques of delegation that motivate this study. We then present our baseline model and explain its relationship to these critiques. Sections 3 and 4 present the two main results of the paper. In Section 3, we show that asymmetric information about politicians' motivations in combination with non-transparencies in delegated policymaking lead to equilibrium exploitation of delegation that electoral incentives fail to eliminate. However, in Section 4, we argue that such equilibrium exploitation of delegation is not in and of itself sufficient to justify a nondelegation doctrine. Section 5 discusses the robustness of our main results to alternative assumptions about the process of delegated policymaking, and Section 6 concludes.

1 Accountability-Based Critiques of Delegation

Although they rest on a variety of positive and normative premises, critiques of delegation have a common target – legislation that delegates highly consequential choices to the executive without setting meaningful restrictions on how the executive may resolve those choices. Schoenbrod (1993) points to the Clean Air Act as an example. That statute requires a federal administrator to set ambient air quality standards, which in turn are to be achieved by a combination of state and federal regulations, backed up by judicial enforcement. The statute is not precise, however, regarding the pollutants the administrator may target and the severity of limits the administrator may set on those pollutants.[4] As such, Schoenbrod (1993, 73) concludes that "Congress sidestepped the two hardest and most fundamental choices: how clean to make the air, and who should bear the cleanup burden."

Our analysis focuses on two especially compelling concerns about such vague statutes. The first is that vague delegation allows legislators to implement costly or unpopular policies with relative *impunity*. As John Hart Ely writes,

> How much more comfortable it must be simply to vote in favor of a bill calling for safe cars, clean air, or nondiscrimination, and to leave to others the chore of fleshing out what such a mandate might mean. How much safer, too – and here we get to the nub. For the fact seems to be that on most hard issues our representatives quite shrewdly prefer not to have to stand up and be counted but rather to let some executive-branch bureaucrat... "take the inevitable political heat." (Ely 1980, 131-32)

In other words, if an unpopular or harmful choice is made by a bureaucrat under vague statutory authority, legislators avoid the electoral consequences that (implicitly, in Ely's account) they would have borne if they had instead passed a statute that specifically required

[4]The statute merely states that the administrator must choose standards that "are requisite to protect the public health" and "public welfare." See Sections 109(b)(1) and 109(b)(2) of the Clean Air Act.

that choice.[5]

The second concern is that the option to delegate results in increased *shirking* on the part of incumbents. According to delegation's detractors, the impunity created by broad language is so reliable that legislators routinely exploit it to pursue policies that go against the public interest. In particular, legislators use broad delegation as a tool for meeting the demands of special interests without risking electoral punishment by the majorities of voters who must fund those demands. Schoenbrod (1993) points to the agricultural supply quotas issued by the Department of Agriculture under the authority of the Agricultural Adjustment Act of 1933 as an example. Legislators, Schoenbrod (1993, 55) claims, appeal "to agency officials in private" to use their statutorily-granted authority to set highly restrictive quotas. The legislation that grants that authority, however, ensures that legislators are "immune from political harm," since the legislation is "framed in terms of attractive abstractions" such as "leaving agricultural policy to the experts in the Department of Agriculture" (Schoenbrod 1993, 55). This sort of reasoning leads critics of delegation to hypothesize that a judicially enforced nondelegation doctrine "should reduce the use of regulation to produce private benefits... at collective cost" (Aaronson, Gellhorn, and Robinson 1982, 63).

2 Model

In this section, our aim is to provide micro-foundations for the concerns of delegation's detractors – i.e., delegation exacerbates legislative shirking and enables legislators to shirk with relative impunity. In the model we develop, an incumbent must choose between making policy directly or delegating to a bureaucrat who has expertise about which policy alternative most benefits the public. In an equilibrium of the model, public-spirited incumbents delegate in order to apply this expertise in the interest of a representative voter, while captured

[5]Fiorina (1989, 46-47) makes a similar claim. Vague legislative drafting, he claims, leads to bureaucratic decisions that anger various constituencies. Legislators please constituents by complaining about and intervening in those decisions, but are not punished for enacting the statutes that authorized those decisions in the first place.

incumbents delegate in a manner that purely benefits a special interest. The problem for the voter is that non-transparencies in delegated policymaking make the former type of delegation indistinguishable from the latter. As will be seen, in the equilibrium we construct, the worst fears of delegation's critics obtain. By delegating, incumbents are able to act against the public interest with relative impunity. Moreover, under a range of conditions, allowing legislators to delegate increases legislative shirking. In short, both of the critics' concerns – *impunity* and *shirking* – are operative.

2.1 Policy and Preferences

We consider a setting in which a single incumbent legislator must decided whether to transfer resources from a representative voter to a special interest.[6] While agnostic about the form this transfer takes (e.g., subsidy, quota, cash grant, etc.), we assume that the transfer is more likely than not to harm the public. Formally, let p denote the policy selected, where $p = t$ if the transfer is made and $p = n$ if the transfers is not made. The voter's payoff is given by

$$u_V(p, \omega) = \begin{cases} 1, & \text{if } p = \omega \\ 0, & \text{otherwise} \end{cases},$$

where $\omega \in \{n, t\}$ is the underlying state of the world. Hence, the transfer benefits the public if and only if $\omega = t$. The prior probability that $\omega = n$ is $q \in (\frac{1}{2}, 1)$. This means that while there is positive probability that the public benefits from the transfer, in expectation the public is worse off when the transfer is made.

Allowing for the possibility that the public might benefit from the transfer may appear

[6]The setting we study is based on one developed by Coate and Morris (1995). However, there are a number differences between their framework and the one here, and two are especially important. First, in their model, politicians have private information about the optimal policy, while in ours, they do not. Second, they use their model to explore a completely different set of questions. Their analysis concerns whether transfers to special interests are made in an efficient manner in equilibrium. Our model does not speak to the efficiency of transfers. Instead, we are interested in whether allowing politicians to compensate for their lack of expertise by delegating benefits the public, despite non-transparencies in delegated policymaking that could hinder electoral accountability.

inconsistent with the premises on which accountability-based critiques of delegation rest. For instance, one might argue that the agricultural supply quotas that Schoenbrod (1993) blames on delegation never benefit the public. We address this concern later in the paper by studying the limiting case in which $q = 1$ – i.e., the case in which the transfer is known to always the harm the voter. For now, note that one can point to any number of policies that have the characteristics we model here. Government provision of public goods, for instance, typically necessitates the purchase of goods and services from private contractors on a massive scale. Such projects benefit the firms that win the contracts, but may or may not benefit the representative taxpayer in the net. Alternatively, consider the Congress's response to the financial crisis of 2008. When deciding whether to pass TARP, thereby giving the Treasury Department the authority to purchase troubled assets from distressed institutions, it seemed clear that this would benefit bank executives and bank creditors. But there was uncertainty as to whether the effects of such a bailout on credit markets, net of the costs, would benefit everyone else.

Returning to our model's setup, the incumbent legislator is motivated in part by policy preferences and in part by a concern for gaining re-election. In addition, we assume incumbents are heterogeneous in their policy preferences: some are *public spirited* and others are *captured*. We specify the timing of policy choices and re-election in detail below. For now, it suffices to say that after policy choices are made, the legislator either gains re-election or does not. A public-spirited legislator shares the representative voter's state-contingent policy preferences. Hence, the public-spirited legislator's payoffs are given by

$$u_V(p, \omega) + \delta \times \begin{cases} 1, & \text{if he is re-elected} \\ 0, & \text{otherwise} \end{cases},$$

where $\delta > 0$. Hence, δ is a parameter that captures the weight the legislator applies to holding office in the future relative to current policy. A captured legislator also puts a weight of δ on re-election, but wishes to make the transfer to the special interest regardless

of whether doing so benefits the voter. His payoff is

$$\begin{cases} 1+\delta, & \text{if } p=t \text{ and he is reelected} \\ 0+\delta, & \text{if } p=n \text{ and he is reelected} \\ 1, & \text{if } p=t \text{ and he is not reelected} \\ 0, & \text{otherwise} \end{cases}.$$

We assume that a politician's type – i.e., whether he is public spirited or captured – is private information. We use π to label the common-knowledge prior probability that the incumbent is public spirited.

2.2 When Delegation is Not Available

Ultimately, we use our model to compare voter welfare in a world in which the legislator is not allowed to delegate to a world in which delegation is permitted. Our framework is easiest to understand by first considering the former. If the legislator cannot delegate, then he must specify policy directly. The voter observes this choice (but not the underlying state) and updates her belief about the probability that the legislator is public spirited.[7] We leave in reduced form the map from the voter's beliefs to the probability of re-election. Formally, we model policymaking in the absence of the option to delegate as the following extensive form game:

1. Nature chooses whether the incumbent is public spirited or captured. She reveals her choice only to the incumbent. Nature also chooses whether the transfer benefits the voter: she chooses the state of the world ω. No one observes the realization of ω.

2. The incumbent chooses policy $p \in \{n, t\}$.

3. The voter observes p and then updates her beliefs about the incumbent being public

[7] In effect, we are considering a setting in which it takes time for the public to learn the consequences of a given policy course.

spirited. (The voter does not observe ω or her utility level until after the election.) The incumbent is then re-elected with probability $F(\mu)$, where μ is the voter's updated belief that the incumbent is public spirited, and F is a strictly increasing and continuous function defined on $[0, 1]$.

4. All actors receive their respective payoffs.

2.3 When Delegation is Available

When delegation is available, the legislator chooses whether to implement policy directly through specific legislation or to delegate policymaking authority to a bureaucrat. If the legislator writes specific legislation, events are described as above. Delegating, on the other hand, has three important effects on the policy process.

First, delegation allows for the application of expertise to the decision of whether to transfer the resource to the special interest – expertise which cannot be applied when the legislator specifies policy directly.[8] Formally, if the legislator determines policy via specific legislation, he must do so knowing only the prior distribution on the state of the world – i.e., that $\omega = n$ with probability q. In contrast, if he delegates, then (de jure) authority over policy is granted to a bureaucrat. This bureaucrat observes a signal $s \in \{n, t\}$ that is imperfectly correlated with the underlying state and subsequently chooses policy. Conditional on the realization of ω, $s = \omega$ with probability $\gamma \in (q, 1)$. The restriction that $\gamma > q$ implies that the bureaucrat maximizes the voter's welfare by implementing the transfer if and only if $s = t$.[9]

Second, we assume that the legislator has the ability to influence how the bureaucrat conditions her choice on the realization of her signal.[10] In the first iteration of the model

[8]This premise is largely consistent with a large body of scholarship on delegation. See, for example, Epstein and O'Halloran 1999a.

[9]In contrast, if $\gamma < q$, then regardless of the bureaucrat's signal, the voter's welfare would be maximized by the bureaucrat not implementing the transfer.

[10]The view that legislators can influence bureaucratic policy choices, even in the face of asymmetric information, is standard in game-theoretic work on delegation (see Epstein and O'Hallaron 1999a, pages 23-29, and citations therein).

we present, this influence takes an especially stark form. If the legislator delegates, then he may grant the policy choice to one of two types of bureaucrats. One type of bureaucrat is public spirited. This type shares the voter's state-contingent policy preferences. The other type is captured: she prefers to make the transfer to the special interest regardless of the state. Both types care only about policy.

Third, delegated policymaking is relatively non-transparent. For now, we impose an especially extreme form of non-transparency, assuming that the voter never learns the bureaucrat's signal of the state, type, or policy choice. Thus, if the legislator delegates, the voter cannot observe the information upon which the bureaucrat's policy decision is based, the actions the legislator takes to influence bureaucratic behavior, or the policy chosen.

Each of our assumptions about delegated policymaking – expertise, legislative control, and non-transparency – plays an important role in our analysis. They are, of course, disputable and we thus revisit them later. For now, it is worth noting that there are a number of variations on these assumptions under which qualitatively similar results to the ones which we derive obtain. For instance, our central insights go through even when the public observes the bureaucrat's policy choice (see Section 5). Our initial version is simply the most tractable of these variations. Further, our assumptions concerning delegated policymaking are consistent with the premises on which existing accountability-based critiques of delegation rest. One can think of our analysis, then, as setting aside questions about the plausibility of these assumptions, and focusing instead on whether these assumptions, if true, would support the key conclusions of delegation's detractors.

Formally, we represent policymaking when delegation is available as the following extensive form game:

1. Nature chooses whether the incumbent is public spirited or captured. She reveals her choice only to the incumbent. Nature also chooses the state of the world ω. No one observes the realization of ω.

2. The incumbent chooses whether to delegate. If the incumbent does not delegate, he

chooses policy $p \in \{n, t\}$ directly; in contrast, when the incumbent delegates, instead of determining policy directly, he chooses whether to delegate to a public-spirited or captured bureaucrat. The bureaucrat chosen observes a signal of the state of the world $s \in \{n, t\}$ and subsequently chooses policy $p \in \{n, t\}$.

3. Whereas the voter observes the policy choice made when the politician chooses policy directly, policymaking under delegation is non-transparent: the voter observes only whether the incumbent has delegated; she does not observe the type of bureaucrat chosen, the bureaucrat's signal about the state of the world, or the policy choice the bureaucrat makes. Based on her observations, the voter forms belief μ about the probability that the incumbent is public spirited. The incumbent is then re-elected with probability $F(\mu)$.

4. All actors receive their respective payoffs.

The following table summarizes our notation:

Table 1: Notation

$p \in \{n, t\}$	policy, where $p = t$ if the transfer is made and $p = n$ otherwise
$\omega \in \{n, t\}$	state of the world, where the transfer benefits the voter if and only if $\omega = t$
$q \in \left(\frac{1}{2}, 1\right)$	common prior probability that $\omega = n$
$s \in \{t, n\}$	bureaucrat's signal of the state of the world
$\gamma \in (q, 1)$	accuracy of bureaucrat's signal of the state ω
$\delta > 0$	weight incumbent applies to the value of re-election
$\pi \in (0, 1)$	common prior probability that the incumbent is public spirited
μ	voter's posterior probability that the incumbent is public spirited
$F(\mu)$	probability of re-election given μ

3 Delegation, Shirking, and Impunity

The first contribution of this model is to demonstrate that the dismal positive predictions of delegation's critics – i.e., delegation exacerbates legislative shirking and mutes the electoral costs of doing so – can be derived from a standard political agency setup.

We begin by analyzing the variant of our model in which delegation is not allowed. In this variant, there are only two possible legislative actions: a bill that denies the transfer outright and a bill that grants it outright. Since the incumbent knows only the prior probability $1-q$ that the transfer benefits the voter when deciding which policy to choose, and $q > \frac{1}{2}$, the incumbent maximizes the voter's expected policy payoff by denying the transfer. Our first result demonstrates that there exist perfect bayesian equilibria (henceforth referred to as equilibria) in which the public-spirited incumbent forbids the transfer and the captured incumbent does the same if and only if he cares enough about re-election.

Proposition 1 *(Equilibria when Delegation is Not an Option.) Let* $\underline{\delta} \equiv \frac{1}{F(1)-F(0)}$ *and* $\overline{\delta} \equiv \frac{1}{F(\pi)-F(0)}$.

(a) An equilibrium in which the public-spirited incumbent forbids the transfer with probability one always exists.

(b) In such an equilibrium, if $\delta \leq \underline{\delta}$*, the captured incumbent mandates the transfer with probability one; if* $\delta \in \left(\underline{\delta}, \overline{\delta}\right)$*, the captured incumbent randomizes between making the transfer and not making the transfer; if* $\delta \geq \overline{\delta}$*, the captured incumbent forbids the transfer with probability one.*

(c) In any equilibrium in which the public-spirited incumbent forbids the transfer with positive probability, he does so with probability one.[11]

[11] It follows from Proposition 1 that the only other perfect bayesian equilibrium is one in which both types of incumbent set $p = t$ with probability one. We ignore such equilibria for two reasons. First, they are worse for the voter than the equilibria specified in Proposition 1. Second, such equilibria require that the voter believes the incumbent is captured with high probability when she observes the transfer denied ($p = n$). Consequently, such equilibria do not survive the universal divinity refinement (Banks and Sobel 1987), as the incumbent with the greatest incentive to select $p = n$ is the public-spirited one. In contrast, the equilibria described in Proposition 1 do survive the universal divinity refinement.

To understand Proposition 1, notice that in an equilibrium in which the public-spirited incumbent always denies the transfer, the captured incumbent reveals himself to be so when he mandates the transfer. As a result, the captured incumbent must choose between maximizing his probability of re-election (by selecting $p = n$) and maximizing his policy payoff (by selecting $p = t$). Consequently, the captured incumbent will pool with the public-spirited incumbent, forbidding the transfer, only when the weight he attaches to re-election δ is sufficiently large. Importantly, in the specified equilibrium, shirking – i.e., making the transfer even though doing so harms the voter in expectation – is punished harshly at the polls. Specifically, an incumbent that chooses $p = t$ wins re-election with probability $F(0)$, the minimum possible probability.

Given the behavior specified in Proposition 1, the public's policy payoff is at most q in a world in which delegation is prohibited.[12] This, of course, is less than the payoff of γ that would result if delegation were allowed and all incumbent types were to delegate to a bureaucrat who would utilize her expertise. Hence, the public, in principle, could benefit from delegation in our theoretical setup. Whether the public in fact does so is the matter we now turn to. Unfortunately, our next proposition is somewhat pessimistic about the extent to which the public can gain when delegation is permitted. It establishes that whenever the public-spirited incumbent uses delegation to promote the public's interest, the captured incumbent uses delegation in ways that harm the public's interest.

Proposition 2 *(Good Delegation Implies Bad Delegation.) In the model in which delegation is available, all of the following hold:*

(a) In any equilibrium, conditional on delegating, the public spirted incumbent delegates to a public-spirited bureaucrat and the captured incumbent delegates to a captured bureaucrat.

(b) In any equilibrium, the public-spirited bureaucrat makes the transfer if and only if her

[12]The voter's expected payoff when $p = n$ is simply the probability that $\omega = n$, q. The voter's expected payoff when $p = t$ is the probability that $\omega = t$, $1 - q$. As $q > \frac{1}{2}$, it thus follows that the voter's expected payoff when delegation is banned is at most q.

signal of the state $s = t$; in contrast, the captured bureaucrat makes the transfer regardless of her signal.

(c) In any equilibrium in which the public-spirited incumbent delegates with positive probability, the captured incumbent delegates with probability one.

Because of the potential gains from bureaucratic expertise, one might like to permit politicians to delegate. But given the opportunity, due to the non-transparency of delegated policymaking, only public-spirited politicians will use delegation in a way that harnesses that expertise to the voter's advantage (parts (a) and (b) of Proposition 2). Most importantly, part (c) of Proposition 2 tells us that *sincere delegations* by the public-spirited incumbent – i.e., delegations made with the purpose and effect of benefiting the voter – are always accompanied by *insincere delegations* by the captured incumbent – i.e., delegations that are made purely for the benefit of the special interest. In fact, in any equilibrium in which the public-spirited incumbent delegates with positive probability, the captured incumbent delegates with probability one. Notice that when the captured incumbent delegates, the ultimate policy that results from his delegation is exactly the same as that which would result if specific legislation that mandates the transfer directly ($p = t$) had been chosen. As such, in any equilibrium in which the public-spirited incumbent delegates, the probability that the captured incumbent shirks is at least as great, if not greater, than that when delegation is prohibited.[13] Hence, Proposition 2 illustrates how delegation can exacerbate legislative shirking.

Proposition 2 also has ramifications for the conditions under which delegation allows legislators who shirk to do so with relative impunity. In particular, Proposition 2 implies that all equilibria in which delegation occurs with positive probability take one of two forms: either captured incumbents are the only type of incumbent to delegate or both incumbent types delegate with positive probability. In both classes of equilibria, the captured incumbent

[13]Since the voter's policy payoff is maximized when the incumbent delegates to a public-spirited bureaucrat, anything other than doing so constitutes shirking when delegation is permitted.

executes the transfer to the special interest even though he knows that doing so will (in expectation) harm the voter. Critically, however, *it is only in the latter class of equilibria* that the captured incumbent shirks *with some degree of electoral impunity.*

To understand why this is the case, notice that if only captured incumbents were to delegate, delegations would be maximally punished at the polls. This is because an incumbent observed to delegate would be known to be captured – i.e., the public's posterior that the incumbent is public spirited would be equal to zero and the incumbent's probability of re-election would be $F(0)$. Accordingly, in such equilibria, a captured incumbent could not escape accountability by delegating, as voters would fully recognize the captured incumbent's delegation for what it was – a de facto transfer to the special interest. In contrast, in equilibria in which both incumbent types delegate, the non-transparency of delegated policymaking ensures that the voter places positive probability on the incumbent being public spirited upon observing a delegation, *even when the incumbent is in fact captured and has delegated to a captured bureaucrat.*

That delegation can mute the costs of shirking hinges on the non-transparencies involved in delegated policymaking. By assumption, the voter can observe whether the incumbent delegates, but cannot observe the type of bureaucrat to whom the incumbent delegates; nor can the voter observe the bureaucrat's signal or policy choice. Therefore, a delegation by the public-spirited incumbent to a public-spirited bureaucrat looks exactly the same to the voter as a delegation by the captured incumbent to a captured bureaucrat.[14] Hence, in equilibria in which the public spirted incumbent delegates, the captured incumbent can delegate to a bureaucrat of his own type and still be treated as if there were some probability he is public

[14]Even when the bureaucrat's choice is observable, a similar phenomenon arises. The captured bureaucrat always makes the transfer. Thus, if the voter sees the bureaucrat deny the transfer, she knows the bureaucrat is public spirited. But the public-spirited bureaucrat's expertise sometimes suggests that the transfer benefits the voter, and thus transfers are sometimes made by the public-spirited bureaucrat. Since the voter does not share in that expertise (i.e., does not observe the bureaucrat's signal), she therefore places positive probability on the event that the bureaucrat is public spirited even when she sees the bureaucrat make the transfer. Therefore, when the bureaucrat's policy choice is observable, if the public-spirited incumbent delegates to the public-spirited bureaucrat in equilibrium, then the captured incumbent can delegate to the captured bureaucrat, and still be treated as if he were public spirited with positive probability. See Section 5 for further discussion of the case in which the public observes the bureaucrat's policy choice.

spirited. Consequently, in these equilibria, captured incumbents execute the transfer with certainty, yet, at the same time, escape maximal punishment at the polls.

We have thus far demonstrated that delegation offers a degree of electoral impunity for those who shirk provided that public-spirited incumbents delegate with positive probability. What we have not demonstrated, however, is that delegating is consistent with equilibrium behavior for public-spirited incumbents. Indeed, Proposition 2 suggests that public-spirited incumbents may have an electoral *disincentive* to delegate. Since delegation by public-spirited incumbents is always accompanied by delegation by captured incumbents, upon observing delegation, the voter will believe the incumbent is captured with positive probability. The public-spirited incumbent, then, may in fact harm his electoral chances by delegating. We therefore turn to the question of whether there exist equilibria in which the public-spirited incumbent delegates.

Begin by noticing that one can support equilibria in which both incumbent types delegate with probability one by specifying that the voter believes that the incumbent is captured when he fails to delegate.[15] This is unsatisfying because it relies on ad-hoc and disputable off-path beliefs. The voter knows that between the two possible pieces of specific legislation, the captured incumbent has a strict preference on policy grounds for the bill that grants the transfer outright ($p = t$), while the public-spirited incumbent has a strict preference for the bill that denies the transfer outright ($p = n$). Yet this equilibrium supports delegation by assuming that the voter's belief about an incumbent that deviates to specific legislation does *not* depend on which of the two possible specific bills she observes. To tie our hands, we require the voter to take into account the policy incentives of elected officials when forming

[15]More precisely, consider the following strategy and belief profile: Suppose that both public-spirited and captured incumbents delegate to a bureaucrat of their own type, the public's posterior that the incumbent is public spirited upon observing a delegation is π, and that the public believes the incumbent is captured in the event that he fails to delegate. First, notice that the specified beliefs are consistent with the requirements of perfect bayesian equilibrium. Second, notice that given the specified beliefs, the public-spirited incumbent's payoff from delegating is $\gamma + \delta F(\pi)$, whereas his maximal payoff from not delegating is $q + \delta F(0)$; finally, observe that the captured incumbent's payoff from delegating is $1 + \delta F(\pi)$, whereas his maximal payoff from not delegating is $1 + \delta F(0)$. As $\gamma > q$ and F is strictly increasing, it follows that both incumbent types maximize their respective expected payoffs by delegating. Hence, the specified strategies and beliefs constitute an equilibrium.

off-path beliefs.[16]

Definition 1 *(Strong Off-Path Beliefs.) A perfect bayesian equilibrium is supported by strong off-path beliefs if and only if both of the following are true:*

(a) If adoption of the bill that denies the transfer outright (i.e., $p = n$) is off the path of play for both types of incumbent, then when that bill is observed, the voter assigns probability one to the event that the incumbent is public spirited.

(b) If adoption of the bill that grants the transfer outright (i.e., $p = t$) is off the path of play for both types of incumbent, then when that bill is observed, the voter assigns probability zero to the event that the incumbent is public spirited.

Our next proposition establishes that there exist equilibria supported by strong off-path beliefs in which both incumbent types delegate:

Proposition 3 *(Existence of Equilibria with Shirking and Impunity)*

(a) There exists an equilibrium supported by strong off-path beliefs in which the public-spirited incumbent delegates with positive probability if and only if

$$\delta \leq \delta_P \equiv \frac{\gamma - q}{F(1) - F(\pi)}.$$

(b) If $\delta \in \left(0, \frac{\gamma - q}{F(1) - F(0)}\right)$, there is exactly one such equilibrium. In that equilibrium, both types of incumbent delegate with probability one, each to a bureaucrat of his own type.

(c) If $\delta \in \left(\frac{\gamma - q}{F(1) - F(0)}, \delta_P\right)$, there are exactly two such equilibria. In one, both types of incumbent delegate with probability one, each to a bureaucrat of his own type. In the other, the captured incumbent delegates to a captured bureaucrat with probability one, and the

[16] While our refinement on off-path beliefs is in the spirit of universal divinity (Banks and Sobel 1987), we cannot apply universal divinity directly to our setting (or other refinements developed for signaling games), as our model of delegated policymaking is not, strictly speaking, a signaling game, failing to fall into the canonical two-player sender-receiver paradigm.

public-spirited incumbent mixes between writing a bill that denies the transfer outright and delegating to a public-spirited bureaucrat.

In either of the equilibria identified in Proposition 3, the captured incumbent escapes full electoral accountability by delegating. In particular, because both incumbent types delegate, albeit for different purposes, when the captured incumbent delegates, the public places positive probability on the event he is public spirited. In contrast, if the captured incumbent were to mandate the transfer by statute, a policy that has the same welfare consequences to the public as his insincere delegation, he would reveal himself to be captured. Hence, in the specified equilibria, by delegating, the captured incumbent mitigates the electoral cost of his shirking. Moreover, because delegation mutes the electoral punishment of pursuing a policy course that results in the special interest receiving the transfer for certain, the probability that the captured incumbent shirks is sometimes greater (when $\delta > \underline{\delta}$) and never less than than that when delegation is prohibited. Hence, Proposition 3 provides micro-foundations for those who worry that delegated policymaking emboldens captured incumbents to pursue policy ends they would not pursue if they had to do so more transparently via statute.

The key condition that must be satisfied if equilibria are to exist in which both incumbent types delegate is that the incumbent must not place too much weight on re-election (i.e., $\delta < \delta_P$). This is because in either of the equilibria specified in Proposition 3, the incumbent can convince the public he is public spirited by forbidding the transfer by statute ($p = n$); consequently, delegating is costly electorally. Hence, to induce the incumbent to delegate, he must prioritize his policy goals over his re-election goals to a sufficiently large extent – formally, δ must be sufficiently small.

Proposition 3 has one more important implication to note. Critics of delegation are quick to dispute "public interest" or "technocratic" justifications for delegation, whereby delegated policymaking is represented as a handing-over of policy authority to public-spirited experts (Croley 2008; Goodsell 2004; Landis 1938). For instance, some claim that the policies bureaucrats typically adopt under broad statutory authority are prima facie harmful to the

public. Others claim that bureaucrats really do not have any intrinsic expertise advantage relative to legislators. A third objection is that special interest capture of legislators is endemic, and thus politicians are unlikely to use delegation to benefit the public, even if doing so is possible in principle. Inspecting Proposition 3, one can see that movements in parameters consistent with these objections all *reduce* the threshold δ_P, thereby reducing the range of δ for which captured incumbents can shirk with relative impunity. More precisely, by raising the ex-ante probability q that the transfer harms the representative voter, lowering the expertise advantage of the bureaucrat, parameterized by $\gamma - q$, or lowering the prior probability π with which the incumbent is public spirited, one decreases δ_P. Thus, our model suggests that in disputing the public interest rationale for delegation, delegation's detractors undermine their own claim that delegation can be used by incumbents to act against the public interest with relative impunity.

4 Evaluating a Nondelegation Doctrine

The concern that delegation will be exploited by politicians leads delegation's critics to advocate for judicial enforcement of a nondelegation doctrine, whereby courts would invalidate statutes that grant authority to the executive without articulating any meaningful restrictions on how that authority may be used. In particular, the arguments of delegation's critics suggest that enforcement of a nondelegation doctrine would both enhance electoral selection and yield immediate policy benefits. For instance, Schoenbrod (1993) and Ely (1980) each hypothesize that by delegating, legislators obscure their own positions, in effect revealing less of the information that voters could use to forecast their performance in future terms. A nondelegation doctrine would, they claim, force legislators to take unambiguous positions and thus improve voters' ability to screen out incumbents inclined to act against their interests. Others argue that limiting delegation would result in better policy (e.g., Aaronson, Gellhorn, and Robinson 1982), claiming that lawmakers will be less inclined to pursue poli-

cies contrary to the public interest when they cannot make the bureaucracy do their bidding. Using our theoretical framework, we show that each of these arguments, while having merit, is only partially complete.

First, consider the screening rationale for a nondelegation doctrine. As the critics of delegation anticipate, screening can be improved by prohibiting delegation. For instance, suppose that $\delta < \frac{\gamma - q}{F(1) - F(0)}$. Then, by Proposition 3, when delegation is allowed, there is a plausible equilibrium in which both types delegate for sure and as a consequence are totally indistinguishable.[17] In contrast, as $\delta < \frac{\gamma - q}{F(1) - F(0)}$ implies that $\delta < \underline{\delta}$, it follows from Proposition 1 that when delegation is prohibited the incumbent's policy choice perfectly reveals his underlying type, as public-spirited incumbents forbid the transfer and captured incumbents mandate the transfer. Thus, over this region of the parameter space (i.e., $\delta < \frac{\gamma - q}{F(1) - F(0)}$), a nondelegation doctrine would improve screening, exactly as critics of delegation hypothesize. However, this will not generally be the case. Notice that if electoral concerns are strong enough – i.e., $\delta > \overline{\delta}$ – then, by Proposition 1, there is no screening whatsoever under nondelegation, since both incumbent types forbid transfers. Therefore, when $\delta > \overline{\delta}$, a prohibition on delegation would not improve screening, and, in some instances, could actually hinder it.[18]

Now consider the policy rationale for a nondelegation doctrine given that delegation is exploited by captured incumbents (i.e., one of the equilibria specified in Proposition 3 is played). A ban on delegation, while *potentially* inducing captured incumbents to pursue a policy course more in tune with the voter's interests, prevents public-spirited incumbents from utilizing the bureaucrat's expertise to the voter's advantage. Whether prohibiting del-

[17] In fact, since $\delta < \frac{\gamma - q}{F(1) - F(0)}$, this is the only equilibrium in which delegation mutes the electoral costs of shirking (see Proposition 3).

[18] An example in which screening is harmed by banning delegation is the following: Suppose that π is sufficiently large, so that $\delta_P = \frac{\gamma - q}{F(1) - F(\pi)} > \overline{\delta} = \frac{1}{F(\pi) - F(0)}$. In addition, suppose that $\delta \in (\overline{\delta}, \delta_P)$. Since $\delta > \overline{\delta}$, when delegation is banned, by Proposition 1, both incumbent types select $p = n$. However, since $\delta \in (\overline{\delta}, \delta_P)$ and $\overline{\delta} > \frac{\gamma - q}{F(1) - F(0)}$, by part (c) of Proposition 3, there exists an equilibrium when delegation is allowed in which the captured incumbent delegates insincerely and the public-spirited incumbent mixes between delegating and $p = n$. Thus, when delegation is restricted, there is no learning about type; however, when delegation is permitted and the selected equilibrium is played, there is imperfect learning about type.

egation improves the behavior of captured incumbents depends on the value attached to re-election δ. When $\delta < \underline{\delta}$, restricting delegation has no effect on the behavior of captured incumbents: captured incumbents transfer the resource to the special interest with probability one regardless of whether delegation is permitted. However, when $\delta > \underline{\delta}$, restricting delegation disciplines the behavior of captured incumbents: with delegation, captured incumbents transfer the resource to the special interest with probability one, whereas without delegation, they transfer the resource with probability less than one. Hence, there is a policy cost to delegation if and only if captured incumbents are sufficiently ambitious.

Nevertheless, even when delegation promotes shirking by captured incumbents (i.e., $\delta > \underline{\delta}$), it is not necessarily the case that the resulting policy costs outweigh the policy benefits of allowing public-spirited incumbents to utilize the bureaucrat's expertise. The former will dominate only when the bureaucrat's informational advantage vis-a-vis the elected official's is small ($\gamma - q$ is small) or the fraction of politicians inclined to use delegation to promote the public's welfare is small (π is small).

In sum, we have provided a model that micro-founds concerns that delegation emboldens incumbents to pursue policies contrary to the public interest. Yet even in such a model, the selection and policy benefits of a nondelegation doctrine are ambiguous. In some circumstances, a ban on delegation benefits the public.[19] However, in other instances, the public is

[19] A numerical example in which the public benefits policy-wise and selection-wise from a ban on delegation is the following. Suppose that the value attached to re-election $\delta = 1.07$, the prior probability that the incumbent is public spirited $\pi = .7$, the prior probability that the state $\omega = n$ is $q = .7$, the accuracy of the bureaucrat's signal of the state $\gamma = .8$, and the function that maps the public's posterior that the incumbent is public spirited into a probability of re-election $F(\mu) = \mu^{\frac{1}{5}}$. Hence, $\underline{\delta} = 1$, $\overline{\delta} \approx 1.074$, and $\delta_P \approx 1.45$. Since $\delta \in (\underline{\delta}, \overline{\delta})$, when delegation is prohibited, by Proposition 1, the public-spirited incumbent selects $p = n$ and the captured incumbent mixes between $p = n$ and $p = t$. Writing σ^* for the equilibrium probability the captured incumbent selects $p = n$, numerical calculation establishes that $\sigma^* \approx .94$; thus, the public's policy payoff when delegation is prohibited $\pi q + (1 - \pi)(q\sigma^* + (1 - q)(1 - \sigma^*)) \approx .69$. Now consider the case when delegation is allowed. Since $\delta < \delta_P$, by Proposition 3, there exists an equilibrium in which both incumbent types delegate with probability one. The policy payoff in such an equilibrium is $\pi\gamma + (1 - \pi)(1 - q) = .65$. Thus, not only is the public's policy payoff in this equilibrium less than that when delegation is prohibited, but the public's ability to learn about the incumbent's type is less as well.

better off allowing delegation despite the fact that it is exploited by captured politicians.[20,21]

More generally, our analysis reveals two theoretical considerations that pose subtle but substantial challenges to accountability-based arguments for the nondelegation doctrine. The first is that abusive delegation can only escape electoral punishment to the extent that incumbents at least occasionally employ delegation in voters' interests. To claim that delegation is abused with relative impunity, then, may necessarily be to claim that delegation is sometimes used beneficially. If this is the case, judicial enforcement of a nondelegation doctrine would necessarily eliminate some welfare-improving uses of the institution – unless, of course, judges can somehow distinguish between sincere and insincere delegation even though voters cannot.[22]

Second, our analysis suggests that the role electoral incentives play in arguments for a nondelegation doctrine is not as straightforward as one might expect. Arguments for the nondelegation doctrine often rest on a presumption that electoral incentives are too weak to eliminate legislators' abuse of delegation. Nondelegation in this view should be used by the courts as part of a strategy that Ely (1980) calls "representation reinforcement" – an effort to compensate for imperfections in systems of electoral accountability. Our analysis supports the intuition that weak electoral incentives lead to delegation's abuse. Indeed,

[20] An example in which the public benefits policy-wise and is not harmed selection-wise by allowing delegation is the following. Fix $\delta = 1.07$, $\pi = .9$, $q = .7$, $\gamma = .8$, and let $F(\mu) = \mu^{\frac{1}{5}}$. Relative to the example in footnote 19, everything is held constant with the exception that the prior π that the incumbent is public spirited is now greater. Simple calculation reveals that $\overline{\delta} \approx 1.02$ and $\delta_P \approx 4.80$. Since $\delta > \overline{\delta}$, when delegation is prohibited, by Proposition 1, both incumbent types select $p = n$ with probability one. This equilibrium results in a payoff of .7 to the public. And since $\delta < \delta_P$, by Proposition 3, when delegation is permitted, there exists an equilibrium in which both incumbent types delegate with probability one. This equilibrium results in a payoff of .75 to the public. Hence, permitting delegation has no effect on the voter's ability to learn about the incumbent's type, but does improve the public's policy payoff.

[21] Even when delegation benefits the public policy-wise and selection-wise, critics of delegation may still desire judicial enforcement of a nondelegation doctrine for reasons outside the model. For instance, it might be argued that the deception involved when captured incumbents delegate insincerely undermines public support for democratic processes, which, in turn, could have a number of bad downstream effects (e.g., low electoral participation, lack of trust in government, etc.). For a related argument, see pages 19-20 of Schoenbrod 1993.

[22] Whether and how judges can distinguish between legitimate and illegitimate delegation, and whether courts have any special capacity to do so relative to other institutions, are major points of contention in the legal scholarship on the nondelegation doctrine. See, for instance, Schoenbrod 2003, Schuck 1999, and Sunstein 2000.

exploitation of delegation is a plausible feature of equilibrium in our model only when the weight δ that politicians place on future officeholding is small (i.e., $\delta < \delta_P$). Despite this fact, we have shown that if electoral incentives are very weak, the public can be better off allowing delegation. In particular, when $\delta < \underline{\delta}$, banning delegation does nothing to improve the discipline of ill-intentioned incumbents; yet, it does remove a tool that public-spirited incumbents would employ to benefit voters – a tool that, by part (a) of Proposition 3, they would be willing to employ only *because* their electoral ambition is low. Thus, while the critics are right to identify weak electoral incentives as a plausible cause of abuse of delegation, their claim that a nondelegation doctrine would effectively compensate for those weak incentives is problematic – just because captured incumbents benefit from the plausible deniability provided by delegation does not ensure that they will stop making transfers to special interests once the option to delegate is removed.

5 The Key Assumptions

We have shown that the option to delegate can exacerbate legislative shirking and that politicians can shirk with relative impunity by delegating. We now briefly discuss how our assumptions concerning delegated policymaking affect these results.

The Assumption that Bureaucratic Policy Choices are Not Observable

The model allows the public to observe legislative policy choices, but not bureaucratic policy choices. Allowing the public to observe the bureaucrat's policy choices would <u>not</u> change our central insights. Even with this form of transparency, insincere delegation still accompanies sincere delegation. Moreover, provided that the weight attached to office is not too large, there exist equilibria in which each incumbent type delegates to a bureaucrat of his own type with probability one.[23] In such equilibria, even when the public observes the bureaucrat make the transfer to the special interest, the public cannot conclude for certain that the incumbent

[23]Somewhat surprisingly, one can show that when F is convex, such equilibria exist for a wider range of δ than when the bureaucrat's policy choice is not observable.

that delegated to the bureaucrat is captured. This is because public-spirited bureaucrats, who are delegated to by public-spirited incumbents, transfer resources to the special interest with positive probability (i.e., whenever $s = t$). Consequently, even when the public is fully aware of the policies implemented by the bureaucracy, captured incumbents can escape full electoral accountability for delegations that are in effect outright transfers to the special interest.[24]

The Assumption that Legislative Pressure on the Bureaucracy is Not Observable

The model does not allow the public to observe whether the appointed bureaucrat is public spirited or captured. This is meant to represent a setting in which legislators are able to influence bureaucratic choices through means that are undetectable to the public. To understand the effects of relaxing this assumption, consider the case in which legislative influence of the bureaucracy is detectable. In particular, assume that the public observes the type of bureaucrat the incumbent appoints. In any equilibrium supported by strong off-path beliefs of this variant of our model, conditional upon delegating, public-spirited incumbents never delegate to captured bureaucrats.[25] Consequently, when the public observes delegation to a captured bureaucrat, the public concludes that the incumbent is captured himself. As a result, insincere delegations are now fully punished – i.e., the incumbent's probability of re-election from delegating insincerely is identical to that when he mandates the transfer via specific legislation ($p = t$). This then suggests that the more transparent legislative involvement in bureaucratic policymaking is, the less likely it will be that insincere delegations go unpunished.

[24]By a related logic, even if the public were to learn both the bureaucrat's policy choice and the state of the world, equilibria would exist in which captured incumbents escape full accountability when delegating insincerely. Only by assuming that the public observes both the bureaucrat's policy choice and the information that policy choice was based upon (i.e., the bureaucrat's signal) would one eliminate equilibria in which insincere delegations are not fully punished.

[25]To see why, by way of contradiction, suppose that there exists an equilibrium in which the public-spirited incumbent delegates to the captured bureaucrat. It can be proven that in any such equilibrium, the captured incumbent forgoes selecting $p = n$. But then $\mu(n) = 1$, since it is either off path, and our off-path refinement applies, or it chosen by the public-spirited incumbent. Consequently, the public-spirited incumbent's payoff from forbidding transfers outright ($q + \delta F(1)$) is greater than that from delegating to a captured bureaucrat ($(1 - q) + \delta F(\mu)$), a contradiction.

The Assumption that the Bureaucrat is Perfectly Controlled by and Responsible to the Legislature

In practice, federal bureaucrats have dual principals – the President and the Congress. Moreover, because the President's constituency is national, there is reason to believe he may be more public regarding than the Congress.[26] Thus, even if legislators are able to pressure bureaucrats into pursuing policies contrary to the public interest, it is not necessarily the case that bureaucrats will be perfectly responsive. For instance, consider a variant of our model in which upon delegating, the legislator continues to determine which bureaucrat type to appoint. However, suppose that with probability α, the bureaucrat's policy choice is reviewed by a public-regarding executive. Finally, assume that in the event that a review occurs, the executive learns the bureaucrat's signal and subsequently selects the policy that maximizes the voter's welfare. In this setting, even when the legislator delegates to a captured bureaucrat, there is positive probability that the transfer is not made to the special interest. This has two effects: First, it makes delegation less attractive to the captured incumbent, since he is no longer ensured that he can effect his favored policy via delegation. Second, even if captured incumbents delegate insincerely, the policy costs to the public from such delegations are now attenuated. Consequently, as Mashaw (1985, 1997) suggests, to the extent that the President is more public regarding than the Congress, shared control over the bureaucracy increases the potential benefit from permitting delegation.

6 Conclusion

The claim that delegation provides a means by which politicians can pursue policies contrary to the public interest with relative impunity is a perennial element of normative attacks on delegation. Yet the consistency of this claim, and the related claim that delegation exacerbates legislative shirking, with a political-agency approach to delegation and accountability

[26]This premise often appears in the arguments of opponents of the nondelegation doctrine. For example, see pages 95-96 of Mashaw 1985 and page 2335 of Kagan 2001.

has not always been clear. The analysis in this paper specifies a mechanism through which delegation can plausibly make policy – even policy that outright undermines the interests of voters – "safer" for legislators.

Three premises are critical to the formulation we propose. First, there must be a genuine public interest rationale for delegating: delegation must allow for the application of expertise to policy choices that cannot be applied when those choices are specified in legislation directly. Second, some politicians must be motivated to use delegation in a manner that promotes the public's welfare. Third, there must be non-transparencies in the process of delegated policymaking: the actions legislators take to influence the bureaucracy cannot be completely observable to the public. Under these conditions, we have shown that delegation not only makes it safer to act against the public interest, but can also result in politicians acting against the public interest with greater frequency. All this occurs in our model despite the fact that voters act on correct conjectures about legislative behavior.

Despite the fact that delegation is exploited by some politicians in our model, our theoretical framework illustrates that the case for judicial enforcement of the nondelegation doctrine is far from straightforward. In our model, delegation allows politicians to escape full responsibility for pursuing policy that undermines the public's welfare only when some politicians employ the bureaucracy to promote the public's welfare. Thus, a prohibition on delegation would necessarily eliminate delegations that benefit the public. Consequently, the support our findings provide for having courts overturn legislation that gives broad policymaking authority to the bureaucracy is, at best, equivocal.

The Appendix

Proof of Proposition 1. *Proof of part (a).* First, suppose that $\delta \leq \underline{\delta}$. And consider the following strategy and belief profile: the public-spirited incumbent forbids transfers with probability one, the captured incumbent mandates transfers with probability one, $\mu(n) = 1$,

and $\mu(t) = 0$. Inspection reveals that the beliefs are derived via Bayes' rule. All that remains to verify is that each incumbent type is maximizing his payoff. The public-spirited incumbent's policy payoff from forbidding transfers is q and is greater than his policy payoff from mandating transfers, $(1-q)$, since $q > \frac{1}{2}$. This, combined with the fact that his probability of re-election is also higher when he forbids transfers (since $\mu(n) > \mu(t)$ and F is increasing in μ), implies that forbidding transfers is consistent with equilibrium behavior. The captured incumbent's payoff from forbidding transfer is $\delta F(1)$, whereas his payoff from mandating transfers is $1 + \delta F(0)$. The latter is weakly greater than the former since $\delta \leq \underline{\delta}$; hence, mandating transfers is consistent with equilibrium behavior for the captured incumbent.

Second, suppose that $\delta \in (\underline{\delta}, \overline{\delta})$. Then the equation $1 + \delta F(0) = \delta F\left(\frac{\pi}{\pi+\sigma(1-\pi)}\right)$ has a unique solution in σ, which we denote by σ^*.[27] Now consider the strategy and belief profile in which the public-spirited incumbent forbids transfers with probability one, the captured incumbent mixes between forbidding transfers and mandating transfers, placing probability σ^* on forbidding transfers, $\mu(n) = \frac{\pi}{\pi+\sigma^*(1-\pi)}$, and $\mu(t) = 0$. Inspection reveals that the beliefs are consistent with Bayes' rule. Since the public-spirited incumbent maximizes his policy payoff by forbidding transfers and, given the specified beliefs, forbidding transfers also maximizes his probability of re-election, doing so is consistent with equilibrium behavior. The captured incumbent's payoff from mandating transfers is $1 + \delta F(0)$, whereas his payoff from forbidding transfers is $\delta F\left(\frac{\pi}{\pi+\sigma^*(1-\pi)}\right)$. Given the construction of σ^*, these two payoffs are equal, so mixing is consistent with equilibrium behavior for the captured incumbent.

Third, suppose that $\delta \geq \overline{\delta}$. And consider a strategy and belief profile in which the public-spirited and the captured incumbent forbid transfers with probability one, $\mu(n) = \pi$, and $\mu(t) = 0$. Inspection reveals that the beliefs are consistent with the requirements of perfect bayesian equilibrium. Since the public-spirited incumbent maximizes his policy payoff by

[27] That a solution exists is a consequence of the following observations: Since $\delta > \underline{\delta}$, when $\sigma = 0$, $1+\delta F(0) < \delta F(1)$. Since $\delta < \overline{\delta}$, when $\sigma = 1$, $1 + \delta F(0) > \delta F(\pi)$. In addition, $F\left(\frac{\pi}{\pi+\sigma(1-\pi)}\right)$ is continuous in σ. Hence, by the Intermediate Value Theorem, a solution to $1 + \delta F(0) = \delta F\left(\frac{\pi}{\pi+\sigma(1-\pi)}\right)$ in σ exists. That the solution is unique follows from the fact that F is strictly decreasing in σ.

forbidding transfers and, given the specified beliefs, forbidding transfers also maximizes his probability of re-election, doing so is consistent with equilibrium behavior. The captured incumbent's payoff from mandating transfers is $1+\delta F(0)$, whereas his payoff from forbidding transfers is $\delta F(\pi)$. The latter is weakly greater than the former since $\delta \geq \overline{\delta}$; thus, forbidding transfers is consistent with equilibrium behavior for the captured incumbent.

Proof of part (b). Suppose that $\delta \leq \underline{\delta}$. And consider an equilibrium in which the public-spirited incumbent forbids transfers with probability one. However, suppose, by way of contradiction, that the captured incumbent forbids transfers with positive probability. Two implications follow. First, $\mu(n) < 1$. Second, the captured incumbent's payoff from forbidding transfers must be at least as great as that from mandating them: $\delta F(\mu(n)) \geq 1 + \delta F(\mu(t))$. This inequality holds only when $\mu(n) \geq \mu(t)$ and $\delta \geq \frac{1}{F(\mu(n))-F(\mu(t))}$. So, suppose that $\mu(n) \geq \mu(t)$. Notice that since $\mu(n) < 1$, $\frac{1}{F(\mu(n))-F(\mu(t))} > \frac{1}{F(1)-F(0)} = \underline{\delta}$. This fact, taken together with our supposition that $\delta \leq \underline{\delta}$ implies that $\delta < \frac{1}{F(\mu(n))-F(\mu(t))}$, a contradiction.

Now suppose that $\delta \in (\underline{\delta}, \overline{\delta})$. And consider an equilibrium in which the public-spirited incumbent forbids transfers with probability one. However, suppose, by way of contradiction, that the captured incumbent uses a pure strategy. There are two cases to consider. The first case involves the captured incumbent mandating the transfer with probability one. In this case, $\mu(n) = 1$ and $\mu(t) = 0$. In addition, the captured incumbent's payoff from mandating transfers is at least as great as that from forbidding them: $1 + \delta F(0) \geq \delta F(1)$. This inequality holds only if $\delta \leq \frac{1}{F(1)-F(0)} = \underline{\delta}$, a contradiction. The second case involves the captured incumbent forbiding transfers with probability one. In this case, $\mu(n) = \pi$. In addition, the captured incumbent's payoff from forbidding transfers is at least as great as that from mandating them: $\delta F(\pi) \geq 1 + \delta F(\mu(t))$. This inequality holds only if $\pi > \mu(t)$ and $\delta \geq \frac{1}{F(\pi)-F(\mu(t))}$. So, suppose that $\pi > \mu(t)$. Notice that $\frac{1}{F(\pi)-F(\mu(t))} \geq \frac{1}{F(\pi)-F(0)} = \overline{\delta}$. This fact, taken together with our supposition that $\delta < \overline{\delta}$, implies that $\delta < \frac{1}{F(\pi)-F(\mu(t))}$, a contradiction.

Finally, suppose that $\delta \geq \overline{\delta}$. And consider an equilibrium in which the public-spirited incumbent forbids transfers with probability one. However, suppose, by way of contradiction, that the captured incumbent mandates transfers with positive probability. Two implication then follow. First, $\mu(n) > \pi$ and $\mu(t) = 0$. Second, the captured incumbent's payoff for mandating transfers is at least as great as that from forbidding them: $1 + \delta F(0) \geq \delta F(\mu(n))$. This inequality holds only if $\delta \leq \frac{1}{F(\mu(n))-F(0)}$. Notice that since $\mu(n) > \pi$, $\overline{\delta} = \frac{1}{F(\pi)-F(0)} > \frac{1}{F(\mu(n))-F(0)}$. This fact, taken together with our supposition that $\delta \geq \overline{\delta}$, implies that $\delta > \frac{1}{F(\mu(n))-F(0)}$, a contradiction.

Proof of part (c). Suppose, by way of contradiction, an equilibrium exists in which the public-spirited incumbent mixes between mandating transfers and forbidding transfers. This implies that the public-spirited incumbent's payoff from forbidding transfers equals that from mandating transfers: $q + \delta F(\mu(n)) = (1 - q) + \delta F(\mu(t))$. This equality, taken together with the fact that $q > \frac{1}{2}$, implies that $\mu(t) > \mu(n)$. Furthermore, since $\mu(t) > \mu(n)$, we have that $1 + \delta F(\mu(t)) > \delta F(\mu(n))$: the captured incumbent's payoff from mandating transfers is greater than that from forbidding them. Thus, the captured incumbent's equilibrium strategy places probability zero on forbidding transfers. However, this, taken together with the fact that the public-spirited incumbent forbids transfers with positive probability, implies that $\mu(n) = 1$, so $\mu(n) \geq \mu(t)$, a contradiction. ■

Proof of Proposition 2. *Proof of part (b).* This result follows directly from the specification of payoffs for the captured bureaucrat and the public-spirited bureaucrat.

Proof of part (a). When the incumbent delegates, the voter learns only that a delegation has occurred. Thus, conditional upon delegating, optimality requires the incumbent to delegate to the type of bureaucrat that delivers him the highest policy payoff. This fact, taken together with part (b), has two implications: First, if the public-spirited incumbent delegates, he delegates to a public-spirited bureaucrat. Second, if the captured incumbent delegates, he delegates to a captured bureaucrat.

Proof of part (c). Consider an equilibrium in which the public-spirited incumbent dele-

gates with positive probability. The voter's posterior that the incumbent is public spirited upon observing delegation, $\mu(del)$, is then strictly positive and the captured incumbent's payoff from delegating is $1 + \delta\mu(del)$. We need to show that the captured incumbent delegates with probability one. There are three cases to consider.

Case (i): Begin with the case in which the public-spirited incumbent delegates with probability one. And suppose, by way of contradiction, that the captured incumbent delegates with probability less than one: either the captured incumbent mandates transfers by statute with positive probability or the captured incumbent forbids transfers by statute with positive probability. Begin with the former. Then, $\mu(t) = 0$ and the captured incumbent's payoff from mandating transfers by statute is $1 + \delta F(0)$. Since $\mu(del) > 0$, $1 + \delta F(0) < 1 + \delta F(\mu(del))$. Consequently, mandating transfers by statute is not consistent with equilibrium behavior for the captured incumbent. Now suppose that the captured incumbent, with positive probability, forbids transfers by statute. Thus, $\mu(n) = 0$ and his payoff from forbidding transfers by statute is $0 + \delta F(0)$. Since this is less than his payoff from delegating, forbidding transfers by statute is inconsistent with equilibrium behavior for the captured incumbent. Thus, each alternative to the assertion that the captured incumbent delegates with probability one leads to a contradiction.

Case (ii): Now consider the case in which the public-spirited incumbent mixes between forbidding transfers by statute and delegating. And suppose, by way of contradiction, that the captured incumbent delegates with probability less than one. The public-spirited incumbent's mixing implies that his payoff from forbidding transfers by statute is equal to that from delegating: $q+\delta F(\mu(n)) = \gamma+\delta F(\mu(del))$. Now notice that $\delta F(\mu(n)) < q+\delta F(\mu(n)) = \gamma + \delta F(\mu(del)) < 1 + \delta F(\mu(del))$, so $\delta F(\mu(n)) < 1 + \delta F(\mu(del))$: the captured incumbent's payoff from delegating is greater than that from forbidding transfers by statute. Hence, the captured incumbent places zero probability on forbidding transfers by statute. This generates two series of implications:

1. First, $\mu(n) = 1$, since the public-spirited incumbent forbids transfers by statute with

positive probability. But this then implies that the public-spirited incumbent's payoff from forbidding transfers by statute is strictly greater than that from mandating transfers by statute. Hence, the public-spirited incumbent places zero probability on mandating transfers by statute.

2. Second, the fact that the captured incumbent places zero probability on forbidding transfers by statute, taken together with our supposition that he delegates with probability less than one, implies that the captured incumbent must place positive probability on mandating transfers by statute. Thus, $1 + \delta F(\mu(t)) > 1 + \delta F(\mu(del))$, so $\mu(t) \geq \mu(del)$. Consequently, since $\mu(del) > 0$, as the public-spirited incumbent delegates with positive probability, $\mu(t) > 0$.

However, since we have just established that in any equilibrium in which the public-spirited incumbent mixes between delegating and not delegating and the captured incumbent delegates with probability less than one, the captured incumbent places positive probability on mandating transfers by statute and is the only incumbent type to do so, it follows that $\mu(t) = 0$, which contradicts our implication otherwise.

Case (iii): Finally, consider the case in which the public-spirited incumbent mixes between mandating transfers by statute and delegating. And, by way of contradiction, suppose that the captured incumbent delegates with probability less than one. Given the public-spirited incumbent's mixing, his payoff from mandating transfers by statute is equal to that from delegating: $(1 - q) + \delta F(\mu(t)) = \gamma + \delta F(\mu(del))$. Since $(1 - q) < q < \gamma$, the preceding equality implies that $\mu(del) < \mu(t)$. This fact, combined with the fact that the captured incumbent is indifferent policy-wise between delegating and mandating transfers by statute, implies that the captured incumbent places zero probability on delegating. Consequently, only the public-spirited incumbent places positive probability on delegating, so $\mu(del) = 1$. Hence, $\mu(del) \geq \mu(t)$, a contradiction. ■

The following lemma will be invoked in proving Proposition 3.

Lemma 1 *Let* $\delta_P \equiv \frac{\gamma - q}{F(1) - F(\pi)}$. *Two facts are:*

(a) When $\delta \in \left(\frac{\gamma - q}{F(1) - F(0)}, \delta_P \right)$, *there exists a unique solution to*

$$q + \delta F(1) = \gamma + \delta F\left(\frac{\pi\sigma}{\pi\sigma + 1 - \pi} \right) \tag{1}$$

in σ.

(b) There does not exist an equilibrium supported by strong off-path beliefs in which the public-spirited incumbent mixes between delegating and mandating transfers by statute.

Proof:

Proof of part (a). Suppose $\delta \in \left(\frac{\gamma - q}{F(1) - F(0)}, \delta_P \right)$. We need to show that equation (1) has a unique solution in σ. Since $\delta < \delta_P$, it follows that when $\sigma = 1$, $q + \delta F(1) < \gamma + \delta F(\pi)$. And, since $\delta > \frac{\gamma - q}{F(1) - F(0)}$, it follows that when $\sigma = 0$, $q + \delta F(1) > \gamma + \delta F(0)$. Thus, by the continuity of F and the Intermediate Value Theorem, a solution to (1) in σ exists. In fact, the solution is unique since the RHS of (1) is strictly increasing in σ.

Proof of part (b). Suppose, by way of contradiction, that there exists an equilibrium supported by strong off-path beliefs in which the public-spirited incumbent mixes between delegating and mandating transfers by statute. This then implies that the public-spirited incumbent's payoff from mandating transfers by statute is at least as great as that from forbidding transfers by statute: $(1 - q) + \delta F(\mu(t)) \geq q + \delta F(\mu(n))$. Given that $q > \frac{1}{2}$, the preceding inequality implies that $\mu(t) > \mu(n)$. Now notice that since the public-spirited incumbent delegates with positive probability, by part (c) of Proposition 2, it follows that the captured incumbent delegates with probability one. As such, $\mu(n) = 1$, for if $p = n$ is off path, our off-path refinement applies, and if $p = n$ is on path, then only public-spirited incumbents select it. Since $\mu(n) = 1$, $\mu(n) \geq \mu(t)$, a contradiction with our earlier implication otherwise. ■

Proof of Proposition 3. *Proof of part (a).* We first show that if there exists an equilibrium supported by strong off-path beliefs in which the public-spirited incumbent delegates with

positive probability, then $\delta \leq \delta_P = \frac{\gamma - q}{F(1) - F(\pi)}$. So, suppose that there exists an equilibrium supported by strong off-path beliefs in which the public-spirited incumbent delegates with positive probability. We know from Proposition 2 that in any such equilibrium the captured incumbent delegates with probability one. Thus, by Bayes' rule, $\mu(del) \leq \pi$. In addition, $\mu(n) = 1$, as either the public-spirited incumbent is the only incumbent type to place positive probability on selecting $p = n$ or no incumbent type places positive probability on selecting $p = n$, in which case our off-path refinement applies. The public-spirited incumbent's payoff from delegating is then $\gamma + \delta F(\mu(del))$, whereas his maximum payoff if he forgoes delegating is $q + \delta F(1)$. Since the public-spirited incumbent delegates with positive probability, it must be the case that $\gamma + \delta F(\mu(del)) \geq q + \delta F(1)$. And since $\mu(del)$ is at most π, in order for the preceding inequality to hold, $\delta \leq \delta_P$.

We now show that if $\delta \leq \delta_P$, there exists an equilibrium supported by strong off-path beliefs in which the public-spirited incumbent delegates with positive probability. To see that this is so, suppose that $\delta \leq \delta_P$ and consider the following strategy and belief profile: each incumbent type delegates with probability one to a bureaucrat of his own type, $\mu(del) = \pi$, $\mu(n) = 1$ and $\mu(t) = 0$. Clearly, the on-path belief $\mu(del)$ is derived via Bayes' rule and off-path beliefs – $\mu(n)$ and $\mu(t)$ – satisfy our off-path refinement. It is also easily verified that both incumbent types are maximizing their respective payoffs. The public-spirited incumbent's payoff from delegating is $\gamma + \delta F(\pi)$, whereas his maximal payoff from not delegating is $q + \delta F(1)$. Since $\delta \leq \delta_P$, the former payoff is greater. The captured incumbent's payoff from delegating is $1 + \delta F(\pi)$, his payoff from forbidding transfers by statute is $0 + \delta F(1)$, and his payoff from mandating transfers by statute is $1 + \delta F(0)$. Since $\delta \leq \delta_P$, $1 + \delta F(\pi)$ is the largest of these three payoffs.

Proof of part (b). Suppose that $\delta < \frac{\gamma - q}{F(1) - F(0)}$. Since $\delta < \frac{\gamma - q}{F(1) - F(0)} < \delta_P$, we know from the proof of part (a) that there exists an equilibrium supported by strong off-path beliefs in which both the public-spirited and captured incumbent delegate with probability one. We now argue that this is the unique equilibrium supported by strong off-path beliefs in which

the public-spirited incumbent delegates with positive probability.

We know from part (c) of Proposition 2 that in any equilibrium in which the public-spirited incumbent delegates, the captured incumbent must delegate with probability one. So, if there exists an additional equilibrium in which the public-spirited incumbent delegates, it involves the public-spirited incumbent mixing between delegating and not delegating and the captured incumbent delegating with probability one.

By part (b) of Lemma 1, we know that there does not exist an equilibrium supported by strong off-path beliefs in which the public-spirited incumbent places positive probability on delegating and mandating transfers by statute. Hence, all that remains to show is that there does not exist an equilibrium in which the public-spirited incumbent places positive probability on delegating and forbidding transfers by statute.

By way of contradiction, suppose that an equilibrium exists in which the public-spirited incumbent mixes between delegating and $p = n$. Two implications immediately follow: First, since the captured incumbent delegates with probability one in such an equilibrium, by Bayes' rule, $\mu(n) = 1$ and $\mu(del) = \frac{\sigma\pi}{\sigma\pi+(1-\pi)}$, where σ is the probability with which the public-spirited incumbent delegates. Second, for some $\sigma \in (0, 1)$, the public-spirited incumbent's payoff from delegating ($\gamma + \delta F(\mu(del))$) must be equal to that from forbidding transfers by statute ($q + \delta F(1)$): there exists a solution to (1) in σ on the $(0, 1)$ interval. Observe that the RHS of equation (1) is bounded below by $\gamma + \delta F(0)$. This, taken together with our supposition that $\delta < \frac{\gamma-q}{F(1)-F(0)}$, implies that for any $\sigma \in (0, 1)$, the LHS of equation (1) is less than the RHS. In other words, there does not exist a $\sigma \in (0, 1)$ that solves equation (1), a contradiction with our earlier implication otherwise.

Proof of part (c). Suppose $\delta \in (\frac{\gamma-q}{F(1)-F(0)}, \delta_P)$. Since $\delta < \delta_P$, we know from the proof of part (a) that there exists an equilibrium supported by strong off-path beliefs in which both the public-spirited and captured incumbent delegate with probability one. We now argue that there exists exactly one other equilibrium supported by strong off-path beliefs in which the public-spirited incumbent delegates with positive probability. Applying arguments

analogous to those used to prove part (b), we know that any such equilibrium involves the captured incumbent delegating with probability one and the public-spirited incumbent mixing between delegating and forbidding transfers by statute. All that remains to show is that such an equilibrium exists and the mixing probability is unique.

We first deal with issue of uniqueness. Suppose that an equilibrium supported by strong off-path beliefs exists in which the public-spirited incumbent mixes between delegating and forbidding transfers by statute, placing probability σ on delegating. Since the captured incumbent delegates with probability one, by Bayes' rule, $\mu(n) = 1$ and $\mu(del) = \frac{\sigma\pi}{\sigma\pi+(1-\pi)}$. In order for the public-spirited incumbent's mixing to be consistent with equilibrium behavior, his payoff from forbidding transfers by statute ($q + \delta F(1)$) must be equal to that from delegating ($\gamma + \delta F(\mu(del))$): equality (1) must hold for some $\sigma \in (0, 1)$. Since the RHS of (1) is increasing in σ, the solution to (1) in σ is unique.

Finally, we turn to the issue of existence. Since $\delta \in (\frac{\gamma-q}{F(1)-F(0)}, \delta_P)$, by part (a) of Lemma 1, a solution to (1) exists. Denote this solution by σ^*. It is then easily verified that the following strategy-belief profile constitutes an equilibrium supported by strong off-path beliefs: The public-spirited incumbent delegates with probability σ^* and forbids transfers by statute with probability $(1 - \sigma^*)$, the captured incumbent delegates with probability one, $\mu(del) = \frac{\sigma^*\pi}{\sigma^*\pi+(1-\pi)}$, $\mu(n) = 1$, and $\mu(t) = 0$. ■

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