

## The Buck Stops ... Somewhere

Tom Cuni Budget

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When Tom's email came, asking if I'd contribute to a budget on "bureaucracy," my first thought was "I was a lawyer for a corporation for thirty years. Some might say that I was bureaucracy." But it only took a moment's reflection to realize that anyone who thought that would be in the dark thrall of error. And so, I persisted.

I felt that I had experienced what you could pop under the rubric of "bureaucracy," but to make sure, I thought I'd confirm I understood the term.

First stop, [dictionary.com](https://www.dictionary.com), which offered definition number one of:

[A] system of government in which most of the important decisions are made by state officials rather than by elected representatives

That didn't sound so bad. I had a hard time coming up with elected officials that I would want making *any* important decisions; but of course, bureaucracy is bad, so I read on to find:

[E]xcessively complicated administrative procedure, seen as characteristic of bureaucracy

So, [dictionary.com](https://www.dictionary.com) was comfortable defining "bureaucracy" in terms of things "characteristic of bureaucracy." The Literary Club, I knew, deserved *better*. On my own, I had a come up with this definition:

Bureaucracy is the separation of decision-making from accountability.

I won't vouch for its originality, but though I've found many articles on the need to couple decision-making and accountability, none defined failure to do it as "bureaucracy."

If you think I'm using "bureaucracy" in a Pickwickian sense, remember -- there's no apter place to do that than The Literary Club, where Mr. Pickwick himself has been spotted from time to time.

Mention bureaucracy, and most think of government. I've had a number of brushes with government, and will try to tell how those did (or didn't) betray bureaucracy, as I defined it.

## I. The Courtin' Life

My first real law job was clerking for Judge John Peck on The US Court of Appeals for the Sixth Circuit here in Cincinnati. Judge Peck was a member of this Club, and served as its President.

The Sixth Circuit is one of the twelve regional divisions of the federal court of appeals. As Judge Peck put it, with his trademark eye-twinkle, it's the "second highest court in the land."

Maybe it's changed, but by and large, the Sixth was appellate light. Most of the cases I saw mattered mostly (and often only) to the parties, and most of the judges were content to decide cases, rather than try to make a lot of new law.

There was no divorce of decision-making from accountability. The judge on a three-judge panel writing for the majority had his or her name on the opinion. One could argue, given federal judges' lifetime tenure, that the accountability was meager, but a legal blunder could be raised to the same panel again, to the full Sixth Circuit, or (rarely, admittedly) to the US Supreme Court.

Judges acquired reputations. Some prized being seen as liberal, some as conservative, but none wanted to be seen as incompetent. There was peer pressure.

As to bureaucracy in the everyday sense, yes, there was lots of process. Appellate briefs had to have one color cover, reply briefs another. Type sizes and margins were set. Deadlines were unforgiving.

Seems petty, until you realize that the Court was a volume operation. The twelve regional Circuits hear around 50,000 appeals a year. In the vast majority, the initial decision maker is right, and will be affirmed. So, small things that got the right paper to the right people at the right time, were worth doing. The Court even developed its own triage system, with staff lawyers wading through the influx, and directing cases to the right level of attention.

Judge Peck developed a presumption of his own for the social-security disability cases that often came up. The typical applicant claimed a bad back, and depression. To get to the Court of Appeals, a thwarted applicant had to go through four levels of

administrative review, then to federal district court, then to the Court of Appeals. Judge Peck's conclusion: "Anybody who goes through all *that*, deserves *something*."

So, bureaucracy experienced? On the accountability front, no. Excessive complication? In the Court itself, my verdict is "no." Procedure kept the volume flowing.

## II. Waiting at the Gates

In thirty years with P&G, I worked from time to time to get P&G government preclearance for something. You might guess needing to beseech government for permission would evoke "bureaucracy" in its rawest form. Forgive some war stories.

During the second Bush administration, P&G wanted to buy the Clairol hair-dye and hair-care businesses. Since P&G had never been in the hair-dye business, we thought that part couldn't be a problem. Turns out that the front-line of the premerger review was run by a Department of Justice antitrust "lifer." Experienced antitrust hands assured us at P&G that that lifer was not the decision maker. But she did control the amount of internal documents P&G had to turn over before the deal could clear.

I'm sure it's not true anymore, but back then, a lot of P&G'ers spent their working lives writing emails to other P&G'ers. Thousands of those emails found their way to our DoJ reviewer. They convinced her that somewhere in P&G servers or files, a smoking gun memo proved that P&G would inevitably (and soon) start selling its own hair-dyes. Under an antitrust theory that had been in bad odor for at least twenty years, if that was the case, P&G could be stopped from the buy.

In the quest for the smoking gun, every new name found in a document's cc: list prompted a DoJ request for that person's documents. It could have gone on forever.

P&G requested, and got, a meeting with the division head, several layers up from our line reviewer. He was a political appointee who'd be gone with the next administration. The meeting was brief, mostly because our reviewer spent more time scowling than speaking. The clearance came two weeks later.

Was there clarity on who was making, and accountable for, the decision? Absolutely. Undue process? Absolutely. I've thought at times about our reviewer. Her life was going through business documents coughed up by lawyers. Had she been trained by them to assume they were hiding the ball? I don't know, but oddly enough, she chose to go by the nickname "Patsy."

### III. Gut Check

Another wait at the government's gate was for the FDA review of olestra. For those of you who have forgotten olestra, a refresher: olestra was a dream. P&G researchers in the late 1960's tried to make an extra-nutritious food for premature infants. They crammed fat onto sugar molecules, and wound up with a molecule too big to be cleaved by digestive enzymes. The stuff could be made into cooking oil and shortening, with zero calories. As humorist James Gorman put in in *The New York Times*, olestra was truly "nothing to sink your teeth into."<sup>1</sup>

When it was invented, it wasn't clear what to do with it. It could be made into so many things, it brought to life the old SNL food-commercial spoof: "It's a floor wax ... *and* a dessert topping."

A look at making it into a cholesterol-lowering drug didn't pan out. It lowered cholesterol, but not enough. Then, in 1984, the US food world changed. Kellogg's made cancer-risk claims for All-Bran, and the FDA didn't stop them. Health claims for foods surged, and the stage was set for olestra-based, fat-free or fat-reduced foods.

P&G in 1987 asked FDA to approve olestra as a food additive. Most food additives are consumed in minute amounts – often the trace amounts transmitted to foods from packaging material. As of 1987, FDA had approved only three new things for direct, intentional addition to human food.

At FDA, who was making decisions was diverse, but clear. Toxicology would review toxicity, Analytical would review the total chemistry, Nutrition would review nutrition. The Foods Center would review all that, and it would ultimately go to the Commissioner for approval. That process took nearly nine years.

Certainly, that's government pettifoggery, right? Well, yes and no. P&G was so bedazzled by the promise of olestra, that after it filed for approval, it set up a public-relations organization to trumpet how monumental, and precedential, olestra was.

The effect of that is illustrated by the *Far Side* cartoon showing a stag saying to a fellow stag with a bullseye on its chest: "Bummer of a birth mark, Hal." Olestra became fundraising manna for every self-appointed food-safety advocacy group. Those groups took FDA to task for waiving one of the standard battery of animal tests on olestra. The waiver got unwaived, and a multiyear test had to be started up. They wrung hands over olestra's absorbing some vitamins, and a vitamin-absorption test had to be invented.

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<sup>1</sup> See <https://www.nytimes.com/1989/06/11/magazine/nothing-to-sink-your-teeth-into.html>

(You may not be pleased to know that the best animal model for the human digestive system was considered to be 400-pound domestic swine. By all accounts, they loved olestra foods.)

Why such regulatory agony? The political, and appropriations, accountability for an approval lay with people who had only *negative* accountability. They would never hear public kudos for approving olestra. They would catch hell if there was a problem.

Some of the old-line FDA'ers themselves got frustrated by the timidity that caused. One asked his colleagues: "Why are we making all this fuss over a little bit of Vaseline in the gut?" That image never made it into P&G marketing.

#### IV. Pacing Ourselves

So, there are some experiences with government, where decision makers were clear enough, but getting quick decisions was sometimes thwarted by distrust of petitioners, and fear of public outcry. At least that's how it looked from a vantage in what Club members call "the Soap Works." Surely *that* well-regarded, publicly-traded company would, in contrast, have clear decision-making lines, efficient decision-making processes, and well-defined accountability.

In my time there, P&G evolved from a company with modest sales beyond North America, to one with sixty percent of its sales elsewhere, and operations on the ground in eighty countries. That bred global organizations alongside regional organizations. The fearsome organizational word, "matrixed," came to apply. At worst, the lines from the movie "The Matrix" seemed to apply: "[N]o one can be told what the Matrix is. You have to see it for yourself."

A system to determine who decided what had to be rolled out. It was called "PACE," with the letters standing for this:

- P – Process owner
- A – Approver (that is, the decision maker)
- C – Contributor
- E – Executor

Note that "A" stood for "Approver," not "Accountable."

Of course, most everyone wanted to be the "A," so it was still hard to decide who was the decider. Interesting workarounds developed. You heard things like:

- “You’re the Approver, but I’m the co-Approver.”
- “You’re the Approver, but I have a veto.”
- “You’re the Approver, but I’m a hard C.”

P&G’ers are creative.

Today, though, with P&G stock around an all-time high, *The Wall Street Journal* reports that P&G has solved the Matrix.<sup>2</sup> And of course, *that* couldn’t be ... an illusion.

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<sup>2</sup> “How P&G Cleaned House Before Covid-19,” *The Wall Street Journal*, November 14-15, 2020, at B1.