

# How the Administrative State Got to This Challenging Place

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*Written for a dispersed agrarian population using hand tools in a local economy, our Constitution now controls an American government orders of magnitude larger that has had to respond to profound changes in transportation, communication, technology, economy, and scientific understanding. How did our government get to this place? The agencies Congress has created to meet these changes now face profound new challenges: transition from the paper to the digital age; the increasing centralization in an opaque, political presidency of decisions that Congress has assigned to diverse, relatively expert and transparent bodies; the thickening, as well, of the political layer within agencies themselves; and the increasing judicial use of analytic techniques invoking the expectations of those who wrote the Constitution so long ago and in such different circumstances. Never easy, finding the appropriate balance between law and politics presents major challenges today.*

As the United States enters the third decade of the twenty-first century, almost two-and-a-half centuries after its Constitution was written, its federal government employs more than two million civilian employees.<sup>1</sup> Of these, more than 1,800 work directly for the President, in the Executive Office of the President (EOP). Virtually all the remainder – outside the seventy thousand or so employed by Congress and the federal judiciary – work in hundreds of government agencies and other institutions, performing tasks assigned to them by congressional legislation.<sup>2</sup>

Our Constitution's text addressing America's government (as distinct, that is, from the particular institutions of Congress and the presidency itself) has not been amended since the founding. Although conservative and libertarian voices increasingly insist that, absent amendment, only the founders' understandings can be honored, our Constitution must somehow be understood in relation to today's dramatically different circumstances, if our government is to continue functioning. In 1791, the first American census reported a population of 3,929,214 inhabiting an area of 864,746 square miles, roughly one percent of today's population, and one-quarter its present area with, correspondingly, a much lower population density. Its economy was predominantly agrarian,

leavened by small, local artisans and other businesses dealing directly with customers. Both travel and communication were impeded by distance, the means of transportation, and the available communication technology. The first Congress to meet once the Constitution was ratified created a Post Office and Departments of War, Navy, Foreign Affairs, and Treasury, each in unique ways suited to its responsibilities; this new government employed few civil servants to manage all its affairs. The first serious count of federal civilian employees, in 1816, reported that they numbered 4,837.<sup>3</sup>

While the Constitution has not changed, Congress has repeatedly created new Departments and new administrative agencies to meet problems arising as the nation and its economy matured. Its reactions to steamboat boiler explosions and fires on navigable American waters, with their high cost in lost lives and property, early illustrated its resourcefulness. An Act of 1838 created a licensing scheme in the Department of the Treasury, requiring various safety measures and providing for twice-a-year inspections by engineers appointed by U.S. district court judges. When this proved inadequate, Congress in 1852 created a Steamboat Inspection Service (SIS) headed by nine presidentially appointed regional inspectors empowered to oversee local inspectors the Secretary of the Treasury could discipline and to adopt implementing regulations. To refine this administrative structure, an 1871 law created a central office and emphatically reframed SIS authority to adopt governing regulations. Measures around the turn of the century placed all service employees except those presidentially appointed into the Civil Service, moved the SIS from the Treasury into the new Commerce and Labor Department, and again heightened its regulatory authority. The result, wrote leading legal scholar Jerry Mashaw, was to combine “something of the ‘New Deal’ independent, regulatory commission and ‘Great Society’ health and safety regulation by delegating administrative authority to a multimember Board that combined licensing, rulemaking, and adjudicatory functions.”<sup>4</sup>

As community-based artisans were replaced by factories and new forms of transportation and communication created a national economy, Congress repeatedly expanded federal administration, establishing government bodies to respond to such risks as discriminatory railroad freight charges, railroad equipment causing workplace carnage on the Civil War’s scale, impure foods that supplied national markets, unethical behaviors by large manufacturers and distant suppliers affecting those markets, and actions presenting unacceptable risks to the national economy. The states created public utility commissions, often separate from the elected executive, to control the behaviors of natural monopolies like electric utilities, telephone companies, or (in the countryside) railroad lines. Congress sometimes placed the regulatory bodies it created in conventional Cabinet Departments; but increasingly it created multimember bodies – the Interstate Commerce Commission and the Federal Reserve Board, for example – that

it placed outside the conventional executive government structure dominated by the President and Cabinet Secretaries.

At the beginning of the twentieth century, “administrative law” emerged as a distinct public law discipline in response to these societal changes. The federal Constitution presumes the existence of a government, yet it defines the powers and responsibilities of only the three institutions at its head: Congress, the President, and the Supreme Court. This was deliberate. The draft sent to the committee concerned with Article II in mid-August of 1787 proposed summarily to define a handful of particular Departments and their responsibilities, and to create a council modeled on parliamentary lines, while explicitly reserving to the President the right of decision after receiving its advice.<sup>5</sup> The draft of Article II returned to the Constitutional Convention, and adopted by it, rejected this approach. It empowered Congress to create all executive institutions below the President as well as any federal courts below the Supreme Court.

Anticipating those creations, the Constitution’s spare text refers both to Departments and to their heads, and requires the Senate’s consent to presidential appointment of the latter. It vests all executive power in a single elected President, charged with seeing that Congress’s laws would “be faithfully executed.” Yet in defining the President’s power in relation to the domestic government Congress was to create, and in contrast to the draft it rejected, the Constitution does not provide that the actions that government takes are to be the President’s; it says only that he may “require the Opinion, in writing, of the principal officer in each of the executive Departments, upon any subject relating to the duties of their respective Offices.” Like the “faithful execution” clause, this language accepts that actual administrative duties will be placed in others than the President himself. Just what Departments there would be and how they would be organized – and in what relationship to the President, Congress, and the courts – was unstated. Our government is, in effect, the hole in our Constitution, a hole Congress has been filling with a remarkable variety of public and quasi-public institutions, possessing varying powers and responsibilities and in varying relationships with the President, Congress, and our courts, ever since.

Studying the institutions that the Constitution defines, then, could no longer suffice. Administrative law emerged as the discipline concerned with the actions of these manifold institutions. Congress, vested with legislative power, quickly understood that it was incapable of foreseeing the hazards the changes were bringing or providing for their control with the necessary speed and detail. Courts, looking at past events through spectacles fashioned by the prior generations’ perspectives, were poorly equipped to meet contemporary social needs. If the President ever had been capable of exercising personal control over all important government actions, that time quickly passed, and it early came to be understood (as the “Opinion, in writing” and “faithful execution” clauses entail)

that governmental duties were the direct responsibility of the institutions Congress had created to perform them.<sup>6</sup> In 1920, following the creation of the Federal Reserve and the Federal Trade Commission earlier in the twentieth century, nine Cabinet Departments (many housing within themselves discrete administrative bodies like the Agriculture Department's Forest Service) and at least two dozen distinct federal governmental bodies with regulatory responsibilities employed about 691,000 civil servants – now organized into a permanent Civil Service chosen for merit, not political connection – under the direction of a much smaller number of politically appointed officials.

The Great Depression of the 1930s brought in its wake the New Deal, reflecting new ambitions and activities, and greatly enlarging the national government. One consequence was the creation of the Executive Office of the President, quite small initially, to advise the President in his relations with the expanding network of government Departments and agencies. Another, spurred by the organized bar's pressure for more formal administrative procedures, was a remarkable empirical study of the procedures the federal government's many administrative agencies actually followed. This study informed the drive for greater uniformity, transparency, and control of agency actions that led, at the end of World War II, to the unopposed congressional enactment of the federal Administrative Procedure Act (APA) to govern the most formal elements of administrative action. This happened at a time when these actions were generally considered to be objective means of applying expertise to social issues, apolitical in their fundamental nature. The APA has since endured without significant amendment of its most central elements, but today, as the possibilities of apolitical expertise have come into question, its processes and their subjects have become highly politicized. The extent of national regulation is being hotly contested, the APA's procedures have been brought back to Congress's attention (albeit without, to date, significant legislation actually to change them), and the Trump administration took dramatic steps to politicize administrative processes.

When the APA was enacted, the principal focus of federal regulation was on high-consequence government actions involving regulation of individual actors, often economic in nature: for example, setting railroad rates, or choosing the routes an airline would be permitted to fly. These actions had long been taken after trial-like administrative procedures of considerable formality that judicial decisions essentially treated as a constitutional necessity (on-the-record adjudication, in the APA's terms, including a formal process for rate-making that, although denominated "rulemaking," strongly resembles what it requires of formal adjudication). Much of the political momentum the New Deal changes generated to define federal administrative procedures focused on these high-consequence decisions, which would directly affect the economic well-being of a particular railroad, airline, or telephone carrier. For almost two decades after the APA's adop-

tion, economic regulation associated with trial-like procedures was the central focus of its use.

Yet the APA also provided less formal “notice-and-comment” public procedures to govern agency adoption of regulations having a more general impact than would a single decision about a particular license, rate, or route. Such rules are, in effect, secondary legislation. If valid, they have the force of statutes, yet they are adopted by executive agencies, not by Congress. Rulemaking within the framework of enabling statutes had long been judicially tolerated, as long as those statutes provided a framework of intelligible standards that permitted courts to assess their legality. (Early in the twentieth century, for example, the Supreme Court had upheld a statute authorizing the Secretary of Agriculture to adopt regulations to secure the objectives of the national forest lands under his administration, and permitting criminal enforcement of one of those regulations, which the Secretary had adopted to control the grazing of sheep there.) For a quarter-century, rulemaking was little studied by either students or scholars of administrative law.

The late 1960s and 1970s brought profound changes. New statutes discarded or dramatically restructured much economic regulation and closed the agencies responsible for it (for example, the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Power Commission, and elements of the Federal Communications Commission), as economists persuaded Congress that such regulation inappropriately constrained the operation of economic markets and the entry of new competitors into them. Increasing concerns about the transparency of government records, in the wake of McCarthyism and developing civil rights struggles, produced the Freedom of Information Act (FOIA) and then the Privacy Act that would bloom beyond all expectations; they contributed as well (along with significant concerns about the administration of welfare programs) to focused attention on the procedural rights of individuals caught up in both criminal and administrative disputes with the government. Now courts were persuaded that citizen-government relationships potentially involved entitlements, not merely beneficiary-benefactor relations; this “due process explosion” dramatically expanded both the caseloads of agencies dealing with individual relationships with government and the formality of the decision processes those agencies employed. In the wake of these developments came dramatic growth in the public provision and subvention of legal services.

At the same time, courts found in the importance of interests that statutes called on government to protect – such as aesthetic, recreational, or similar beneficiary interests – sufficient reason to permit judicial challenges to administrative decisions affecting them by anyone suffering their concrete impairment. These findings considerably expanded the set of persons having standing to challenge government actions. Combined with the possibility of challenging government regulations immediately upon their adoption, before their enforcement, it was

now possible for citizens or non-governmental organizations (NGOs) representing them to challenge regulations for having done too little, not too much, to protect the interests Congress had made an agency responsible to regulate. Regulators thought to have been tamed (“captured”) by the “daily machine-gun-like impact” of their interactions with the regulated now had to be concerned, as well, with the possibility of challenge from others.<sup>7</sup> The Audubon Society and the Sierra Club first appeared as litigants in federal court in 1969; by mid-June 2020, the number of their appearances stands at 2,335, having steadily increased decade after decade.<sup>8</sup>

Perhaps the most dramatic changes resulted from new public concerns about health, safety, and the environment, leading both to the enlargement of some existing regulatory authorities, such as the Food and Drug Administration, and to the creation of new ones, including the National Highway Traffic Safety Administration, the Occupational Safety and Health Administration, and the Environmental Protection Agency. Rulemaking was often the most influential procedure these agencies employed, and they used it in ways profoundly affecting whole industries (and, through them, the national economy). All automobile manufacturers would now have to equip their vehicles in prescribed ways; all factories using benzene would have to control their workers’ exposure to it; all coal-burning electric utilities would have to reduce the pollutants their smokestacks emitted. These high-impact rulemakings and their associated rulemaking procedures rapidly drew the attention of scholars, the courts, and “public interest” litigators asserting that agencies had failed adequately to protect the interests that statutes made them responsible to secure.

Although the courts eventually discredited efforts to convert the procedures used in these important rulemakings into a species of trial process (on the judicial model), they nonetheless interpreted the APA’s sparse language about rulemaking in ways that substantially embroidered its transparency and its demands. Perhaps building on FOIA’s clear commands, the courts now required agencies to expose scientific reports and similar data as elements of the statutory comment process. Although the APA’s language permits notice for comment of merely “a description of the subjects and issues involved,” courts required a new round of commentary for regulations that were not a “logical outgrowth” of the proposal made. And although Congress in 1946 would likely have expected judicial review of rulemaking to be like the light-fingered touch its statutes ordinarily received, now courts undertook to assure themselves that the agencies had taken “hard looks” at the issues they resolved: addressing significant comments filed by interested persons, demonstrating sound reasoning, and revealing a reasonable connection to the materials available to them. Richard Stewart, in influential scholarship, aptly characterized these developments as requiring a “paper hearing” comparable to legislative hearings, and as appropriately recognizing the differing claims on ju-

dicial respect owing to legislative action and administrative action.<sup>9</sup> By the 1980s, these developments had all become firmly established in the legal framework. Few voices were to be heard challenging their appropriateness.

As early as the Nixon administration, the model of administrative bodies as objective, essentially apolitical actors came into intellectual question, as neoclassical economic views and associated political science “public choice” theories took hold. Administrative agencies – and consequently their processes – have become considerably more political, and formalism and originalism have become more characteristic of judicial approaches to the issues of administrative law. Before dealing with these changes, however, which considerably predate the Trump administration, it is useful to give brief attention to another, whose consequences for the administrative state and regulation are only beginning to be felt: the transition from the paper to the digital age.

When agency adjudications and rulemakings had only paper records, particular items were discrete and existed in limited copies. Filing cabinets were physical, and their searchability depended on their organization and, perhaps, indexing. Parties to an adjudication would be entitled to receive copies of each document filed, and that filing would occur in a ritual order generally providing an opportunity for response. Notice-and-comment rulemakings, on the other hand, lacked discrete parties; all interested were entitled to comment. Comments were filed only with the proposing agency, and all comments – in support or in opposition – could be filed at the one deadline the agency had set to receive them. There was no provision for seeing others’ comments or responding to them. Although FOIA permitted anyone to ask to see all filed comments, this right was independent of the rulemaking itself, and hardly practical for any proposal inviting wide participation. Save how an agency might choose to engage with the outside world while processing comments – a process itself constrained by the paper record – the agency essentially had a monopoly on the information that had come to it. To the extent information is power, the agency was where the power was.

The transformation of government records from paper to digital formats has worked extraordinary changes. FOIA searches have been complicated by the new phenomenon of email chains combining many documents in one stream, but the capabilities of electronic search have also greatly eased them. Much more important, now that desired words, concepts, or references can be found almost instantaneously where they occur, searching government records generally has been transformed. As statutes now command, agencies have placed data and documents online in public electronic agency libraries – a veritable explosion in the transparency of governmental work and work-product. Regulations.gov, a unified site for notice-and-comment agency rulemaking, has simplified public participation, and now anyone interested can review filed comments and respond to them.

One consequence may be a certain loss of effective agency power in relation to the White House; since what is in the government “cloud” can be as easily viewed in the EOP as in the agency itself, agencies have lost any informational advantage the paper age had given them.

Governmental sharing of data sets and research results has fostered new possibilities for public-private actions: use of its geologic data permitted a private NGO to demonstrate the possible impacts of rising sea levels; a public database reporting toxic substance discharges, searchable by ZIP code, has encouraged discharge reductions that regulations do not yet require; and agency safety ratings influence consumer and manufacturer behaviors alike. If sensors embodied in waste discharge outlets or complex machinery provide signals to agencies as well as to their makers, agencies may be able to use artificial intelligence (AI) to identify more rapidly any issues warranting their response. The filing now of required reports in electronic form would also permit the automated creation of data sets. Indeed, the possibilities of artificial intelligence for learning from data – whether rulemaking comments or data collected from inspections, filed electronic reports, or other available data sets – have only begun to be explored. Although these possibilities are indeed exciting, one must remain aware that AI and algorithms are only as reliable as the humans monitoring and creating them.

On now to the issues of increasing political control and the associated displacement of the view that administrative action is justified by its objective expertise. The displacement was first evident in contexts of straightforward economic regulation. Bodies like the Interstate Commerce Commission (ICC) and Civil Aeronautics Board (CAB) came to be seen as having been captured by the very entities they were supposed to control, acting inefficiently in contexts where market competition would produce efficient results.<sup>10</sup> Pointing out mismatches in regulation failing adequately to account for the possible impact of market operations on corporate behaviors, then Harvard Professor, and now Supreme Court Justice, Stephen Breyer’s *Regulation and Its Reform*<sup>11</sup> underlay Congress’s choice to end the CAB and then the ICC, and to alter the responsibilities of other bodies, such as the Federal Maritime Commission, substantially. The consequence was significantly diminished economic regulation. Here, in eliminating “captured” regulators and empowering competitive markets, the impact of defeating the “expert agency” model was simple deregulation.

But in the realms of health, safety, and environmental protection, regulation depended on science – that is, on expertise. Competition had not produced safer cars, cleaner water or air, or workplace safety. Although the development of information regimes, marketable permits for pollutants, and the like might eventually provide the means of lessening direct regulatory commands – and regulators would learn the virtues of framing standards to be met rather than issuing commands defining precisely what must be done – none of these techniques would

work well to provide accurate information, monitor the use of permits, or define the standards to be achieved, in the absence of a regulatory apparatus. Despite the occasional termination of agency mandates, then, administrative government continued to grow, and the political opposition to regulatory measures denigrated the possibility of objective science and promoted political controls.

In a brilliant 2008 article, then Professor and current Judge David J. Barron called attention to complementary trends that, since the administration of President Nixon, had steadily promoted the political control of ostensibly science-based regulation: its centralization in the White House and the thickening of the political layer within the agencies themselves.<sup>12</sup>

Centralization first, the phenomenon that has attracted the bulk of scholarly attention in recent years. The Executive Office of the President, the White House collective providing the President with his best means for understanding and influencing administrative action, has grown from the six advisors President Franklin D. Roosevelt chose at its creation to more than 1,800 people; today, as in the Obama administration, it includes “czars” the President alone selects and charges with overseeing choices that Congress has assigned to Senate-confirmed agency heads. For internal agency political appointments, as well, loyalty to White House policy preferences has become the dominating consideration. One expression of this decades-long development can be seen in President Trump’s apparent preference to have “acting” officials responsible for administration, rather than appointees subject to the potentially conflicting loyalties that can come from the process of Senate confirmation; reportedly, he had empowered a young White House assistant simply to instruct agency heads whom to appoint to subordinate political posts Congress authorized them to appoint, as constitutionally it may.<sup>13</sup>

Rulemaking’s emergence as an activity having major impacts on the national economy has prompted steady growth in White House initiatives to gain control over its outcomes. These initiatives first appeared under the rubric of presidential oversight and coordination, drawing directly on the President’s constitutional power to “require the Opinion, in writing, of the principal officer in each of the executive Departments, upon any subject relating to the duties of their respective Offices.” They moved inexorably from White House supervision and advice to White House control. This development of White House direct engagement, beginning with President Carter’s Executive Order 12044, was well captured in the introduction to a 2017 Brookings Institution’s analysis, *Evaluating the Trump Administration’s Regulatory Reform Program*:

The regulatory process has been the rare policy area in which presidents from the two major parties have broadly agreed, building on each other’s efforts over the course of decades:

- President Carter formally launched White House oversight of major regulations (those with an estimated annual economic impact of at least \$100 million) issued by executive branch agencies with Executive Order 12044, which mandated that agencies conduct regulatory analyses before issuing major rules, including a consideration of their economic consequences, but did not require balancing costs against estimated benefits.
- President Reagan replaced Carter's order with Executive Order 12291, which was the first to require that agencies explicitly balance estimated benefits of major regulations against their costs, assuming their underlying statutes permit it, stating that "regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society."
- President Clinton replaced that order with Executive Order 12866, which shifted from the requirement that benefits "outweigh" costs to the requirement that benefits "justify" costs, stating that "each agency shall assess both the costs and the benefits of the intended regulation and . . . propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify the costs."
- President George W. Bush lightly amended E.O. 12866 through Executive Order 13422 (later revoked by President Obama), extending the White House oversight requirements to guidance documents issued by executive branch agencies.
- President Obama's Executive Order 13563 reaffirmed the principles established in E.O. 12866, including that agencies should propose or adopt a regulation only if "benefits justify its costs."<sup>14</sup>

President Trump's executive orders on rulemaking, and insistence on speedy deregulation, strongly asserted presidential prerogatives of control. Consistent with his project to lift the heavy hand of government off industry's back, these executive orders stressed the elimination of existing regulations. They forbade agencies to issue new regulations without, in effect, White House permission, permission conditioned on a showing that the totality of costs the agency's rules imposed on the regulated would not then exceed a figure annually set by the Office of Management and Budget (the largest element of the EOP). What future benefits the rules might confer – or, for that matter, what benefits rescinded rules would have provided – were irrelevant. Perhaps unsurprisingly, the overwhelming majority of purported rescissions were found unlawful by courts in which they had been challenged, often for the haste of their adoption and for failures of reasoning. Examples include the Supreme Court's rejection of a citizenship question

in the census, and of the attempted rescission of President Obama's program of deferred action on "dreamers." From the writer's perspective, the more important observation is that Congress has placed these rulemaking responsibilities in the agencies, not the President, and that the steadily tightening presidential grip on these judgments (especially taken together with the increasingly partisan roadblocks in Congress) takes us back to George III, not to Philadelphia.

Politicization, then. The thickness of the political layer inside agencies has grown as well. Political scientist B. Guy Peters recently observed that,

A president in the United States can appoint approximately four thousand people to office, and four or even five echelons of political appointees may stand between a career civil servant and the cabinet secretary. In the United Kingdom each ministry will only have a few political appointments other than the minister or secretary of state in charge – the largest number now is the Treasury with six appointments – but even then, the major interface between political and administrative leaders occurs between the minister and a single career civil servant, the permanent secretary.<sup>15</sup>

While political layering is rising in UK agencies too, a particularly dramatic American shift occurred during the Carter administration, when Civil Service reforms moved essentially all civil servants with policy responsibility into a Senior Executive Service (SES), subject to much greater levels of control by the agency's political leadership than the Civil Service had permitted. The Trump administration's Secretary of the Interior Ryan Zinke reassigned many in his Department's SES staff to jobs unsuited to their abilities. Presidents long regarded the departmental and agency Inspectors General that Congress created in the same Civil Service reform statute as desirably nonpartisan, apolitical internal monitors of agency action, and permitted their service to span changing administrations. For President Trump, however, the signs of "disloyalty" suggested by inquiries into the actions of agency political leadership repeatedly became an occasion for dismissal.

Yet if the President's "taking control over the national administrative process . . . gets things done [and] brings coherence where none existed before," Professor Barron asks, "then what of social learning? What of alternative regulatory approaches? What then of the long view?" He continues:

The concern reflected in such questions . . . lies at the heart of what makes increased centralization and politicization so potentially troubling. These developments . . . have made the federal agencies increasingly ill-suited to perform their customary role of providing a mechanism for social learning. . . . [A] powerful institutional logic has increasingly made the federal bureaucracy a fully committed member of the White House regime. . . . [W]e should . . . be looking for ways to ensure that alternative voices are brought into the mix nonetheless.<sup>16</sup>

Turn now briefly to the courts and to the remarkable range of debates in and about them currently roiling the world of administrative law. When the APA was adopted, law school instruction about administrative law was largely concerned with the use of courts to control administrative processes, not political controls; courts, like agencies, were generally viewed as a collection of experts trained to act on the basis of objective and apolitical factors (“the law” and “justice”). The emergence of legal realism in the academies and prominent Supreme Court actions with high political valence (President Roosevelt’s Court-packing plan, defeated by the New Deal’s “switch in time” – in itself, one might think, a commitment to that apolitical view – and the civil rights decisions of the 1950s) may have contributed to an erosion of that view. Yet the academic framework of administrative law instruction was captured in the title of Louis Jaffe’s magisterial work *Judicial Control of Administrative Action*.<sup>17</sup>

The emergence of rulemaking brought the politics of administrative action to the forefront and contributed (alongside reactions to the liberalization of criminal procedures, civil rights litigation, and the abortion decisions) to the steadily increasing politicization of the judicial appointments process. The Senate’s increasingly partisan behaviors resulted in the abandonment of safeguards that had long controlled presidential ambitions to project their administration’s influence far into the future: respect for the inputs of Senators from states where vacancies had occurred and for the views of the organized bar, and the effective need to secure a supermajority in the face of opposition to any given appointment. During the Trump administration, Senate Majority Leader Mitch McConnell consistently gave the highest priority to confirming the President’s nominations to the federal courts.<sup>18</sup> Given the relative youth of the appointments made, the views of those judges may influence the outcomes of judicial decision-making for decades to come.

Perhaps not coincidentally, the legal framework for administrative law developed over the past decades has come into sharp question. Increasingly, courts are reasoning with formality, relying on dictionaries to determine the “plain meaning” of statutory terms, not attention to the political history of legislation, and generally favoring the original understandings of statutes and the Constitution. Serious questions are now being voiced about the lawfulness of Congress’s authorizations of agency rulemaking and agency adjudication. Rulemaking authority is characterized as a delegation of the “legislative power” only Congress can constitutionally enjoy, not the authorization of executive actions of a character to be found in every developed legal system. Agency adjudication is challenged as the exercise of the “judicial power” the Constitution reserves to federal courts, not executive action subject to judicial review. Long-established doctrine calling on the courts to respect agency policy choices made within the scope of the authority their statutes imperfectly define is being replaced by judicial decision about the meaning of statutes for whose administration they are not responsible, and with

whose complexity they are not familiar. The proposition that statutes can only mean what their words could have been understood to mean at the time of their enactment threatens the universally accepted “paper hearing” courts articulated in response to the emergence of rulemaking’s significance decades after the APA’s enactment. The titles and substance of two colleagues’ recent publications may suggest the tension: Professor Gillian Metzger’s *Harvard Law Review* Foreword, “1930s Redux: The Administrative State Under Siege,” and Professor Philip Hamburger’s book, *Is Administrative Law Unlawful?*<sup>19</sup>

These challenges have long underlain the world of American administrative law and the realities with which it deals, and they can be expected to endure. In recent times, a firestorm of other challenges has arisen that underscores both the necessity of a functioning government capable of dealing with the perils of the natural world, the economy, and human behaviors, and the political difficulties of achieving these ends in our constitutional republic. Partisanship has rendered Congress the “Broken Branch.”<sup>20</sup> A rise of renewed populism, threatening democracies across the world,<sup>21</sup> brought America the presidency of Donald Trump, with its repeated seeming indifference to the rule of law and “unprecedented, historic corruption.”<sup>22</sup> The President’s indifference also to the world of science, evident enough in his administration’s repeated rescissions of environmental standards and its refusals to take seriously the prospects created by climate change, propelled the United States to the forefront of nations suffering from the scourge of COVID-19, with its extraordinary challenges both to science and to an economy it has brought to its knees. Simultaneously, the police killing of George Floyd in Minneapolis has generated an understanding of institutional racism – of the fragility that obscures from Whites the ways in which their economic place and their perceptions have been built on a history of successful oppression of others – that may transform the ways in which the landmarks of American administrative law are understood.<sup>23</sup>

Jacques Lipschutz’s monumental “Bellerophon Taming Pegasus” towers four stories high over the portico of Columbia Law School, whence come these words written in my fiftieth year there. Symbolically, it represents reason taming unreason: indeed, because Bellerophon’s head in the sculpture merges with the wild horse’s body, it is man taming his own unreason. What a powerful metaphor for the work of law and perhaps, in particular, for the work of public law! The growing imbalance between reason and unreason in American administrative law is the occasion for deep concern, and a major challenge for our collective future.

## AUTHOR'S NOTE

Like the other essays in this collection, work on this essay was essentially complete before President Biden's inauguration, so that the impacts of that transition, actual and potential, are not considered. Ahmed Mabruk provided invaluable research assistance.

## ABOUT THE AUTHOR

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## ENDNOTES

- <sup>1</sup> In 2019, the number was 2.1 million if one counted the individuals it employed and about fifteen percent higher if one calculated "full time equivalents." Julie Jennings and Jared C. Nagel, "Federal Workforce Statistics Sources: OPM and OMB," R43590 (Washington, D.C.: Congressional Research Service, 2019).
- <sup>2</sup> Jennifer Selin and David Lewis, *Sourcebook of United States Executive Agencies*, 2nd ed. (Washington, D.C.: Administrative Conference of the United States, 2018), 12, provide numbers of federal agencies ranging from 118 to 600, depending on definitions.
- <sup>3</sup> See Deanna Malatesta, "Evolution of the Federal Bureaucracy," in *A History of the U.S. Political System: Ideas, Interests, and Institutions*, vol. 1, ed. Richard A. Harris and Daniel J. Tichenor (Santa Barbara, Calif.: ABC-CLIO, 2010), 373, 380.
- <sup>4</sup> Jerry L. Mashaw, "Administration and 'The Democracy': Administrative Law from Jackson to Lincoln, 1829–1861," *The Yale Law Journal* 117 (8) (2008); a more limited view of the SIS's functions is expressed in Joseph Postell, *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government* (Columbia: University of Missouri Press, 2017), 96–102.
- <sup>5</sup> "The President of the United States shall have a privy council, which shall consist of the president of the Senate, the speaker of the House of Representatives, the chief justice of the Supreme Court, and the principal officer in the respective departments of foreign affairs, domestic affairs, war, marine, and finance, as such departments of office shall from time to time be established; whose duty it shall be to advise him in matters, respecting the execution of his office, which he shall think proper to lay before them; but their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt." Morris draft of August 20, found in Thomas H. Calvert, *The Federal Statutes Annotated: Containing All the Laws of the United States of a Contained and Permanent Nature in Force on the First Day of January, 1903*, vol. 8 (New York: Edward Thompson Company, 1905), 200–202.
- <sup>6</sup> "If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of

the law ; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.” William Wirt, Office of the Attorney General, Opinions of the Attorneys General of the United States, October 20, 1823, 624, 625. Roger Taney, as President Jackson’s Attorney General, gave him the same advice.

- <sup>7</sup> James Landis, *Report on Regulatory Agencies to the President-Elect* (Washington, D.C.: U.S. Government Printing Office, 1960), 69.
- <sup>8</sup> Lexis search of combined federal cases for “Name(Sierra Club) or Name(National Audubon Society),” conducted June 15, 2020.
- <sup>9</sup> Richard B. Stewart, “The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decision-Making: Lessons from the Clean Air Act,” *Iowa Law Review* 62 (1977): 713, 731–733.
- <sup>10</sup> See, for example, Marver H. Bernstein, *Regulating Business by Independent Commission* (Princeton, N.J.: Princeton University Press, 1955); and George Stigler, “The Theory of Economic Regulation,” *Bell Journal of Economics and Management Science* 2 (1) (1971): 3–18.
- <sup>11</sup> Stephen Breyer, *Regulation and Its Reform* (Cambridge, Mass.: Harvard University Press, 1982).
- <sup>12</sup> David J. Barron, “From Takeover to Merger: Reforming Administrative Law in an Age of Agency Polarization,” *The George Washington Law Review* 76 (5) (2008): 1095.
- <sup>13</sup> Only “principal” officers need be named by the President and, for them, Senate confirmation is also required.
- <sup>14</sup> Ted Gayer, Robert Litan, and Phillip Wallach, *Evaluating the Trump Administration’s Regulatory Reform Program* (Washington, D.C.: The Brookings Institution, 2017), [https://www.brookings.edu/wp-content/uploads/2017/10/evaluatingtrumpregreform\\_gayerlitanwallach\\_102017.pdf](https://www.brookings.edu/wp-content/uploads/2017/10/evaluatingtrumpregreform_gayerlitanwallach_102017.pdf).
- <sup>15</sup> B. Guy Peters, *The Politics of Bureaucracy: An Introduction to Comparative Public Administration*, 7th ed. (New York: Routledge, 2018).
- <sup>16</sup> Barron, “From Takeover to Merger,” 1151–1152.
- <sup>17</sup> Louis Jaffe, *Judicial Control of Administrative Action* (Boston: Little-Brown, 1965).
- <sup>18</sup> By the middle of 2020, President Trump had made two hundred Article III appointments. See Russell Wheeler, “Trump’s 200th Judicial Appointment: Less Than Meets the Eye,” Brookings Institution, June 26, 2020, <https://www.brookings.edu/blog/fixgov/2020/06/26/trumps-200th-judicial-appointment-less-than-meets-the-eye/>.
- <sup>19</sup> Gillian Metzger, “1930s Redux: The Administrative State Under Siege,” *Harvard Law Review* 131 (1) (2017); and Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014). As may be evident, his answer is “yes.” For a rejoinder, see Adrian Vermeule’s book review, “No,” *Texas Law Review* 93 (2015): 1547.
- <sup>20</sup> Thomas E. Mann and Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (Oxford: Oxford University Press, 2006); Mann and Ornstein produced two sequels as the problem deepened over the years.
- <sup>21</sup> Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018).

- <sup>22</sup> This is how Republican Senator Mitt Romney characterized President Trump's commutation of the prison sentence of Roger Stone, a long-time political ally. Peter Baker, "President Ignores Limit Honored Even by Nixon," *The New York Times*, July 12, 2020.
- <sup>23</sup> Robin DiAngelo, *White Fragility: Why It's So Hard for White People to Talk about Racism* (Boston: Beacon Press, 2018). An extended blog symposium on the impact of implicit bias on administrative law, initiated July 13, 2020, may be found at "Symposium on Racism in Administrative Law," *Yale Journal on Regulation*, <https://www.yalejreg.com/topic/racism-in-administrative-law-symposium/>.