2016

Politics and Agencies in the Administrative State: The U.S. Case

Peter L. Strauss

Columbia Law School, strauss@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the [Administrative Law Commons](#), [Law and Politics Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Peter L. Strauss, *Politics and Agencies in the Administrative State: The U.S. Case*, COMPARATIVE ADMINISTRATIVE LAW, SUSAN ROSE-ACKERMAN & HENRY R. LUCE, Eds., EDWARD ELGAR PUBLISHING, 2017; COLUMBIA PUBLIC LAW RESEARCH PAPER No. 14-537 (2016).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2003

This Working Paper is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

COLUMBIA LAW SCHOOL

PUBLIC LAW & LEGAL THEORY WORKING PAPER GROUP

PAPER NUMBER 14-537

POLITICS AND AGENCIES IN THE ADMINISTRATIVE STATE: THE U.S. CASE

PETER L. STRAUSS

2016

Politics and Agencies in the Administrative State: The U.S. Case

Peter L. Strauss

The American presidential election pending as this article goes to press, culminating a period of extreme political partisanship in our national government generally, gives point to an essay on politics and agencies in the American regulatory state. In our two-party system, it has often been the case in recent times, including the last six years, that the President comes from one of the parties and one or both houses of our legislature are controlled by the other. All American agencies (including, in the American case, the so-called independent regulatory bodies) are associated with the President in the executive branch, yet dependent on the Senate for confirmation of their heads and other important officers and on the agreement of both houses for their budgets. So, with constitutional structure as a focus, one might ask what, if any, necessary structural relationship do bodies within the executive have to the legislature? Must there be a connection? What kind of a connection, and how assured? What, if any, work is excluded from their purview because it is necessarily the work of a legislature? Alternatively, one might ask, more descriptively: what are the actual relationships; how do executive and legislative politicians influence the administrative state, either before or after it takes action? These are large subjects for inquiry, whose dimensions can only be sketched here. More extensive treatment of these subjects and other matters can be found at length in the just published Third Edition of my *Administrative Justice in the United States* (Strauss 2016).

In comparative perspective, one immediately notices that American government is both presidential and federal,¹ complicating relationships both horizontally and vertically; and also that, at present, our national legislature, if not our judicial system, is dysfunctional. One hopes that this latter state of affairs will prove transitory, despite the increasing partisanship of American politics. Where partisanship has produced divided government – the presidency in the hands of one party, Congress controlled by the other – unwillingness to compromise has generated repeated budgetary crises, long senatorial delays in confirming presidential nominations to important administrative positions (and even outright rejections), and significant reductions in actual legislating. Presidents, in turn, have been driven to increasingly rely on self-help – the use of officials who do not require Senate confirmation to oversee important policy developments, enhanced control over administrative activity, and reliance on regulations and soft-law instruments to do the work that might ordinarily be expected of legislation. In individual states, increasingly identified as “red” or “blue,” divided government is less common. A stable one-party dominant state can drift away from the political middle ground; yet as a colleague has recently suggested (Bulman-Pozen 2016), interactions between the President and the governors of one-party states in conducting shared governmental business have contributed to a form of executive federalism that may seem familiar to comparativists.

It might be added that, from a comparative perspective, politics has an unusually strong hold on the American judiciary as well. The United States does not have a professional judiciary, given special education and promoted over the course of a single career through increasingly demanding judicial assignments. American judges, educated as all American lawyers are, ascend to the bench mid-career, from private or public practice or from the academy. With few

¹ Of possible interest on the federalism front is the very recent E. A. Young (2015), ‘The European Union: A Comparative Perspective,’ available at <http://ssrn.com/abstract=2742307>, accessed 7 September 2016.

exceptions,² the positions to which they ascend are generalist positions in a single judicial hierarchy that encompasses both public and private disputes, both ordinary and constitutional litigation. In a majority of states, judges are elected, making both their selection and their continuance in office not only a matter of political will, but also the result of electoral campaigns to which, under current American law, substantial sums may be contributed by persons believing the outcome may affect their interests. Federal judges are appointed to life terms--nominated by the President subject to confirmation by the Senate. The process has become intensely partisan, as has been illustrated by the controversy over filling the Supreme Court vacancy created by Justice Antonin Scalia's death.³ The Court's authority over such socially divisive issues as abortion, gender identity, gun control and the political rights of corporations underscores the stakes. Presidents seek appointments that will project their political preferences well past their terms in office; and Senators from the other party, aware of this, use the confirmation process to slow or even block appointments. Even positions on the intermediate United States Circuit Courts are contested, with the responsible Senate Committee withholding approval of politically controversial nominations, and other members of the Senate working to obstruct the confirmation of nominees made by Presidents of the other party.

1. Presidential, not Parliamentary

² A few jurisdictions treat criminal trials or appeals separately; monetary claims that would operate on the state or national treasury may involve specialist courts; and the initial stage of bankruptcy proceedings, as well, occurs before 'bankruptcy judges' who hear only that kind of case.

³ Justice Scalia, a conservative stalwart on the Supreme Court for 30 years, died 13 February 2016, as presidential election campaigns were heating up. With four months remaining in the current Term of the Court, and certainty that a new President could not place a nominee on the Court until at least half the following year's cases had been heard, President Obama nominated Judge Merrick Garland for the position. Garland was unusually old (63) in relation to recent appointments, and his long tenure as a judge on the country's second most important court for decisions affecting governmental interests, the D.C. Circuit, had established him as an apolitical, centrist candidate. Nonetheless, reflecting the political importance of the position, the Republican-controlled Senate made clear that no hearings would be held on the nomination, or votes permitted, before the November election.

Differences between parliamentary and presidential systems have important implications for administrative governance in relation to the legislature. Formation of a multi-party coalition government in a parliamentary system may be complex and delayed well past the election date; yet the government once formed will immediately be led by a full complement of politically responsible officials with, typically, a rather thin political layer of officials overseeing the work of civil servants. The government rises and falls as a whole when elections are held or confidence is lost. If its ministers are able to reach agreement on a draft of legislation, their relation with the parliament virtually assures its enactment. The drafting is collegial – the prime minister does not put before the parliament proposals bearing his imprint only. And the collective imprint, together with the identification of the ministers with the parliamentary majority, substantially eases the enactment process. Often, if not invariably, ministers are members of the Parliament and participate fully in its proceedings. If that legislation creates ministerial bodies with the authority to issue secondary legislation– that is, regulations –the Council of Ministers or Cabinet is likely to assure that those regulations, also, will be a collective product. Perhaps it will be necessary to lay them before the parliament against the (slim) chance they will be disapproved; in any event, the minister will be directly answerable to that body. And the prime minister, herself, is dependent on collective support for her continued authority; should she lose it, someone else will ascend to her position.

If independent bodies are placed outside this politically unified system in parliamentary systems, one consequence could be that any authority they have to adopt secondary legislation (regulations) requires the use of public procedures (like the American notice-and-comment procedures), which are not required of ministerial agencies adopting such measures. The

important point for present purposes is to understand that American practice makes no such distinction. Here, public notice-and-comment procedures are generally required for the adoption of secondary legislative measures, without regard to agency type.

Collectivity is missing from the American presidency, unity from presidential-legislative relations. The Constitution explicitly forbids Members of Congress to serve in executive office in any capacity.⁴ And the executive branch as a whole functions under the oversight of one individual and his immediate advisors (the President and the Executive Office of the President), not a collective cabinet. Cabinet secretaries and other heads of government agencies can take office only on the Senate's confirmation of their nomination--a process that is often contentious and time-consuming (O'Connell 2010). For just this reason even the fact of nomination may be considerably delayed while possible candidates are "vetted" against the possibility of embarrassing outcomes. The political layer of officialdom beneath them is considerably thicker than is common in parliamentary systems. Although its membership may not be subject to the Senate's direct control, it is unlikely to be completely formed before the Senate confirms the political heads. In the confirmation process, the political heads may have been induced to make promises about their conduct in office that can then influence their actions; yet once they are in office, only the President controls their tenure.

The difficulties of political leadership can be especially important in departments or agencies in which vacancies occur, through death or resignation, in the midst of a presidential term. In nominating a successor, the President's choices may be sharply limited by the politics of the moment; in general, that successor cannot take office immediately but must await Senate confirmation, which – again – may be significantly delayed. Perhaps a secondary official in the agency will serve as an "acting" head, but that person may not be the President's nominee. This

⁴ U.S. Constitution, art. I, § 6.

issue has been further complicated by the Supreme Court’s recent acceptance of a Senate practice effectively denying the possibility of presidential self-help during periods in which important positions are vacant for extended periods.⁵ The Constitution permits the President to “fill up all Vacancies that may happen during the Recess of the Senate by granting Commissions that shall expire at the end of their next Session.”⁶ Reflecting the history of uses of this power over the centuries, the Court has interpreted this phrase to reach all vacancies – whether they are present during an intra-session recess as well as between formal sessions, and without regard to when they have occurred; it is only necessary that the vacancy persists during a period of formal Senate inactivity. However, that formal period of inactivity must have a fixed duration, perhaps ten days or more. In the case before it the Senate had provided by resolution for pro forma meetings each three days during what would otherwise have been its extensive winter break. The Court concluded that those meetings – a minute or two in length, and rarely with more than one Senator apparently in attendance – sufficed to defeat the President’s power. A Senate controlled by the opposite party than that of the President, then, can readily keep vacancies from being filled by other than the normal nomination-and-confirmation process – and can defeat that “normal” process by delay and extended hearings

The absence of collective political responsibility for executive actions means that no council of ministers needs to agree to the President’s acts; cabinet secretaries have neither control over his tenure in office nor any capacity, by agreement among themselves, to approve or disapprove any action he might take. It is the President who submits nominations to high office and legislative proposals to Congress, and while he does so after consultations, in the end his wishes

⁵ *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550 (2014). Even this result was quite narrowly reached. Four concurring Justices, the conservative bloc, would have limited the applicability of the Vacancy clause to inter-session recess vacancies, and even then only if those vacancies actually arose, not merely persisted, during that particular recess.

⁶ U.S. Constitution, art. II, sec. 2.

control. Then, when those proposals get to Congress, its processes are independent of his wishes. The public's votes for its members may or may not have coincided with the vote for him, but in any event they are independent of his political preferences. They do not constitute a singular "government" in the parliamentary sense. In the case of divided government, the enactment of legislation that the President supports is far from assured. Enactment of a presidential draft into law is quite unlikely, even on topics with bipartisan support.

Collectivity and responsibility to the legislature are missing as well from the administrative generation of secondary legislation, that is, regulations. Congressional authorizations for rulemaking, as this process is called, almost invariably place it with a particular administrator. "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker,"⁷ but it has long been accepted that Congress can place the power to adopt regulations, a form of hard law, in the hands of a particular administrator, who generally acts after the public consultation process specified by the federal Administrative Procedure Act.⁸ Once it has done so, its formal capacity to alter administrative actions (beyond, that is, the discipline that may be inflicted by budgetary restrictions or oversight hearings) is limited to new statutory measures – which, quite beyond the difficulties created by the internal complexities of the legislative process, must be able to survive a presidential veto.

The Office of the President, and not a ministerial collective, is also responsible for any oversight of agency notice-and-comment rulemaking, the American secondary legislation process. Here, political (but not legally required) considerations differentiate its relation to rulemaking in independent regulatory bodies and other elements of administrative government.

⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁸ 5 U.S.C. § 553. The process is described in (Strauss 2016).

Statutorily rulemaking is an activity internal to the individual governmental units on which Congress has conferred the power to engage in it. Beginning in the administration of President Jimmy Carter, however, and as it became evident that rulemaking had become a major source of legal obligation in the American economy, Presidents have used Executive Orders⁹ to put in place measures that require presidential engagements with important rulemakings. These measures (which, again, have a singular, not a collective, political character)¹⁰ have steadily grown stronger over the years. They invite all agencies to participate in an annual regulatory planning activity, permitting presidential input into agency policy-making priorities and eventuating in a public “Regulatory Plan” creating advance notice of possible forthcoming regulatory activity. Executive agencies, but not the independent bodies, are then required to engage in cost-benefit analysis procedures under the supervision of a White House office, the Office of Information and Regulatory Analysis (OIRA) for their important individual rulemakings. In American administrative law, it may be remarked, these “ministry-level” bodies (such as the Environmental Protection Administration, the Occupational Safety and Health Administration or the National Highway Traffic Safety Administration), and not the independent regulatory commissions, are the ones responsible for the bulk of regulations having an important impact on the American economy.

Whether the resulting presidential power over the bodies Congress has authorized to engage in rulemaking has become excessive, whether that power is exercised as transparently as it should be, and whether it has become excessively politicized (rather than grounded in objective and normative policy considerations) are matters now hotly debated in the American literature.

⁹ These are presidential directives to administrators, legally effective within the government but lacking direct force on private parties.

¹⁰ The current form is Executive Order 12866, 58 Fed. Reg. 51735 (1993), only slightly amended (strengthened) since President Clinton adopted it early in his administration. E.O. 13563, 76 Fed. Reg. 3821 (2011)

(Kagan 2001; Calabresi and Yoo 2008; Strauss 2007). But instincts grounded in expectations about parliamentary government – that this activity is a coordinated activity for which the government is collectively responsible – these instincts must be suppressed when considering the American practice.

2. Congress and administrative agencies

2.1 Formation

As has often been remarked, there is a hole in the American Constitution (Mashaw 2014). The government is not there – well, barely there. Article I speaks to the Congress and its powers; Article II to the President and his powers; and Article III to the judiciary. A clause in Article I authorizes Congress to enact any legislation “necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,” but notwithstanding these words the Constitution vests *no* powers “in the government of the United States, or in any department or officer thereof.”¹¹ This phrase appears to be an overlooked residue of an earlier draft that would have specified several cabinet departments with particular responsibilities. The universal understanding today is that the national government is exclusively to be created by statute and, save for the powers the Constitution vests in the President himself and any that might be found implicit in his personal office (Monaghan 1993), executive bodies only take the form and enjoy only the legal authority that Congress enacts. Save as statutes might authorize him to do so, the

¹¹ U.S. Constitution, art. I, § 8.

President cannot himself create governmental bodies, or reallocate their functions as he might prefer.

Indeed, Article II, addressing the President and his authority, is explicit both that there will be a government with Departments headed by individuals other than himself, and that they will have responsibilities defined by law. Presidential powers are defined by the second section of Article II, and relevantly provide

The President shall be Commander in Chief of the Army and Navy of the United States ...; 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 ...

He ... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Both the fact of required confirmation, which creates in officials a relationship of honor if not legal obligation between themselves and the Senate, and the striking contrast between

“Commander in Chief” and “Opinion, in writing,” suppose a certain distance between the President and the heads of the bodies Congress creates to carry out the laws it enacts.

Readers perhaps know that, despite this striking textual contrast, some scholars and some presidential actions argue that the President’s authority over domestic government is plenary -- that the discretionary authorities Congress may have created in particular agencies are in fact his to exercise (Calabresi and Yoo 2008; Prakash 2016). In the author’s judgment, these propositions cannot be squared with the constitutional scheme – and, indeed, suggest a potential for one-person government that would have been alarming to the Constitution’s drafters (Strauss 2007). In a famous concurrence denying President Truman’s exercise of an authority not congressionally conferred, and emphatically rejecting the Solicitor General’s argument that the vesting clause ‘constitutes a grant [to the President] of all the executive powers of which the Government is capable,’ Justice Jackson understandably characterized the ‘Opinion, in writing’ power as ‘trifling.’¹²

Although the principal officers of government bodies – that is, those subject to supervision only by the President – *must* be senatorially confirmed, Congress can authorize the appointment of inferior officers by the President acting alone, or by the heads of particular Departments or agencies. To do so, as it often has, gives up the controls inherent in the confirmation process. When it then delays or even refuses confirmation of principal officers, government agencies are controlled by these inferior officers, responsible only to the President or perhaps even civil service officials; in the case of multi-member commissions, the agencies may lack the quorum necessary to act.

¹² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640-41 and n. 9 (1952) (Jackson, J., concurring).

Since the adoption of the Constitution, Congress has created governmental and quasi-governmental bodies in a great variety of forms, varying considerably in their relationships to the President and to itself, in their constitution and powers, and in their leadership. Within the government today, three forms dominate: cabinet departments headed by a Secretary and generally embracing within themselves a variety of subordinate bureaus or agencies; single-purpose agencies headed by a single administrator, such as the Social Security Administration or the Environmental Protection Agency; and multi-member bodies (often called independent regulatory commissions) such as the Federal Reserve or the Securities and Exchange Commission. Little question remains about Congress's power to create 'independent commissions,' typically headed by multi-member commissions serving staggered fixed terms in office. The leadership of these bodies must be established by the nomination-and-confirmation process. All are elements of the executive branch, and hence within the President's obligation to 'take Care that the Laws be faithfully executed.'¹³ Differences to other parts of the executive are a matter of degree and detail only (Strauss, 1984).

Because the President alone has the responsibility for assuring the faithful execution of the laws, only executive officials – not the Congress – enjoy the power to appoint or remove subordinate executive officials from office.¹⁴ (less important officials within the 'Civil Service' of the executive branch are neither appointed nor may they be dismissed politically.) As respects single administrators appointed with senatorial advice and consent, the removal power is in general unlimited; they serve 'at will,' and typically resign at a change in presidential administration. Congress has successfully required the President to make a showing of 'cause' if he wishes to remove some advice-and-consent officers, notably but not exclusively the

¹³ U.S. Constitution art. II, § 3.

¹⁴ *Bowsher v. Synar*, 478 U.S. 714 (1986).

commissioners of the independent regulatory commissions serving fixed terms of office.¹⁵ Emphasizing commissioners' necessary subjection to presidential oversight, however, the Court recently found Congress constitutionally precluded from assigning a similar "for cause" removal authority to an independent regulatory commission that Congress had empowered to appoint and control a subordinate board of independent actors; that, the Court reasoned, would place those board members at too great a distance from the constitutionally requisite possibility of presidential oversight.¹⁶

In creating various subordinate governmental and quasi-governmental bodies, Congress has been highly imaginative over the years, and this has occasionally given rise to questions about the limits of its authority to do so. Mixed bodies have been with us since the First Bank of the United States (1791). Quasi-governmental bodies today include the National Passenger Railroad Corporation (AMTRAK), the United States Postal Service, the Federal Deposit Insurance Corporation, the Federal Open Market Committee, the Tennessee Valley Authority, and many others serving important functions in the national economy. Their leadership may be wholly or partially comprised of government officials appointed by constitutional processes. Typically not defined as 'agencies' of the federal government, still they may be subject to numerous of its constraints – such as exposure to the Freedom of Information Act, or subjection to the constraints of the Bill of Rights. Important questions respecting their status have recently arisen in litigation involving AMTRAK, and it seems possible they will become the object of considerable contestation during the 21st Century that was missing during the 20th.¹⁷

¹⁵ *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935).

¹⁶ *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

¹⁷ *Department of Transportation v. Assoc. of American Railroads*, 135 S.Ct. 1225 (2015), reinstated on remand *Ass'n of Am. R.R. v. United States DOT*, 2016 U.S. App. LEXIS 7750 (2016); these question will not be discussed here.

2.2 Authority

Agencies have only the authority Congress creates for them, both as to the subject matter of their work, and the forms of action they may use in doing that work. Thus, statutory constraints, substantive and procedural, are always in question in relation to administrative agency behaviors affecting the public. Typically, subject matter is focused in a particular area of concern, although the terms for agency action are often stated in capacious terms. The Clean Air Act, for example, provides that the Administrator of the Environmental Agency is to adopt primary and secondary national air quality standards for each air pollutant she has identified such that

(1) National primary ambient air quality standards ... shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. ... [and]

(2) Any national secondary ambient air quality standard ... shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. ...¹⁸

¹⁸ 42 U.S.C. § 7409(b)(1,2).

It should be apparent that this statute provides the Administrator with substantial choice over regulatory targets, as well a good deal of room (‘based on such criteria and allowing an adequate margin of safety, . . . requisite to protect the public health’) within which to act against them. The Administrator is authorized not only to adopt these standards, following the statutorily prescribed rulemaking procedures, but also to enforce them, and to seek penalties for their violation in proceedings that begin within the agency, before one of its administrative law judges.

In a constitutional system that radically separates the powers of Congress, President, and courts, one might think Congress would be precluded from empowering the executive to adopt secondary legislation and initially to adjudicate its violation, as well as to enforce it. Often styled ‘delegation of legislative authority,’ the regulatory adoption problem is better characterized as ‘creation of executive authority.’ This authority then is conditioned by judicial control of the legality of its exercise. As may be surprising to persons used to parliamentary governments, once Congress has authorized an executive actor to adopt secondary legislation implementing a statutory charge, it can disapprove it *only* by enacting a statute doing so¹⁹ – and that, of course, requires either a presidential signature (unlikely to be used to defeat an act of his administration) or the supermajorities required for both houses successfully to override a presidential veto. There is, to be sure, a special statute, the Congressional Review Act (CRA), that assures prompt notification to Congress of rules once adopted and provides a rapid means for summary disapproval;²⁰ but the CRA has been successfully used only once in the almost two decades since it was enacted,²¹ and then because a change in presidential administration intervened between the rule’s adoption and its disapproval.

¹⁹ *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

²⁰ 5 U.S.C. § 801.

²¹ Pub. L. No. 107-5, 115 Stat. 7 (2001).

John Locke, (Locke 1690), an English philosopher who had a considerable influence on the thinking of our founding generation, denied outright the capacity of a legislature to confer legislative authority on others. Yet the American legislature, like virtually all others in the world, regularly confers on administrative agencies the authority to adopt secondary legislation that, if valid, has the force and effect of a statute. Three constraints differentiate these measures from statutes: they must be statutorily authorized; they must be adopted following statutory procedures that enable significant public input to which reasoned responses must be made; and their legal validity (and factual support) is subject to considerably greater judicial scrutiny on review than would be the case for statutes.²²

Proper statutory authorization depends on the existence of an ‘intelligible principle’ so that a reviewing court can assess their legality.²³ By requiring an ‘intelligible principle,’ American courts constrain the scope of agency discretion by themselves delimiting the space within which agencies are empowered to act, and by checking as well the reasonableness of agency actions. Reasonableness review of regulations is a process considerably more intensive than attends inquiries into the constitutionality of primary legislation. To be sure, an ‘intelligible principle’ is not a very demanding standard, and much of the American debate over ‘delegation’ has addressed its indefiniteness. The very existence of the requirement, however, gives agency officials an incentive to frame their actions to support the appearance of legality, incorporating extended explanations of their reasoning process in their required explanatory statements, supplying and explaining supporting data, and so forth (Stack 2015). The intensity of judicial review characteristic of the most important rulemaking only heightens that impulse. In a number of cases, the courts have adopted constructions of agency authority narrowing the policy space

²² 5 U.S.C. §§ 553, 706.

²³ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (2001).

within which agencies are able to act – refusing, as Justice Scalia once colorfully put it, to find that Congress would ‘hide elephants in mouseholes.’²⁴ The more important point, however, is that the courts regularly uphold agencies in their authority, for example, to define acceptable levels of ozone in the atmosphere, to require that cars contain air bags having defined operating characteristics, to specify the terms of valid offerings and sales on stock exchanges, and so forth.

2.3 Subsequent control

Once Congress has created an agency with an initial scope of authority, its subsequent direct controls over agency behavior derive from agencies’ need to secure additional congressional statutes authorizing further actions they might wish to take, their usual need to secure congressional funding for their activities in the annual appropriations process (some agencies are given, to greater or lesser extent, the possibility of self-funding through fees they are permitted to charge for the services they render) and – politically – through the possibility of calling agency officials to appear before them in ‘oversight’ hearings in which their conduct of office might be publicly and embarrassingly challenged.

A further inhibition on the American Congress’s possibilities of control, already mentioned, may seem quite remarkable in comparative context. Once an executive official is in office, Congress’s capacity to remove her is limited to the cumbersome process of impeachment. Congress might successfully limit the President’s authority of removal by requiring him to demonstrate ‘cause’ for removal. Whether ‘cause’ has successfully been demonstrated has never

²⁴ Id. at 468. On the related judicial presumption that Congress does not generally delegate to agencies the authority to settle questions of ‘vast economic and political significance,’ see B. Emerson (2016), ‘Administrative Answers to “Major Questions”: On the Democratic Authority of Agency Statutory Interpretation,’ available at <http://ssrn.com/abstract=2818786>, accessed 7 September 2016.

to my knowledge arisen as a legal issue, but in practice, like ordinary civil service protections, the requirement provides some assurance of continuance in office. And Congress's possibility to impose such a limit seems substantial. It clearly lacks the authority to do so only for those few officers (such as the Secretary of State) who of necessity serve, as Chief Justice Marshall early put it, as "the mere organ by whom [the President's] will is communicated," so that "nothing can be more perfectly clear that their acts are only politically examinable,"²⁵ and the consequent need for peremptory presidential control of their tenure in office is obvious.²⁶ The bulk of executive officials, however, exercise a discretion that is tolerable *only because* it is constrained by law and subject to judicial control for its legality;²⁷ as to these officials, who are *not* the President's alter ego, the possibility that Congress can prevent the President from removing them except for "cause" seems considerably stronger. Although dicta in the strongest Court statement about presidential removal authority, *Myers v. United States*,²⁸ flatly asserted that no such distinction could be made, it did so only in the service of precluding Senate participation in the removal decision. That the Senate's consent may not be required for the removal of *any* executive official settles a question quite different from whether Congress can condition the President's removal of officers with duties separable from his own on the existence of 'cause.' Subsequent decisions have made this clear (Strauss 2011).

In parliamentary systems, the political allegiances between those who are responsible for creating the national budget and those who will enact it more-or-less assure that the budget will reflect political consensus about how the nation's available financial resources should best be

²⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803).

²⁶ 272 U.S. 52 (1926).

²⁷ 'Congress has been willing to delegate its legislative powers broadly - and courts have upheld such delegation because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.' *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (1976) (Leventhal, J., concurring).

²⁸ 272 U.S. 52 (1926).

distributed. The ‘power of the purse’ is indeed a potent political instrument, and congressional use of it can create situations quite at odds with presidential preferences. The President may have staffed the Department of Labor’s Occupational Safety and Health Administration with appointees strongly favoring regulatory actions to safeguard worker health and safety; but if Congress only appropriates funds sufficient to attend to 40 thousand of the nation’s more than 8 million workplaces, its preferences for weak enforcement will prevail. In recent years, budgetary enactments have tended to be part of omnibus legislation that effectively precludes significant congressional debate over their specifics, considerably empowering the appropriations committees that consider particular elements of the President’s annual budget submission. That these enormous, consolidated bills are subject to a simple up-or-down vote permits, as well, the intrusion into them by a Member or Members of particular riders forbidding the expenditure of any funds to support activities of which he or they disapprove. And the President is then able to approve or disapprove only the appropriations measure as a whole; he cannot veto particular elements he finds unwise (as the governors of some American states can under their state constitutions), or improperly supportive of special interests.²⁹

In conducting oversight hearings, congressional committees exercise no formal authority over executive action, but they may nonetheless be able to produce significant practical constraints on agency action. Congressional demands for agency information are not readily blocked by assertions of executive privilege (and efforts to make such assertions have on occasion led to litigation), and the potential for embarrassment through revelation of what the agency would prefer not to disclose can itself inhibit. Agencies have relations with at least four committees – appropriations and subject matter committees in each chamber – and any of them may require the presence of agency officials, typically its political leadership, at a hearing. Even

²⁹ *Clinton v. City of New York*, 524 U.S. 417 (1998).

if the hearing is not motivated by hostility, as in the case of divided government or in the wake of calamity, having to prepare and then testify subtracts time and energy from the agency leadership, and these necessities may arise with great frequency.

A professional body now known as the Government Accountability Office,³⁰ several thousand strong, serves Congress both as a financial auditor of the legality of appropriations expenditures, and as a performance auditor seeking out waste and inefficiencies in agency function. Like the Inspectors General serving government departments and important agencies, these bureaucrats may be housed in the agency itself, and enjoy unimpeded access to agency officials and documents; their reports, provided to agency heads for possible response before transmission to Congress, earn considerable attention there, as well as informing Congress.

3. Courts, administrative agencies and the place of politics

One might think control of administration by courts, ‘the rule of law,’ to be entirely distinct from political controls, and the Supreme Court’s first discussion of constitutional review appeared to draw that line explicitly. For highly political acts, where executive officials serve as “the mere organ by whom [the President’s] will is communicated,” Chief Justice Marshall wrote in *Marbury v. Madison*, “nothing can be more perfectly clear that their acts are only politically examinable.”³¹ In fact, however, this “political question” proposition is quite limited in its application. Congress typically provides for judicial review of completed agency actions affecting private interests, and the courts generally apply a strong presumption favoring it even

³⁰ Formerly the General Accounting Office, and under both names the GAO.

³¹ N. 25 above.

in circumstances where one might think it questionable.³² In the ordinary administrative context, in which delegations of rulemaking authority must be purchased with the coin of judicial review, government lawyers can make the claim that review is precluded – that courts cannot appropriately assess the legality of the government’s actions, perhaps because ‘intelligible standards’ are missing – only at the risk of having the court conclude that, therefore, the challenged delegation of authority is invalid.³³

Indeed, when questions have been raised about the permissibility of substituting administrative for judicial decision-makers in settings that could readily be placed in courts, the judicial analysis now parallels that for the accommodation made to the authorization of executive rulemaking, previously discussed.³⁴ So long as the assignment does not substantially displace courts’ traditional common law responsibilities for resolving private disputes or determine criminal guilt as such, effective judicial review of agency adjudication of disputes suffices to permit Congress to assign initial adjudication of disputes to an executive branch agency.³⁵ Unlike European systems, America lacks an administrative judiciary; its hearing officers, today styled Administrative Law Judges or Administrative Judges, are civil servants, not members of the judiciary, and the administrators who may be empowered to act on their decisions are political appointees of the executive branch. Administrative agencies like the Environmental Protection Agency (EPA) and the Social Security Administration (SSA) regularly use trial-like hearings to decide matters (such as civil penalties) that one might expect to be assigned for trial in the ordinary courts. The financial stakes of decision can be great, and the volume of these

³² E.g., *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986). The occasional statute entirely precluding review generally concerns matters outside ordinary domestic administrative action, or for discrete and usually quite minor matters effectively assigned to non-judicial actors.

³³ As happened in *South Dakota v. Dept. of the Interior*, 69 F.3d 878 (8th Cir. 1995), vacated on other grounds, *Department of the Interior v. South Dakota*, 519 U.S. 919 (1996).

³⁴ Compare n. 27 above.

³⁵ *CFTC v. Schor*, 478 U.S. 833 (1986).

trial-like proceedings can be enormous; EPA's civil penalties run to millions of dollars, and the SSA has a docket of disability cases greater than that of the federal judicial system. The possibility of judicial review suffices to permit these assignments.

Beginning around 1970, perhaps as an outgrowth of the successful use of the courts to battle racial injustice in public administration, litigation to promote 'public interest' propositions dramatically increased. The 'political question' exclusion of such issues as legislative districting ended.³⁶ With growing awareness of the environmental impact of super-highways and other governmental projects, lawsuits to enforce statutory constraints became common.³⁷ Although standing to invoke the courts' aid has long required the demonstration of an injury in fact, caused by government action and remediable by the courts, a decision of the 1970s significantly expanded this access; it treated as the necessary 'injury in fact' *any* harm resulting from a challenged action that could reasonably be associated with the concerns of the statute plaintiffs were attempting to enforce. Injury to a conventional legal right would not be required.³⁸ For example, someone regularly using a particular element of public lands could have standing to challenge a governmental action that would impair her aesthetic enjoyment of the land, endanger the trout she liked to fish for, or end its wilderness character. This liberal access to judicial review corresponded with, and reinforced, growing perceptions that federal agencies facing judicial review only at the behest of those they regulated had become insensitive to the public values they were charged to protect (Stewart 1975). And because expanded standing required agency attention to the wider range of interests that now might subject its actions to judicial review, the expansion provided some protection against what one noted scholar once

³⁶ *Baker v. Carr*, 369 U.S. 186 (1962).

³⁷ The Sierra Club and the Audubon Society, major 'public interest' organizations, appear as parties in only one federal case in the 1960's, over 100 in the 1970's, with consistent growth in each succeeding decade.

³⁸ *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970).

characterized as the daily machine-gun-like impact on both agency and its staff of industry representation' (Landis 1960).

As the Supreme Court's membership became more conservative, justices frequently expressed concern that courts were being pulled into domains proper only for politics. A dominating case, *Lujan v. Defenders of Wildlife*,³⁹ recently became the most cited of all Supreme Court administrative law decisions. It concerned a "citizen suit" provision of the Endangered Species Act, authorizing any person to challenge alleged violations. Two individuals and an NGO concerned with endangered species challenged a regulation that excluded terrestrial species of other lands from what until that time had been a requirement of interagency consultation about actions that could affect endangered species. However, the two members had no fixed and imminent plans to visit the foreign lands where American foreign aid to support construction projects might have contributed to the extinction of endangered species they hoped to view in the wild. They had shown no imminent, concrete harm to the aesthetic interests necessary to qualify for standing. And government's curtailment of the statutory duty of interagency cooperation could not independently establish standing, absent some discrete, concrete injury flowing from it. To allow Congress to authorize such an action absent a caused and remediable concrete injury to the plaintiffs would permit litigation simply to enforce the proper administration of the laws in the abstract, impermissible under Article III of the Constitution as the majority concluded it must be understood. The Court remarked

When ..., as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, . . . causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government

³⁹ 504 U.S. 555 (1992).

action or inaction -- and perhaps on the response of others as well. . . . [I]t becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.

In an email to me, Professor Cynthia Farina well captured the stakes in the ongoing Court disputes over this quite complex, even abstruse, question:

All these efforts to restrict access to judicial review create asymmetric pressure on agencies because they disproportionately close out intended and incidental beneficiary challenges. So, judicial review works as a one-way ratchet, always pushing in the deregulatory direction. . . . [T] here is no way to understand standing doctrine except as a series of battles . . . in a war between two irreconcilable political philosophies about the appropriate role of government. If we [the holders of the more conservative philosophy] can’t limit regulatory programs directly via a robust non-delegation doctrine, we can at least ensure that judicial review always works against assertions of regulatory authority.⁴⁰

Recognition of the possibilities of political oversight and control can be found in numerous judicial lines of analysis about the limits of judicial review. Agencies are limited, in justifying their decisions, to those factors made statutorily relevant and not, for example, simple political preferences.⁴¹ Yet absent the clearest indications of abuse, American courts will refuse to look

⁴⁰ Email of 17 November 2015, on file with author.

⁴¹ For example, *Massachusetts v. EPA*, 549 U.S. 497 (2007).

behind stated reasons for ‘real’ ones, and accept that when a record could support various outcomes, unrevealed presidential inputs may have influenced the choice actually made.⁴²

Justice Stevens’ famous opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁴³ second only to the *Lujan* case in citation volume, substantially relies on the fact of politically responsible presidential oversight in justifying its position treating agency determinations of matters fitting within legislative gaps as matters for oversight only, not independent judicial decision.

Of course in judicial review many issues arise that are not associated with the relation of political to judicial oversight, or the recent conservative judicial concerns about substituting judicial for political controls. Many of the papers in this volume address judicial review issues, comparatively or in relation to particular legal systems, and in the tight constraints of space allotted to individual contributions essentially preclude discussion of these issues. The author’s views on such questions as ‘hard look review,’ ‘Chevron deference,’ ‘arbitrary and capricious,’ etc. are set out in some detail elsewhere. (Strauss 2002; Strauss 2016). Here, only a few cautionary remarks for readers coming to the subject from other systems will be offered. The standards of judicial review applicable to federal administrative action are dealt with in Section 706 of the APA.⁴⁴ A number of organizing concepts are central. ‘Allocation’ governs much of the thinking – that is, an appreciation for the division of responsibility between agency and court.

‘Deference’ is a word one frequently encounters in this context, and it is important to understand that it has at least two senses – one, expressing the ‘weight’ that would be appropriate for a court to afford agency judgments when deciding matters for which the court is independently responsible; and the other, acknowledging the ‘space’ within which the agency

⁴² *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981)

⁴³ 467 U.S. 837 (1984).

⁴⁴ 5 U.S.C. § 706.

has been authorized to decide matters subject to judicial oversight (Strauss 2012). To invoke a sports analogy, in the first sense the court is the ‘player’ in the game, whose independent actions might be influenced by the views of another; in the second, it is in the position of ‘referee,’ who must permit others to play within established boundaries, subject to its enforcement of the game’s rules. ‘Discretion’ is another term of uncertain meaning, that we have met in the contrast between the acts of those who serve as the President’s alter ego (say, the Secretary of State), outside the ambit of judicial controls, and the decisions of those on whom Congress has conferred an authority that can *only* be sustained if its legality can be assured on judicial review. The APA provides for judicial review of ‘discretion’ of the latter, but not the former, type;⁴⁵ and even within that type what constitutes an “abuse of discretion” is not a singular concept, but varies in intensity among the variety of contexts in which it occurs (Strauss 2016).

4. Conclusion

Perhaps by the time this essay is in print the current American political uncertainties will have been somewhat resolved --- at least until the following elections. What one can understand is that in the American system, in ways distinct from what one might experience in parliamentary democracies with a judiciary less subject to political selection, politics and ‘the rule of law’ are in considerable tension. American jurisprudence has come well past Chief Justice Marshall’s declaration that courts could have no business examining (and hence constraining by the operation of law) any matter committed to the executive’s discretion. For the normal issues of domestic policy, judicial review is, in essence, a constitutional requisite. Politics operates nonetheless.

⁴⁵ 5 U.S.C. §§ 701(a)(2), 706(2)(A).

Over the library entrance to Columbia Law School, where I teach, looms Jacques Lipchitz's enormous sculpture, *Bellerophon Taming Pegasus* – a metaphor for reason's struggle with unreason, well suited to a school of law. The force of the metaphor is all the clearer when one sees that the sculptor has merged Pegasus into Bellerophon's head – the unreason he is taming, quite a painful struggle to judge by the horse's expression, is his own. In the United States if not elsewhere, administrative law sits in that painful place, a continuing contest between reason and unreason, and one must continuously work to make the influence of the former substantial.

References

- Bulman-Pozen, J. (2016) 'Executive Federalism Comes to America' *Virginia Law Review*, 102: 954-1030 (forthcoming June 2016).
- Calabresi, S.G. and Yoo, C.S. (2008), *The Unitary Executive: Presidential Power from Washington to Bush*, New Haven: Yale University Press.
- Emerson, B. (2016), 'Administrative Answers to "Major Questions": On the Democratic Authority of Agency Statutory Interpretation,' available at <http://ssrn.com/abstract=2818786>, accessed 7 September 2016.
- Jaffe, Louis (1965), *Judicial Control of Administrative Action*, Boston: Little, Brown.
- Kagan, E. (2001), 'Presidential Administration,' *Harvard Law Review* 114: 2245: 2385.
- Koch, C. 'Administrative Presiding Officials Today,' *Administrative Law Review* 45: 271 (1994).
- Landis, James (1690), *Report on Regulatory Agencies to the President-Elect*.

Locke, John [1960] (1960), *Two Treatises of Government*, Cambridge: Cambridge University Press.

Mashaw, Jerry 2013), *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law*, New Haven: Yale University Press.

Monaghan, H. (1993), ‘The Protective Power of the Presidency,’ *Columbia Law Review*, 93: 1-74 (1993).

O’Connell, Anne Joseph (2010), *Waiting for Leadership*, Washington D.C.: Center for American Progress.

Prakash, Saikrishna Bangalore 2016, *Imperial from the Beginning: The Constitution of the Original Executive*, New Haven: Yale University Press.

Stewart, R.B. (1975), ‘The Reformation of American Administrative Law,’ *Harvard Law Review* 88: 1667-1813.

K. Stack (2015), ‘Purposivism in the Executive Branch: How Agencies Interpret Statutes,’ *Northwestern University Law Review* 109: 871-932.

Strauss, Peter (2013). *Administrative Justice in the United States*, 3rd ed., Durham, N.C.:

Strauss, P. (2012), “‘Deference’ is too Confusing – Let’s Call Them “*Chevron Space*” and “*Skidmore Weight*,”” *Columbia Law Review* 112: 1143-1173.

Strauss, P. (2011). ‘On the Difficulties of Generalization: PCAOB in the Footsteps of *Myers*, *Humphrey’s Executor*, *Morrison* and *Freytag*,’ *Cardozo Law Review* 32: 2225-2283.

Strauss, P. (2007), ‘Overseer or the Decider? The President in Administrative Law,’ 75 *George Washing Law Review* 75: 696-760.

Strauss, P. (1984), ‘The Place of Agencies in Government: Separation of Powers and the Fourth Branch,’ *Columbia Law Review* 84: 573-669 (1984).

Young, E.A. (2015), 'The European Union: A Comparative Perspective,' available at <http://ssrn.com/abstract=2742307>, accessed 7 September 2016.