The Administrative Passive Voice

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Sharon Jacobs, *The Administrative State's Passive Virtues,* **66 Admin. L. Rev. 565** (2014), available at SSRN.

The federal bureaucracy has long been accused of torpor. Administrative agencies, we are oft told, take years to do much of anything. Whether this supposed-sluggishness is because of intentional institutional design, judicial review, administrative preference, or the inherent conservativeness of bureaucracy is unclear. In recent years, moreover, the core descriptive claim that agencies are too slow and do too little has been significantly undermined. Nevertheless, positive accounts of administrative delay are rare and under-theorized. Sharon Jacobs's *The Administrative State's Passive Virtues* is a long overdue updating and application of Bickel's notion of the passive virtues in the context of courts, as applied and developed for the Administrative State.

To oversimplify a bit, Bickel argued that given the counter-majoritarian nature of courts in the United States, judicial actors can, do, and should utilize justiciability doctrines to avoid or defer deciding certain difficult or politically controversial cases. This practice of avoiding certain decisions was said to be desirable because it avoided potential attacks from the other branches or citizens and allowed the other branches with a better democratic pedigree to decide difficult political issues. Though well-known and rhetorically powerful, Bickel's passive virtues suffered a mix of acute and chronic intellectual beatings. But Bickel's ghost remains a powerful trope in modern constitutional law and Jacobs's point is not that Bickel was right about courts. Rather, it is that agencies have similar structural characteristics to courts in the ways that motivate Bickel and that we lack a theory or really even a concept of administrative passive virtues. Until now.

To wit, agencies have a significantly discretionary docket; agencies lack the democratic pedigree of Congress or the President; agencies often suffer political backlash from their policies; and perhaps more than courts, agencies risk funding loss if they stray too far from the preferences of their political principals. Through a series of administrative passivity case studies on the Environmental Protection Agency, the Fish and Wildlife Service, and the Federal Energy Regulatory Commission, Jacobs argues that agencies can, do, and should rely on passive tools. Agencies utilize the timing and extent of regulation to preserve their institutional power and legitimacy.

Analytically, Jacobs identifies three subsets of passivity: (1) *decisions not to decide*, like the EPA's decision before Mass. v. EPA not to decide whether GHG emissions from motor vehicles endanger public health and welfare; (2) *step-by-step regulation* in which agencies resolve some issues in a Rule but leave others that could have been decided for another day; (3) *administrative minimalism*, which involves a constellation of practices guided by the lodestar of choosing less ambitious solutions to avoid decisions with more problematic practical consequences (e.g., FWS's avoidance of listing decisions for potentially endangered species in the face of a hostile Congress in the mid-1990's). The case studies are chock full of useful insights; identifying the issue and constructing a vocabulary and framework for analyzing them are significant contributions on their own.

As the paper notes, sometimes agencies utilize passivity for undesirable or nefarious reasons, what is often called agency *shirking*. Suppose Jacobs is right that sometimes agency passivity—what we might

call *shrugging* is grounded in desirable institutional reasons that might enhance social welfare.

An initial puzzle is why shrugging works as a strategy for agencies. The benefit of strategic shrugging to an agency depends on deferral having a different political meaning or resonance than declining or deciding. That is, when an agency says "we will defer a decision" that is less politically costly, generating less social opposition, then when an agency says "yes" or "no." Off-hand, this could be right, but is not clear why a mobilized interest group who desires administrative action would not be just as upset by "not-right-now" as "no." In those cases, deciding not to act does not avoid political controversy, just as deciding to act would not avoid political controversy.

For a different set of agency decisions, the political costs of action (to the agency) are surely asymmetric. That is, one policy choice risks generating lots of political opposition, while the other policy choice risks generating less or no opposition. An implicit assumption of the Jacobs article is that the asymmetric political costs case is relatively common and that the asymmetries map onto the "action/activity" vs. "inaction/passivity" categories, such that action risks political opposition and inaction does not. This seems possible, but I am left uncertain as to whether or why this is so.

Nevertheless, suppose it is true. For a reviewing court, or indeed for legislators, or the President, or the public, the problem is how to distinguish good shrugging from bad shirking. Although one often finds articles trailing off a bit when it comes to how to address a challenge like this, Jacobs displays keen instincts and sharp insights. Her discussion of recent arbitrary and capricious review, as applied to agency passivity, is very useful and I learned enormously from it.

Jacobs urges, in short, that agencies should be more forthright about their reasons for passivity and courts should be deferential when reviewing them. This does not really solve the shirking v. shrugging problem, but perhaps the problem is no more severe in the passivity context than in the activity context. That is, the task of judicial review is always to try to distinguish good reasons for agency action from bad reasons for agency action, and there is no reason to think courts will be less good at it when evaluating passivity than when evaluating activity.

But the real question is not whether courts *can* do so, but whether courts *will* do so. Bickel's positive account was that courts defer difficult decisions because it is in their institutional interest to do so. Jacobs urges that agencies will behave in this way because it is in their institutional interest to do so. But is it in the courts institutional interest to review passively administrative agency passivity? And without being too cutesy about it, what are the systemic effects of passive judicial review of passive agency action?

If judicial review is a corrective to agency bias, whether in the direction of overreach or underreach, then a somewhat more active doctrine of judicial review might be desirable even if agency passivity is often laudable. More to the point, the very reasons that Bickel suggested courts would use the discretionary docket to protect their institution do not suggest courts will passively review agency passivity. The political costs to the courts of insisting an agency "do something" are often lower than the political costs of saying "you must do this" or "you may not do that." If so, then one is left wondering if it is in the judicial review of agency passivity that it is least likely courts will themselves embrace the passive virtues.

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