RULE BY LAW

The Politics of Courts in Authoritarian Regimes

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new security measures of some kind. The essential disagreements concern how and how much to adapt traditional constitutionalist compromises and understandings of civil liberties, not whether to adapt them or not. My focus here is very limited and is not an attempt to describe all of the many legal changes in intelligence gathering and other areas of homeland security as part of an authoritarian convergence. Second, criticisms of the institutional innovations described later come not just from the left, but from the libertarian right, including Republicans, and even from states-rights-oriented Southern nostalgists. Third, we might be able to learn from history, because many of the institutional mechanisms being proposed as solutions to the terrorist threat have been tried before, albeit under different conditions. Carefully drawing lessons from these experiences could be a worthwhile exercise.

The overall political context under which new antiterrorist measures are adopted is important. Citizens in the contemporary United States live under a political regime that bears little resemblance to the authoritarian regimes of Brazil and the Southern Cone. Nevertheless, it is not necessarily inappropriate to compare political measures taken against presumed enemies in authoritarian regimes with those adopted in democracies. Democratic governments have certainly engaged in political trials, especially in wartime. For example, Barkan points out that some 2,000 political dissidents were prosecuted in the United States during World War I, mainly for violating laws that forbade most forms of criticism of U.S. involvement in the war (1985: 1).

A new type of security court was created in the United States in response to the attacks of 9/11. President Bush signed an emergency order on November 13, 2001, that established military commissions to try noncitizen "unlawful enemy combatants" accused of terrorism. The Military Commissions Act passed by Congress and signed by President Bush in 2006 ratified the existence and procedures of these courts. As in Brazil and Chile under military rule, the executive in the United States decreed that a terrorist "war" necessitated the use of a special court system, controlled by the executive and insulated from the civilian judiciary. Unlike Brazil and Chile, in the U.S. case this system did not consist of preexisting military courts, but a new institution that was in many ways more severe than ordinary military justice.[30]

In addition, the Bush administration created a new legal regime to deal with suspected terrorists. For citizens, it invented the designation "enemy combatant," and claimed the right to apply this label to anyone it suspected of

[30] As a precedent, the Bush administration cited the military tribunal that tried and sentenced to death German spies captured on U.S. soil during World War II. But this case occurred before the United States signed several major treaties, including the Geneva Conventions.

terrorist activity. These suspects were then detained in military facilities, without access to a lawyer and without charges initially being brought ("Detention Cases," 2004).[31] As for noncitizen terrorist suspects, the Department of Defense decided in early 2002 to call them "unlawful combatants" and to place them outside the purview of both U.S. justice and the Third Geneva Convention dealing with prisoners of war. Captured in Afghanistan and incarcerated on the Guantánamo naval base in Cuba, these detainees are subject to the jurisdiction of the military commissions created by President Bush's 2001 order.[32]

These two features of the legal response to the terrorist attacks constitute an extraordinary change in traditional U.S. legality as it relates to political crime. As in Brazil and the Southern Cone, the policies have produced a debate between their supporters, who feel that they are measured responses to a severe threat, and their critics, who fear the erosion of constitutional rights by the executive.[33] It seems plausible that the conventional legal order and judicial procedures might be ineffective against small cells of determined, politically motivated killers ready to attack civilian targets. The question is whether new institutions created to deal with this problem create costs, in terms of curbs on and threats to civil liberties, that outweigh their presumed benefit of increased security. Another related issue is to what extent the executive can be trusted, in the absence of conventional checks and balances, not to use its emergency powers for institutional self-aggrandizement against other branches of government, political opponents, and dissident members of the citizenry (Arato 2002: 470).

It is striking that the military commissions established to try the Guantánamo detainees are similar to the military courts employed against the opposition by the Brazilian and Chilean military regimes. When it comes to presidential control over the courts, they are more draconian than the Brazilian military courts under military rule. As described in the order, they are constituted ad

[31] At the time of writing – August 2007 – the best-known detainees in this category were Yaser Esam Hamdi, a U.S.-born Saudi Arabian who fought for the Taliban and was captured in Afghanistan in late 2001; and the alleged "dirty bomber" José Padilla, arrested in Chicago after a trip to Pakistan in the spring of 2002 ("Detention Cases," 2004). Hamdi was subsequently turned over to Saudi Arabian authorities and released. Padilla was detained for three and a half years before being put on trial in a Federal court in Miami. See "After 9 weeks, U.S. rests in Padilla terror trial" at CNN.com accessed at www.cnn.com/2007/ on July 13, 2007.

[32] The detainees in Guantánamo, alleged Taliban and al-Qaeda combatants from more than forty countries, numbered 370 in August of 2007 ("Brown Quer Soltos Cinco de Guantanamo,"2007). In response to the Supreme Court decision of June 2004 discussed later, some pretrial screenings of detainees have taken place to determine their status. At the time of writing (August 2007) no judgment in the military tribunals had taken place.

[33] For different views of these and other post-9/11measures, see Amitai Etzioni and Jason Marsh (2003) and Schulz (2003).

hoc by the Secretary of Defense – in other words, the executive branch directly controls their composition and procedures. The identities of judges and prosecutors are apparently kept secret, as with the "faceless courts" sometimes used in Latin America. Defendants are not allowed any right of appeal to a civilian court, either in the United States or abroad. (Appeals can only be made to panels named by the Secretary of Defense.) Judges in the tribunals are given the leeway to close the trials to the press and public for almost any reason.[34] In all these respects the courts afford fewer procedural rights to defendants and more zealously guard executive privilege than the Brazilian military courts of 1964–1979. They also involve judges who as active-duty military officers in a chain of command lack independence and simultaneously fight the defendants as well as judge and sentence them, as in the Southern Cone military courts.

The commissions are authorized to sentence defendants to death with a unanimous vote of their members (Mintz 2002). Federal officials, including President Bush, have publicly suggested that the defendants are guilty. Lawyers complain of an inability to adequately represent their clients. Charges in the commissions involve membership in particular organizations as much as specific actions. Evidence presented by prosecutors is likely to include statements made under duress or even torture (Dodds, 2004).[35] And then-Secretary of Defense Donald Rumsfeld said that acquittals in the military commissions would not necessarily lead to the release of defendants – the executive could continue to detain them (Scheuerman 2006: 119). Because those tried in the military commissions seem to lack rights, and the executive claims to be able to deal with them in what seems to constitute a legal vacuum, this particular institution seems to resemble a rule by law more than it does a rule of law.[36]

The order creating the commissions constitutes a major reform of the judiciary, accomplished by presidential decree. In the proposed special court system, there is little separation between executive power, on one hand, and the judicial power on the other. In classic military style, defendants are first

[34] For an argument against this provision of the regulations, see Klaris (2002).

[35] This article claims that several former prisoners at Guantánamo have said that they made false confessions after interrogations.

[36] It is important to point out that the Bush Administration's claims with regard to its treatment of noncitizen "unlawful combatants" and citizen "enemy combatants" are not at all similar to the changes in criminal law and procedure described by Martin Shapiro in his conclusion to this volume, Chapter 13. The latter changes are modifications of clearly understood and enforced rules. The Bush administration's claims are to absolute discretion unbounded by law – the kind of discretion that when wielded by regimes outside the United States is often labeled "authoritarian."

and foremost "enemy combatants," and only secondarily bearers of rights as in the civilian court system. The emergency order therefore represents a potentially serious inroad into the U.S. constitutional tradition, and a significant militarization of the judiciary.[37]

If, as Andrew Arato writes, "Constitutionalist self-limitation of elected power . . . [is] the one truly American achievement" in the political realm, then it is not clear that this achievement will entirely survive the onslaught of the "war on terrorism" (2000: 328).[38] U.S. law professor Laurence Tribe invoked a Southern Cone military regime when he talked about the treatment of citizens accused of being "enemy combatants." He said that in these cases the government is "asserting power akin to that exercised in dictatorships like Argentina, when they just 'disappeared' people from their homes with no access to counsel, no list of the detained or executed" (Benson and Wood 2002).

The fact that a prominent expert on U.S. constitutional law invoked a Southern Cone dictatorship in describing the treatment of "enemy combatants" should not go unnoticed. Professor Tribe's comment is part of a much larger body of criticism that is too scholarly to be dismissed as mere "rhetoric," "clichés," and "banners and slogans," as does Martin Shapiro in Chapter 13, when he argues that the notion of authoritarian convergence actually serves authoritarianism.[39] The parallel being drawn here between Southern Cone security courts and the U.S. military commissions is based on a careful historical examination of the institutional architecture and procedures of each set of courts. Readers may find the analogy implausible, but the argument that it is politically inconvenient should be irrelevant to the scholarly debate about how to interpret post-9/11 legal changes in the United States.

[37] For these and other insights into the military commissions I am indebted to the participants in the symposium "The Judiciary and the War on Terror" held at the Tulane University Law School on February 21, 2003, especially Robin Shulberg, a federal public defender; Eugene Fidell, the president of the National Institute of Military Justice; Edward Sherman, a professor of Tulane Law School; Jordan Paust, of the University of Houston Law Center; and Derek Jinks, of the St. Louis University School of Law.

[38] Arato suggests that there is a general tendency for U.S. presidents to seek a way out of the gridlock inherent in the U.S. presidential and federal system by invoking emergency powers. However, the open-ended nature of the "war on terrorism," and the unconventional nature of the presumed war, makes this particular push for emergency powers particularly dangerous from a constitutional point of view.

[39] It is difficult to understand the logic of Shapiro's position. He seems to be saying that those who criticize the indefinite detention of a U.S. citizen on suspicion of terrorism and compare it to the actions of an authoritarian regime are –somehow, mysteriously – fomenting authoritarian rule. At this point we seem to have entered a world that resembles Lewis Carroll's *Alice through the Looking Glass*, in which the conventional relationship between cause and effect has been turned upside down.

A review of the record of the use of military courts in Brazil and Chile alerts us to the fact that such courts are often a convenient tool of executives anxious to avoid compromise, dialogue, and the give-and-take of democracy. The expansion of security court jurisdiction, invoked in response to specific, seemingly unique emergencies, is often gradually ratcheted upward to encompass more people and circumstances. Over time, its pro-prosecutorial bias allows investigators, prosecutors, and judges to become sloppy about evidence and procedures, violating rights and giving the executive branch the benefit of every doubt. The result can sometimes be the emergence of an unaccountable state within a state.

However, considerable conflict over the executive branch's legal response to terrorism has occurred, and is likely to continue. A small band of commentators in the news media has criticized the creation of the military commissions.[40] Some of this criticism may have had an effect, because in addition to modifying the original order, the administration placed the accused terrorists Richard Reid and Zacarias Moussaoui, as well as the "American Taliban" John Walker Lind, on trial in civilian, federal courts. Perhaps more importantly, scholars and judicial elites – law professors, legal commentators, military lawyers, and some prosecutors and judges – have criticized the executive's claims to be able to indefinitely detain prisoners, both citizens and noncitizens.[41] One such critic characterized the architects of the federal government's detention policies as "executive power absolutists" (Taylor 2004).[42] And in an editorial, the *New York Times* called the 2006 act that consolidated the commissions "a tyrannical law that will be ranked with the low points in American democracy, our generation's version of the Alien and Sedition Acts."[43]

[40] The outpouring of commentary on the military commissions is too great to list here. For significant criticisms of the tribunals see Arato (2002), Safire (2001), Lewis (*New York Times* 2001), Butler (2002), and Nieer (2002). For a defense of the commissions see Gonzales (2001) and Wedgwood (2002).

[41] For some examples of this work, see Gathii (2003), Lugosi (2003), and Amann (2004).

[42] Other commentators have criticized the Bush administration's military commissions and treatment of citizen "enemy combatants." Law professor Sanford Levinson (2006: 67–68) writes, "I believe the Bush Administration threatens the American constitutional order – and for that matter, the edifice of world order built in the aftermath of World War II – more than any other administration in my lifetime." Political scientist Bill Scheuerman (2006: 118) declares that "In the spirit of Carl Schmitt, influential voices in the [Bush] administration interpret the executive branch's authority to determine the fate of accused terrorists along the lines of a *legal black hole* [emphasis in the original] in which unmitigated discretionary power necessarily holds sway." And law professors Neal Katyal and Laurence Tribe declare (2002: 1259–1260) that "the President's Order establishing military tribunals for the trial of terrorists is flatly unconstitutional" because it violates the principle that the powers that define the law, prosecute offenders, and adjudicate guilt should be three separate entities.

[43] "Rushing Off a Cliff," *New York Times*, September 28, 2006 at http://www.nytimes.com/2006/accessed on July 20, 2007.

If our analysis is correct, the most significant conflicts over these issues will involve judicial elites, on the one hand, and the military and the civilian proponents of militarized law on the other, with groups of activists across the ideological spectrum playing an important role as well. Already, judges have ruled against the executive branch in several high-profile cases. For example, in October 2003, a federal judge ruled that accused 9/11 terrorist Zacarias Moussaoui should not face the death penalty because the government would not allow his defense lawyers to question al-Qaeda prisoners. In this case, the court upheld the right of defense to have the same access to witness testimony and other forms of evidence. The government lawyers had claimed that the right had to be restricted in the interests of national security (Bravin 2003).[44]

In June of 2004 the U.S. Supreme Court partially rejected the Bush administration's positions in three cases involving the rights of detainees held in the war on terrorism. The most important, and the biggest reversal for the government, was *Hamdi v. Rumsfeld*. In it, the court ruled that a U.S. citizen held as an "enemy combatant" in the United States has a right to a hearing to determine the legality of his incarceration. While the court did not rule that a U.S. citizen could not be tried by a military tribunal, it did uphold the right of detainees to a notice of the charges against them, an opportunity to contest those charges, and the right to appear before an ostensibly neutral authority. In *Rasul v. Bush* and *al Odah v. the United States*, the court ruled that prisoners being held in Guantánamo Bay had the right to present legal objections to their detentions in federal courts ("Detention Cases," 2004).

Perhaps most sweepingly, in June 2006 the Supreme Court ruled that the military commissions created by President Bush's 2001 executive order were unconstitutional (Goldberg 2006). These rulings suggest that the extraordinary powers claimed by the executive after 9/11 will be at least partially rolled back by the U.S. judiciary on a case-by-case basis.

The U.S. case is an important one for understanding the use of security courts. If we can recognize the occasional existence of a limited "judicial space" and some procedural rights for defendants under an authoritarian regime, as we have in the Brazilian case, we must also be alert to the possibility of authoritarian legality in a democracy. Put another way, democracies can modify their legal systems in ways that undermine their rule-of-law characteristics and unshackle military and security forces. However, when that occurs,

[44] Government lawyers responded to the ruling by saying that they would appeal it, and if they lost the appeal, would designate Moussaoui as an "enemy combatant" so that he could be held without charges indefinitely or tried in a military commission. This shows how the creation of a special court can change the impact of legal decisions in the civilian judiciary, in effect giving the prosecution an entirely new and highly favorable jurisdiction.

judicial-military conflict – not consensus – is the mechanism by which individual rights are protected.

The open question about the U.S. case is to what extent judicial elites will challenge the prerogatives claimed by the executive branch and rule that some powers – such as the right to detain citizens deemed to be "enemy combatants" indefinitely – are unconstitutional.[45] After both World Wars I and II, the U.S. judiciary rolled back some of the emergency powers claimed by the executive during those conflicts. Such a scaling back of executive privilege has begun to take place during the "war on terrorism," but it is also far too early to make a definitive judgment on how the "war" will reshape the legal treatment of opposition and dissent in the United States.[46] This is an extremely important conflict in which both the unique constitutional tradition and extraordinary protection of basic rights in the United States are at stake.

CONCLUSION

Why do authoritarian regimes bother with trials of political opponents in security courts? If they come to power by force, why don't they continue to rule by force and force alone, dropping all pretenses to legality? Given that most of them do not, and instead use security courts to some extent, why do some regimes get such courts' verdicts and sentences to "stick" more effectively than others?

Some existing approaches to these questions are unsatisfactory. For example, the strength of the opposition facing the regime does not seem an adequate explanation for variation in the use of security courts by authoritarian regimes. Similarly, broad generalizations about differences in political culture do not appear to easily fit the cases analyzed here. Nor can variations in authoritarian legality be easily ascribed purely to ideological or attitudinal differences among military officers or judicial elites in each country. Expressions of an exterminationist dirty war mentality by military and judicial elites can be found in the historical record of all three authoritarian regimes in Brazil, Chile, and Argentina.

[45] Andrew Arato takes the optimistic view that resistance to "the illegitimate and dangerous expansion of emergency government" after 9/11 will succeed (2002: 472).

[46] Interestingly, the former Supreme Court Chief Justice, the late William Rhenquist, wrote a book on civil liberties in wartime. His measured conclusion might give hope to both supporters and critics of the executive's claims: "It is neither desirable nor it is remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent in time of war, but they will speak with a somewhat different voice" (Rehnquist 1998: 224–225).

Instead, our cases suggest that attempts by judicial and military organizations to impose institutional solutions to the problem of "subversion" succeed and bind them together, or fail and drive them apart. The degree of military and judicial consensus, integration, and cooperation is a key, neglected variable in unlocking the puzzle of variation in authoritarian legality.

This chapter therefore suggests a two-part answer to the question, why do authoritarian regimes bother to use security courts? First, in the modern world (and all other things being equal), there are advantages to not dropping all pretenses and to continue to legitimate authoritarian rule with some kind of appeal to the law. Legal manipulations and political trials are useful for an authoritarian regime because they can demobilize popular oppositional movements efficiently, reducing the need to exercise force; garner legitimacy for the regime by showing that it "plays fair" in dealing with opponents; create positive political images for the regime, and negative ones for the opposition; under some circumstances, help one faction gain power over another within the regime; and stabilize the repression by providing information and a predictable set of rules around which opponents' and regime officials' expectations can coalesce.

The second part of the answer is that authoritarian regimes use security courts because they can. Given that trials as a means of repression have advantages for authoritarian regimes, those regimes are able to rely on "trustworthy" security courts – courts, either civilian or military, that will produce verdicts in line with their conception of legality, and not challenge the fundamentals of regime rule. However, such trustworthy courts have to be produced by trial and error, over time. That is not easy, and the courts must be flexible enough to adapt to new exigencies of regime rule. Traditional legal establishments may also resist them. Sometimes the attempts to create trustworthy courts succeed, building up a consensus across military and judicial elites, and at other times they fail.

Where judicial-military consensus, cooperation, and integration were high, regime repression relied heavily on security courts, and the legal system was modified conservatively and incrementally. This can be seen in the Brazilian case. Where the military broke with judicial elites, as in Argentina, repression was a radical, largely extrajudicial assault on traditional legal procedures. Where the military and judiciary were quite separate, and cooperation limited, repression took a form that was midway between these two poles. This outcome can be seen in Chile.

The analysis of Argentina suggests that when regimes resort to extrajudicial violence and an all-out assault on traditional legality, they will do so because their prior attempts to manipulate the law and courts to their advantage failed. Behind a dirty war may lie an organizational failure – the collapse of a

trustworthy security court that was ready to prosecute regime opponents with authoritarian laws. Regimes therefore resort to widespread terror and force when they lack the organizational means to institute more legalized forms of repression.

Finally, recent political events should compel scholars to ask whether contemporary democratic regimes, in modifying their legal structures to cope with political emergencies, might be converging with authoritarian regimes in some respects. These modifications can parallel each other even if the overall political context under each type of regime is different. Leaders of democracies in the age of the "war on terrorism" seem to be tempted to create fortress-like protections of the state's national security interests, making extravagant claims of executive privilege and eroding the very civil liberties that they claim to defend (Arato 2002: 457–476). Specific institutions that these leaders create, such as the military commissions authorized by President Bush and the ad hoc treatment of citizen "enemy combatants," can bear a striking resemblance to the practices of authoritarian regimes. At the present time, studying security courts in defunct authoritarian regimes is not just an academic exercise. Similar courts may begin operating tomorrow in the most unlikely places.

APPENDIX

TABLE A.1. *Lethal violence by state forces and other indices of political repression in Argentina, Brazil, and Chile, 1964–1991*

Category	Brazil	Chile	Argentina
Period	1964–79	1973–89	1976–83
Period of heaviest repression	1969–73	1973–77	1976–80
Deaths and disappearances	300+	3,000–5,000	20,000–30,000
Political prisoners	25,000	60,000	30,000
Exiles	10,000	40,000	500,000
Number of people tried in military courts for political crimes (estimates)	7,367+	6,000+	350+
Amnesty	8/28/79	4/19/78	9/23/83 later annulled by Congress
Main human rights Report	Nunca Mais (1985) Secret project supported by the Archdiocese of São Paulo and the World Council of Churches	Rettig Report (1991) Rettig Commission appointed by President Aylwin	Nunca Más (1984) Sabato Commission appointed by President Alfonsín
Population (1988)	144 million	13 million	32 million

Sources: Argentine National Commission on the Disappeared (1986) *Nunca Más*. New York: Farrar Straus Giroux; National Commission on Truth and Reconciliation (1993) *Report of the Chilean National Commission on Truth and Reconciliation*. University of Notre Dame Press; Paul Drake (1996) *Labor Movements and Dictatorships: The Southern Cone in Comparative Perspective*. Baltimore: Johns Hopkins University Press, pp. 29–30; Carlos Nino (1996) *Radical Evil on Trial*. New Haven: Yale University Press, p. 64, 80; Nilmário Miranda and Carlos Tibúrcio (1999) *Dos Filhos Deste Solo (Mortos e Desaparecidos Políticos Durante a Ditadura Militar: A Responsibilidade do Estado)*. São Paulo: Editora Fundação Perseu Abramo/Boitempo Editorial, pp. 15–16.

2

Administrative Law and the Judicial Control of Agents in Authoritarian Regimes

Tom Ginsburg

Authoritarian regimes, like all governments, face the need to control lower level officials who work for the regime. But authoritarian and democratic governments differ in the sets of tools and constraints they bring to the problem, and even within the category of authoritarian governments there are substantial differences in regime capabilities in this regard. This chapter examines the causes and consequences of a decision by an authoritarian government to turn to administrative law as a tool for monitoring government officials.

Administrative law is a notoriously fluid area of law, in which national regimes vary, and there is substantial divergence even over the conceptual scope of the field, much more so than, say, in corporate law or tort law. Part of the confusion comes from the fact that administrative law regimes address three different but fundamental political problems. The first is the problem of coordination among the large number of governmental actors that compose and serve the regime. This problem is addressed by the formal conception of administrative law as encompassing the organization of government; that is, the organic acts establishing and empowering government agencies. This was the definition of administrative law in the former Soviet Union, for example. Administrative law in this conception was not at all about constraint of government but about empowerment of government within a framework of legality, and ensuring that the agency has been properly granted powers from the lawmaker. By defining the scope of authority, the law resolves potential coordination problems among governmental actors.

A separate function of administrative law in some regimes is social control. In the socialist legal systems, administrative law included in its scope law enforced by administrative authorities rather than by judicial authorities. In China today, for example, there are a wide range of violations subject to administrative punishments from police or executive authorities without judicial supervision (Biddulph 2004; Peerenboom 2004a). Administrative law statutes contain the

substantive rules as well as the procedures for punishment, which can include significant periods of detention of the type normally considered criminal in Western conceptual architecture. In practice, "administrative" punishments are implemented by the police. This type of scheme really reflects the inability or unwillingness of the regime to delegate crime control functions to the judicial system, which may lack capacity to achieve the crucial core task of social control.

In this chapter, I focus on the third political function of administrative law regimes, namely the resolution of principal-agent problems (McCubbins, Noll and Weingast 1987; McNollgast 1998, 1999). In the Western legal tradition, administrative law concerns the rules for controlling government action, for the benefit of both the government and the citizens. From the government point of view, the problem can be understood as one in which a principal (the core of the regime, however it is composed) seeks to control agents. All rulers have limited physical and organizational capacity to govern by themselves. Government thus requires the delegation of certain tasks to administrative agents, who have the expertise and skill to accomplish desired ends. The agents' specialized knowledge gives them an informational advantage over their principals, which the agents can exploit to pursue different ends and strategies than desired by the principal. This is the principal-agent problem, and it is one that is ubiquitous in modern administration. To resolve the problem and prevent agency slack, all rulers need mechanisms to monitor agents' performance and to discipline agents who do not obey instructions.

Administrative litigation can help resolve these problems. As is described in more detail later, a lawsuit by an aggrieved citizen challenging administrative action serves the important function of bringing instances of potential agency slack to the attention of the rulers. The courts thus function to a certain degree as a second agent to watch the first. Being a court, of course, requires a commitment to certain institutional structures and practices, which sometimes may create new types of challenges for rulers; indeed, sometimes rulers will lose on particular policy matters to achieve the broader goal of controlling their agents. We should thus not expect that every ruler will adopt an administrative law regime of this type, designed to control government action on behalf of the rulers and the citizenry.

The scope of the agency problem and the tools available to rulers may vary across time, space, and type of organization of the regime itself. This sets up a problem of institutional choice for rulers, of how to choose the most effective mechanism or combination of mechanisms to resolve the particular agency problems they face. The first part of this chapter considers some of the factors that may affect this choice.

THREE DEVICES TO SOLVE AGENCY PROBLEMS

I conceptualize three categories of mechanisms that rulers can choose from to reduce agency costs (Ginsburg 2002): ideology, hierarchy, and third-party monitoring. As with any typology, there are shades of gray in between the categories. Nevertheless I find it a useful framework for categorizing regimes as well as for providing some insight into the changing pressures for judicialization of administrative law.

Internalization and Ideology

Perhaps the most desirable method of reducing agency costs from the perspective of the principal is to convince the agent to internalize the preferences of the principal. Perfect internalization of the preferences of the principal eliminates the need for monitoring and enforcement. Internalization can occur through professional indoctrination and training or through promulgation of a substantive political ideology that commands the loyalty of the agent. Leninist systems, for example, relied on a mix of internalized ideology and externally imposed terror to keep their agents in line, although the Chinese variant of that ideology has not seemed to prevent extensive corruption and severe agency problems (Root 1996). The Chinese Communist Party's conceptual contortions around the ideal of a "socialist market economy" illustrate the lengths that regimes will go to maintain ideological cohesion, which at least in part is designed to minimize agency costs.

It would be a mistake, however, to think that ideologies are the exclusive prerogative of socialist or authoritarian regimes. Internalization can also involve procedural rather than substantive values, so that the agent internalizes a way of acting that will serve the interests of the principal. For example, by requiring that all senior civil servants be trained in law (formerly a legal requirement in Germany and still largely true in Japan), rulers might discourage their agents from departing from the text of statutes. Legal education that emphasizes fidelity to text serves the interest of the coalitions that enact statutes. Indeed scholars have often noted the compatibility of legal positivism with authoritarian rule (Dyzenhaus 1991).[1] The notion that law should serve as the faithful agent of the "political" sphere is a form of ideology that can serve to uphold whatever government is in power.

[1] At least two accounts of important authoritarian regimes dispute this connection. Ingo Muller's classic study of courts in Nazi Germany (1991) illustrated how legal actors betrayed their positivist heritage. Similarly Hilbink (2007) and Couso (2002) emphasize that positivist ideology does not explain the behavior of the Chilean courts during the Pinochet regime, when they upheld regime interests even when the law would seem to require otherwise.

All modern political systems utilize indoctrination through legal education. Educational requirements also help the principal select among potential agents who are competing for employment. By requiring potential agents to undergo costly training *before* selection, the principal allows the agents to signal that they have internalized the values of the principal. Those potential agents who do not share the values of the principal may pursue other careers rather than undertake the training. Furthermore, preselection training reduces the need for postselection indoctrination, the cost of which must be borne directly by the principal. Nevertheless, highly ideological authoritarian systems tend to utilize postselection training, such as the system of Central Political Schools (CPS) found in China and other Communist countries. Indeed, China is currently expanding CPS training to county-level bureaucrats (Whiting 2006: 16).

It seems quite likely that democracies, with their structural commitments to pluralism, have a more difficult time producing substantive ideologies of the power of, say, Leninism. We periodically hear of the end of ideology (Bell 2000), but in an era of new, rising challenges to democracy, it is clear that these eulogies only refer to the industrialized West. One therefore might think that the internalization strategy is to be preferred by authoritarian regimes, and to be avoided by democracies. Even for authoritarians, successful internalization is difficult to observe directly. Any system of governance over a certain scale must therefore utilize other mechanisms as well.

Hierarchy and Second-Party Supervision

By hierarchy, I have in mind a decision by the principal to monitor the agent directly. Rulers may be able to influence bureaucratic agents, for example, through direct manipulation of incentive structures. As mentioned earlier, agents compete against other potential agents to be hired; once hired they compete to advance. By rewarding loyal agents and punishing disloyal agents in career advancement and retirement decisions, rulers provide bureaucrats with an incentive to perform. As has been observed since Weber's classic work (1946), hierarchical structures help reduce monitoring costs, as more senior agents help monitor and discipline junior ones.

Rulers can also manipulate the incentive structure of the bureaucracy as a whole. They can, for example, reduce the budget of an agency; impose process costs such as performance reviews, which utilize scarce staff time; and force the agency to promulgate internal rules that constrain discretion. They can create "internal affairs bureaus," which are essentially external monitors within the agent itself. They can create multiple agencies with overlapping jurisdictions that then compete for budget and authority (McNollgast 1998:

51; Rose-Ackerman 1995). When there are overlapping authorities, agents can monitor each other and prevent any one agent from becoming so powerful as to displace the principal.

Hierarchical control requires monitoring, and this can involve the creation of a specialized agent whose exclusive task is to seek out instances of agent malfeasance for punishment. The imperial Chinese Censorate is one such example, as is its successor, the Control Yuan of the Republic of China.[2] Similarly the Chinese Communist Party relies on a set of institutions to structure incentives for its cadres. For example, its Organization Department provides evaluation criteria for local party secretaries based on performance targets, and these have been adjusted over time (Whiting 2004, 2006).[3] An array of other mechanisms, including horizontal evaluation through so-called democratic appraisal of other colleagues, involve monitoring of the bureaucracy by itself. And both the party and government have internal monitors, the Central Discipline Inspection Commission and the Ministry of Supervision, respectively (Whiting 2006: 19–21).

Socialist legal systems featured a distinctive form of administrative legality (though not formally identified as such) that essentially relied on this strategy of hierarchical supervision. That was the so-called function of general supervision by the Procuracy. The institution originates in imperial Russia, when Peter the Great needed to improve the efficiency of government and tax collection (Mikhailovskaya 1999), and it eventually became quite powerful, known as "the eyes of the ruler." Under the concept of general supervision, maintained today in Russia, China, and some of the postsocialist republics, the prosecutor is empowered not just to serve as an agent for the suppression of crime, but as a supervisor of legality by all other government agents as well. This puts the procurator at a level equal to or superior to judges, and empowers it to take an active role in what would conventionally be characterized as civil or administrative law as well as criminal law.

The procuracy has a bad name in the West because of its association with Stalinism. Viewing the matter from a positive rather than normative perspective, general supervision is an undeniably effective technique for reducing agency costs.

In terms of the distinction between authoritarian and democratic regimes, a key factor is the time horizon of the ruler. Hierarchical mechanisms of control will be easier to undertake for a ruling party with a longer time horizon than for

[2] Republic of China Constitution, Arts. 90–106 (1946).

[3] Whiting notes that the party has engaged in "adaptive learning," for example by replacing raw production targets that created distorted incentives with more nuanced criteria.

a party with a short time horizon. If bureaucrats' time horizons are longer than the expected period of rule by the political principal, bureaucrats may not find rulers' threats of career punishment to be credible. If the punished bureaucrat anticipates that a new ruler will come to power with preferences that align more closely with his own, he may actually reap long-term gains for being disloyal to the present regime (Helmke 2005). Bureaucrats can also exploit their informational advantages to create delay, waiting until a new political principal comes into office. Authoritarian rulers *may* have longer time horizons than those associated with democracy because of the institutionalized turnover in power. This is especially true for party-based authoritarian regimes, and may be less true of military dictators.

Another important distinction between authoritarians and democratic regimes is the type of sanctions they can impose on wayward agents. In a democracy, a corrupt or politically unreliable agent can be fired or, in extreme cases, jailed in relatively good conditions. The sanctions available to authoritarians are far more severe. Thus hierarchy, like ideology, may be preferred by authoritarians.

Judicial Control and Third-Party Supervision

Judicially supervised administrative procedures, such as a right to a hearing, notice requirements, and a right to a statement of reasons for a decision, are a third mechanism for controlling agency costs. By creating a judicially enforceable procedural right, rulers decentralize the monitoring function to their constituents, who can bring suits to inform rulers of bureaucratic failure to follow instructions (McCubbins and Schwartz 1984). Rulers also create a mechanism to discipline the agents and can use the courts as a quality-control system in judging whether the monitors' claims have merit. Although administrative procedures may be accompanied by an ideology of public accountability, their political function is primarily one of control on behalf of rulers (Bishop 1990, 1998; McCubbins, Noll, and Weingast 1987, 1989).

The distinctive feature in judicial supervision is that it relies on the logic of what McCubbins and Schwartz (1984) call fire alarms. The dispute resolution structure of courts is one in which cases are brought from outside – courts are not typically equipped to proactively identify violations. They are thus truly fire alarms rather than police patrols. The institutional structure of courts facilitates upward channeling of decentralized sources of information, for which the costs are paid by private litigants.

Of course, courts are not the only type of fire alarm mechanism available to rulers. The PRC, for example, has maintained a structure for citizen

	General	Specialized
Proactive	Censorate, procuracy	Internal affairs bureau
Reactive	Ordinary court	Administrative court; ombudsmen

FIGURE 2.1. Types of Monitors.

complaints, the Letters and Visits Office, at all five levels of the Chinese government hierarchy (Leuhrmann 2003). Similarly, the Confucian tradition featured a gong whereby citizens could raise complaints before the administration (Choi 2005).

The Scandinavian countries have the additional device of the ombudsman. The ombudsman is a special government officer whose only job is to protect citizens' rights. He or she can intervene with the bureaucracy and in some countries bring court cases to force the government to take certain actions. Unlike the procurator, the ombudsman is reactive, relying on the citizenry to bring cases to his or her attention. This model has also been very influential abroad, but is not typically desired by authoritarian regimes. It is more designed for human rights protection than for ensuring the routine use of administrative procedures. Ombudsmen's legal powers vary across regimes, but generally rely on publicity, which in turn relies on a media independent enough to publicize instances of administrative and political malfeasance.

An additional design choice is the level of specialization, such as may be found in a designated administrative court or even subject-specific monitors. Specialization can improve the quality of monitoring, though it might increase agency costs if judges are themselves "captured" by the technical discourse of the bureaucrats. The range of mechanisms can be arrayed in the following two by two figure (Figure 2.1), in which the top row corresponds to certain types of hierarchical controls and the lower row corresponds to varieties of judicial control that rely on third-party monitoring.

Whereas agents who have internalized the principal's preferences are self-monitoring, and hierarchical supervision involves second-party monitoring and discipline by the principal, administrative law requires passive third parties to monitor and discipline administrative agents. It is therefore the most institutionally complex of the three mechanisms (as well as the last to develop historically). Most systems of administration utilize a combination of the three

mechanisms, and the next section examines some considerations that influence the particular choice.

WHY ADMINISTRATIVE LAW? COMPARATIVE INSTITUTIONAL CHOICE

Under what conditions will political principals rely on third-party, legal mechanisms for supervising agents? As a mechanism of controlling agency costs, judicially enforced administrative law has costs as well as benefits. Extensive administrative procedures entail costs in the form of slower, less flexible administration. In addition, generalized administrative procedures carry some risk for rulers. As Morgan (2006: 220) notes, administrative law is a

> contingent opportunity structure – it shapes who wins and who loses but not necessarily in predictable ways. The outcomes that flow from the application of administrative law (or law-like) doctrines to particular situations can in some circumstances bolster the powerful, in others they provide openings for the disempowered or more vulnerable.

By their nature, procedural rights may extend to rulers' opponents as well as their supporters, and so may lead to policy losses. Rulers can try to tailor the procedures so as to limit access by opponents, but nevertheless will likely be faced with some losses caused by opposition lawsuits. There are also agency problems associated with the use of third-party monitors such as judges. In many systems the factors that give rise to judicial agency costs are likely to be the same as those that produce bureaucratic agency costs. The extent of judicial agency problems will depend on the mechanisms available to rulers for controlling judges, which also include hierarchy and internalization. For example, professional norms of fidelity to law function as an internalized ideology, reducing the agency costs of judicial monitoring. Hierarchical structures within the judiciary are important modalities of control as well. Civil law judges, for example, are typically appointed at a young age and serve in hierarchical structures much like the bureaucrats themselves.

Whether or not rulers want to adopt a strong administrative law regime depends in part on the other mechanisms available for controlling bureaucrats, and in part on rulers' perceptions of judicial agency costs. If rulers believe they can control bureaucrats with other mechanisms, such as indoctrination or control over careers, a system of judicially enforceable administrative law is undesirable.

There may, of course, be exogenous factors that exacerbate agency problems in particular settings. One of the most important may be economic and regulatory complexity. As economies become more complex, they are less

amenable to central control and require more complicated and flexible regulatory schemes. This means empowering regulatory agents relative to political principals. In contrast, regimes of state ownership essentially utilize hierarchical control over the agents to direct the economy. We might thus expect a secular trend toward judicialization simply because of increasingly complex regulation, and a particular shift in economies formerly characterized by state ownership.

We can conceptualize the decision about the mix of judicial monitoring and hierarchical controls in simple economic terms. Rulers will evaluate the benefits of judicially monitored administrative proceduralization and will choose a level of procedural constraint where marginal costs are equal to marginal benefits in agency cost reduction. To do so, they need to consider not only "pure" bureaucratic agency costs but also process costs that come in the form of slower bureaucracy. The former decline with proceduralization, while the latter rise. Furthermore, the political principals must also consider agency costs associated with a third-party monitor, reflected in the proverbial problem of "who guards the guardians" (Shapiro 1986). Choosing the level of proceduralization that minimizes the sum of these costs will set the "price" of the legal solution. Political principals will then evaluate this price against hierarchical and ideological alternatives to choose an agency cost-reduction strategy. Since the costs of monitoring and suing the government under administrative law are borne by private litigants, rulers may be liberal in granting procedural rights.

The relative cost of administrative law as opposed to hierarchy and internalization depends in part on the structure of politics itself. For example, strong political parties help political leaders because they provide a group of committed persons who can assist in the monitoring and discipline of bureaucrats. They also can provide qualified and motivated personnel to staff the bureaucracy. Political parties utilize internalization and hierarchy to help reduce administrative agency costs.

In democracies, principals who govern for an extended period have less need to rely on independent courts as monitors. A disciplined political party that is electorally secure, for example, can easily utilize first- and second-party solutions to the problem of agency cost. Where parties are weak, however, they may want to use courts to protect their policy bargain from repeal by later coalitions because they anticipate electoral loss (Cooter and Ginsburg 1996). Furthermore, weaker and more diffuse parties will be less able to motivate agents ideologically and discipline them through hierarchical mechanisms.

My main claim is that administrative procedures are one mechanism for controlling agency problems. They feature some distinct disadvantages relative to internalization and hierarchy for an authoritarian regime, namely the

possibility of agency costs in the monitor and, more problematically, the open nature of procedural rules, which means that regime opponents may be able to use the mechanisms in ways that are not desirable. Furthermore, the availability of severe punishments for wayward agents under dictatorship, where such niceties as procedural rights for civil servants may be minimal, may bias authoritarians away from judicialized administrative law.

Still under some circumstances, shifts in cost structures among the available substitutes may generate pressures for an administrative procedures regime. If hierarchy or internalization becomes less effective, either because of exogenous reasons or because of factors internal to the regime, we should see greater legal proceduralization. Conversely, if hierarchy or internalization becomes cheaper, we should see less proceduralization. The level of administrative proceduralization will thus reflect the following factors: the severity of the agency cost problem; the process costs of proceduralization, such as slower administration; the costs associated with third-party monitors; and the availability of lower cost mechanisms to reduce agency costs, such as internalization and hierarchy.

AN ILLUSTRATION: THE CASE OF CHINA AND THE SHIFT FROM HIERARCHY TO ADMINISTRATIVE LAW

The theory can also be illustrated by examining administrative litigation in China. China adopted an Administrative Litigation Law (ALL) in 1989, replacing a transitional regime first adopted in 1982 (Pei 1997; Wang 1998; see Landry, Chapter 8). Prior to the passage of this law, citizens' rights of appeal against illegal administrative acts were extremely limited, despite the presence of constitutional guarantees providing for such rights. The new law expanded appeals both within the administration and to the judiciary. This law has been used to generate thousands of administrative complaints for the courts. China's citizens have made use of the system with increasing frequency, with rates increasing more than 20 percent a year throughout the 1990s, though analysts note that the law did not extend to cover rulemaking activities nor, of course, to decisions of the Communist Party. Still, this rate of litigation growth outpaced economic disputing even in the red-hot economy (Clarke, Murrell, and Whiting 2006: 14, 41).

The caseload seems to now be stable at roughly 100,000 cases per year, with a typical "success rate" for plaintiffs of around 15–20 percent (Mahboubi 2005: 4). Virtually every government office has been subject to some suit, save the State Council itself. In addition, accompanying the new procedural mechanisms have been institutional reforms to support the shift toward the

courts. Each judicial district now has a division for administrative cases, and government offices have established offices for monitoring compliance with the new legal framework (Mahboubi 2005: 2).

Why did China formalize administrative procedures and facilitate review by courts? Unlike countries in Eastern Europe, China did not experience a change in political structure during the 1980s, as the Communist Party remained the sole legitimate political party. However, the available modalities of controlling agents changed. In particular, with the ascent of Deng Xiaoping, China ended a period where ideology was the primary mechanism for internal control of agents. Indeed, many of the decision makers in the early Deng era had themselves been victims of ideological zealousness in the Cultural Revolution, and quite self-consciously sought to provide a sounder institutional basis for governance. China's ideological drift is well documented, and continues to be reflected in euphemisms, such as the "Three Represents," that help provide an increasingly thin "socialist" ideological cover for a market economy with a large state sector.

The decline of ideology paralleled an increased reliance on decentralization and deregulation, which reduced the possibility of direct hierarchical control and increased the discretion of lower officials (Shirk 1993; Wang 1998:253–58; but see Tsui and Wang 2004). Local networks of entrepreneurs and party officials collaborated to enhance local economies. In doing so, however, they undermined the party hierarchy that might have otherwise served as an effective means of controlling bureaucratic agents.

Regulatory complexity is also a background factor. As China's market economy developed, the traditional mechanisms of command and control over the economy were less available. A market economy requires a regulatory approach, which in turn depends on complex flows of information between government and the governed. The limited ability of any party structure, even one as elaborate as the Chinese Communist Party, to internalize all the expertise required seems to necessitate enhanced delegation.

We have observed, therefore, a shift toward external forms of monitoring (as well as intensification of the internal forms of party control described earlier.) Multiple monitoring strategies are necessary in an environment wherein agency costs are rampant. The regime relies on a mix of second- and third-party monitoring, reflecting not only the long-term time horizon of the Communist Party but also its increasing need for monitoring mechanisms. Formalizing appeals can be seen as a device to empower citizens to monitor misbehavior by the Communist Party's agents in the government. Some third-party monitoring is acceptable because courts are not yet independent of Communist Party influence in administrative matters. Consistent with the theory, it