How the Administrative State Got to This Challenging Place

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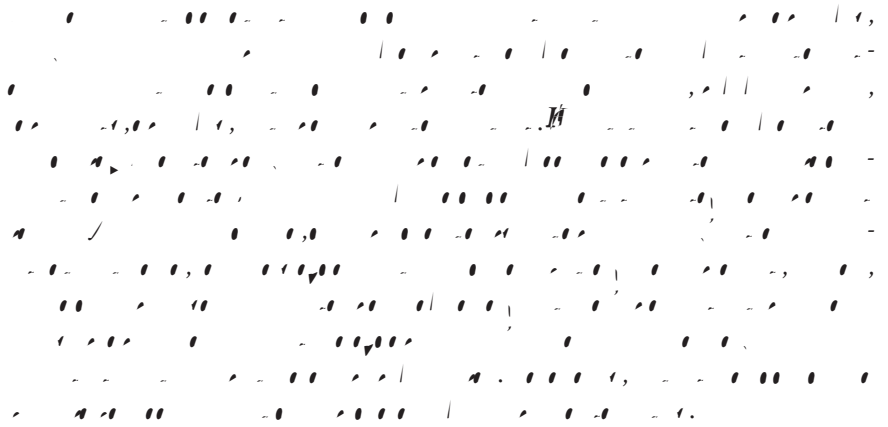

As the United States enters the third decade of the twenty-first century, almost two-and-a-half centuries after its Constitution was written, its federal government employs more than two million civilian employees.[1] Of these, more than 1,800 work directly for the President, in the Executive Office of the President (EOP

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.[3]

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

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.[5] 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

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that governmental duties were the direct responsibility of the institutions Congress had created to perform them.[6] 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

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 as-

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.[7] 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.[8]

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 as-

dicial respect owing to legislative action and administrative action.[9] 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,

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.[10] Pointing out mismatches in regulation failing adequately to account for the possible impact of market operations

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-

- 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."[14]

President Trump's executive orders on rulemaking, and insistence on speedy deregulation, strongly asserted presidential prerogatives of control.enshCod insistite

in the census, and of the attempted recission 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.[15]

While political layering is rising in UK agencies too, a particularly dramatic American shift occurred during the Carter administration, when Civil Service re-

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 process-

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

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