Coordinating Agencies

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Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 **Harv. L. Rev.** ____ (Forthcoming 2012), available at SSRN.

Areas of fragmented and overlapping delegations of power to administrative agencies are common today. For example, fifteen federal agencies play roles in the American food safety arena. Similarly, twelve different agencies deal with exports, and numerous agencies regulate the financial sector, including the SEC, CFTC, OCC, FHA, FDIC, OTS and the Federal Reserve. In addition, as President Obama recently quipped during a State of the Union Address, we have one agency (the Department of the Interior) that is in charge of salmon while they are in fresh water, but a different one (the Department of Commerce) that handles them when they are in saltwater.

Despite the prevalence of these sorts of overlapping delegations in the regulatory arena, legal scholars generally have approached administrative law through a single-agency lens. In a forthcoming Harvard Law Review article titled *Agency Coordination in Shared Regulatory Space*, Professors Jody Freeman and Jim Rossi seek to change this picture. Specifically, Professors Freeman and Rossi depart from what they call the "single-agency focus that is so foundational to administrative law" by offering the "first comprehensive discussion in the legal literature of the problem of fragmented and overlapping delegations of power by Congress to administrative agencies."

Freeman and Rossi's aim is largely descriptive. They begin by describing various theories that scholars have articulated to explain *why* the legislative process creates agency coordination problems in the first place, including game-theoretic models that explore potential strategic benefits to Congress of creating overlapping or redundant agency jurisdiction. Then they move on to describe what they see as the primary challenge raised by overlapping jurisdiction: the problem of "coordination" in a "shared regulatory space." Freeman and Rossi explain that conceptualizing the challenge as one of "coordination" is preferable to conceptualizing it as a problem of "redundancy." This is so, they explain, because collapsing or eliminating agencies to reduce duplicative functions would likely produce the same coordination problems in "ever-larger bureaucracies." In addition, given the scope and complexity of congressional delegations to agencies, Freeman and Rossi suggest that there is an "irreducible minimum" of overlap and fragmentation that calls out for coordination tools and strategies.

The remainder of Freeman and Rossi's article focuses on how we might mitigate the "stubborn and serious crisis of coordination." Specifically, they describe how both Congress and the President already have numerous tools they can use to promote coordination. For example, Congress can resort to structural integration of agencies, inter-agency consultation provisions, and congressionally required joint rulemaking to facilitate agency coordination, and the Executive branch can utilize memoranda of understanding, White House oversight, and coordinated rulemaking. The hard question, according to Freeman and Rossi, is determining which of these tools have the most promise in a given setting. In other words, which tools will achieve coordination benefits that will justify the investment of time and resources and the increase in agency decision costs?

In thinking about which coordination tools might offer the most promise, Freeman and Rossi conclude that the more binding, transparent and substantive the tool, the more likely it will be to "control bureaucratic drift and the easier for principals to monitor," but with the concomitant effect of raising agency decision costs. As a result, different tools might be more or less appropriate in different circumstances. Take joint rulemaking, for example. It will drive up agency costs and will take away agency flexibility by resulting in a durable agency policy choice that can be changed only via an act of Congress or another notice-and-comment rulemaking. Hence, Freeman and Rossi argue that joint rulemaking might be "especially beneficial in instances where agencies are establishing substantive regulatory standards for financial markets or industry, or where certainty and uniformity are more important to a regulatory program than flexibility." In contrast, inter-agency consultation provisions might be most useful in areas where expertise, data or additional perspectives are needed.

In the end, in addition to its significant descriptive contributions, Freeman and Rossi's article stakes out a strong normative commitment in favor of more coordination among agencies. In Freeman and Rossi's view, more effective coordination among agencies has the potential to "generate valuable expertise and information, improve the quality of agency decision making, harmonize potentially inconsistent approaches, and reduce both public and private transaction costs." Members of the legislative and executive branches will be well-served by carefully reading Freeman and Rossi's article and giving serious thought to which tools each branch might use to most effectively achieve the coordination benefits that Freeman and Rossi describe. Scholars too will benefit from following Freeman and Rossi's lead and giving more sustained attention to the trade-offs of various coordination tools rather than continuing to think of administrative law largely through a single-agency lens.

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