

AMERICAN EXECUTIVE POWER IN HISTORICAL PERSPECTIVE

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During the course of almost any presidential administration, certain White House and cabinet-level decisions almost inevitably will catalyze intense controversy about the scope of executive power. My aim here is to offer some context for such discussions by pursuing two objectives meant to spur further deliberation. The first aim is to situate some of the debate in its larger historical context—a context that showcases a recurring interest in robust, democratically sanctioned executive power across administrations. My second aim is to observe how that history is evolving in certain respects even as questions persist about accountability, structure, and the limits of judicial power to oversee executive actions. I do not expect, in the process, to directly answer every prescriptive question about the scope of presidential power and executive organization. Instead, my goal is to build some of the analytical scaffolding for continuing a conversation about a democratically constrained executive branch facing enormously complex challenges that cut across domestic affairs as well as foreign policy.

Max Weber once argued for recognition of the centrality of executive functions in modern government by observing that “power is exercised neither through parliamentary speeches nor monarchical enunciations but through the routines of administration.”¹ No doubt Weber would have recognized the priority that the Reagan Administration thus assigned to shaping the work of the executive branch, given its ambitious domestic and foreign policy agenda. With Watergate still a

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This essay was adapted from panel remarks given at the 2012 Federalist Society Annual Student Symposium held March 3, 2012, at Stanford Law School in Palo Alto.

1. 3 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 1393 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Bedminster Press 1968).

relatively recent event, policymakers and the public engaged in a far-reaching, trans-substantive discussion about the role of the presidency in relation to agencies, Congress, and the courts. In that discussion, the Reagan Administration stood for the proposition that a vigorous executive needed to play a pivotal role in shaping the country's agenda both in domestic and in international affairs.² On the domestic side in particular, certain well-known recent cases in administrative law—such as *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*³ and *Environmental Defense Fund v. Thomas*⁴—implicate decisions of the Reagan Administration asserting a considerable measure of executive control over the law's administration. Through the decisions of senior administrators and the creation of new procedures, the White House sought to shape the administration of statutory programs to reflect a particular philosophy of how the law should be implemented.

This approach did not garner universal agreement.⁵ Nonetheless, as Justice Rehnquist concluded in his concurrence-in-part in *State Farm*, it can be defended for reflecting a degree of democratic legitimacy—an interest that the administration has in implementing the laws in a different way, inasmuch as that implementation is consistent with congressional statutes.⁶ “As long as the agency remains within the bounds established by Congress,” he writes, “it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.”⁷ How, Justice Rehnquist asks, can we expect elections not to matter when the administrative state carries out

2. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1079–84 (2008) (discussing the Reagan Administration's aggressive stance on foreign affairs); John Yoo, *Reagan@100: His Restoration of the Presidency*, NAT'L REV. ONLINE, THE CORNER (Feb. 4, 2011, 4:01 PM), <http://www.nationalreview.com/corner/259034/reagan100-his-restoration-presidency-john-yoo>.

3. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

4. *Env'tl. Def. Fund v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986).

5. See, e.g., Peter L. Strauss, *Overseer or "The Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

6. *State Farm*, 463 U.S. at 57–59 (Rehnquist, J., concurring in part and dissenting in part) (acknowledging the role of political judgment in administrative decisionmaking).

7. *Id.* at 59.

its responsibility?⁸ Surely, he implies, we would still expect much of the government's legitimacy to flow from the President's distinctive role as a national elected official with cross-cutting responsibilities encompassing the entire executive branch.

While that notion of robust, democratically legitimate executive power has sometimes been associated with the Reagan Administration and its successors, it turns out to have longer roots. It was invoked not only in the recent past, as with the Reagan Administration's approach to executive power or Justice Scalia's defense of the *Chevron* doctrine.⁹ Nor is it found only in recent court decisions such as *Free Enterprise Fund v. Public Company Accounting Oversight Board*.¹⁰ Instead, efforts to imbue expansive executive involvement in administration with democratic legitimacy reach considerably further into history. Documents from the Roosevelt Administration, as well as testimony from the Truman Administration, show that the Reagan Administration's focus on vigorous, democratically sanctioned executive legitimacy was, in some respects, not that new at all. To put this in context, most have probably heard about the Roosevelt Administration's battles with Congress vis-à-vis court-packing.¹¹ There was also a parallel battle, however, over the Roosevelt Administration's attempt to reorganize the executive branch.¹² This battle was just as intense in

8. See *id.* ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.").

9. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–20 (1989).

10. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151–56, 3161 (2010) (holding that the dual for-cause limitations on the removal of members of the Public Company Accounting Oversight Board contravene the Constitution's separation of powers but that the unconstitutional limitations are severable from the remainder of the statute).

11. See generally William E. Leuchtenburg, Comment, *FDR's Court-Packing Plan: A Second Life, a Second Death*, 1985 DUKE L.J. 673 (1985) (providing a standard account of the battle between the Roosevelt Administration and Congress over court packing).

12. See Mariano-Florentino Cuéllar, "Securing" the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939–1953, 76 U. CHI. L. REV. 587, 589–90 (2009) (discussing how the Roosevelt Administration used national security concerns as a means to grow the executive branch).

pitch at the time—and probably comparable to debates today¹³ about the Patient Protection and Affordable Care Act.¹⁴

Even as President Roosevelt’s ill-fated measure to achieve “judicial reorganization” failed, President Roosevelt continued clawing for authority to reorganize the executive branch.¹⁵ Just as it did with the court-packing plan,¹⁶ Congress initially turned him down.¹⁷ Interestingly enough, although the Roosevelt Administration did not take another run at court-packing,¹⁸ it did take another run at executive reorganization.¹⁹ In particular, a very interesting set of documents buried in the Roosevelt Library describe what Roosevelt’s advisors were saying to the President about the importance of reorganization.²⁰ The documents speak for themselves:

[A]s a guide to the timing of steps in reorganization the following is suggested:

First, do those things which when done will reduce the difficulties of the President in dealing with his multifarious duties and which will assist him in discharging his responsibilities as the chief administrator of the government.

Second, do those things which when done will advantage the work of those administrative aides who have been chosen by the President to assist him in his discharge of the duties . . . whose responsibility to the people is through the President

13. See, e.g., Janet L. Dolgin & Katherine R. Dieterich, *Social and Legal Debate About the Affordable Care Act*, 80 UMKC L. REV. 45, 85–90 (2011) (discussing recent debates about the Affordable Care Act).

14. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

15. Cuéllar, *supra* note 12, at 589–93 (describing how President Roosevelt gained authority to reorganize the executive branch).

16. See generally Leuchtenburg, *supra* note 11, at 687–89.

17. Cuéllar, *supra* note 12, at 598.

18. *But see* Leuchtenburg, *supra* note 11, at 677–78 (describing Roosevelt’s efforts to rally support for the unpopular court-packing legislation before its eventual defeat).

19. Cuéllar, *supra* note 12, at 611–12 (discussing Congress’s second run at executive reorganization). For more information on exactly what happened, see MARIANO-FLORENTINO CUÉLLAR, *GOVERNING SECURITY: THE HIDDEN ORIGINS OF AMERICAN SECURITY AGENCIES* (forthcoming November 2012).

20. See Cuéllar, *supra* note 12, at 665–66 (2009) (noting that internal White House documents “believe the administration’s insistence that reorganization was meant to advance widely held social goals rather than presidential power”).

Third, do those things which when done will advantage heads of departments in the discharge of their own responsibilities.²¹

A cluster of text at the bottom of the memo entitled “historical note”²² shows that Roosevelt’s aides were describing to the President the result of an executive committee effort to see how the federal government should be reorganized:

It is an interesting fact that few federal administrators have spoken to the members of the President’s Committee on Administrative Management in terms of the interest of the President or the presidency or the Administration—but nearly always in terms of the immediate and particular interest of a department or a bureau as if it were [a] satrapy.²³

This passage provides several key insights into the historical conception of executive power. The first is the extent to which Roosevelt’s staff understood the President to be the chief administrative officer of the government. One can argue about whether that conclusion is warranted as a prescriptive matter.²⁴ Nonetheless, when the Reagan Administration approached this problem, it was not doing so on a blank slate. Rather, it was invoking arguments that found resonance across different presidential administrations, parties, and eras. Second, it is interesting that the staff were concerned that even handpicked, quite loyal political lieutenants in agencies might have divergent views relative to that of the President. Third, the note’s reference to the “immediate and particular interest of a department” implicitly recognizes the extent to which agencies have different cultures and predispositions when using their discretion—a characteristic that arguably heightens the need for robust oversight of an administrative state, particularly when agencies face tradeoffs that the general terms of congressionally drafted statutes do not resolve.

A senior administration official working under President Harry Truman expressed a similar view some years later. Testi-

21. Internal White House Memorandum, *Reorganization* (Apr. 16, 1939) (on file with the Franklin D. Roosevelt Presidential Library, President’s Committee on Administrative Management, Correspondence and Papers, Folder on Reorganization Plan 1, Box 24), *quoted in* Cuéllar, *supra* note 12, at 665–66.

22. Cuéllar, *supra* note 12, at 666.

23. Internal White House Memorandum, *supra* note 21, *quoted in* Cuéllar, *supra* note 12, at 666.

24. *See generally* Strauss, *supra* note 5.

ying before Congress, the former corporate-lawyer-turned-federal-agency-administrator Oscar Ewing described his view of a presidential appointee in terms that did not minimize the relevance of discretion or judgment, but nonetheless bound these qualities to a more fundamental imperative: "The department head must be regarded as an extension of the President's personality. He is expected to carry out any basic instructions which a president may provide for his guidance" ²⁵ Political attitude, which this appointee described as an important consideration for the appointee to bear in mind, "reflects prevailing beliefs on broad public issues, beliefs about the scope and magnitude of Government activities, about both the ends and means of government action." ²⁶ Thus, as Oscar Ewing saw it, the role of an agency official in the Truman Administration was not merely that of a technical expert, but also one that involved engaging in political judgments.

Clearly, there has been a long-running effort on the part of presidents from both parties to figure out how to make sense of their possibilities vis-à-vis a large executive branch in the government—a problem which has largely been created by Congress itself (notwithstanding some instances of presidential efforts to get legislation enacted). This has culminated in a bid to enlarge the Executive Office of the President, to support presidential decisionmaking and oversight through the establishment of senior aides to the President that have responsibility for dealing with cabinet officials—people like Harry Hopkins and Samuel Rosenman in the Roosevelt administration,²⁷ John

25. Cuéllar, *supra* note 12, at 667 (quoting Official Verbatim Transcript of Statement of Oscar Ewing before the House Select Committee on Lobbying Activities (BNA July 28, 1950) (on file at Harry S. Truman Presidential Library, Papers of Oscar R. Ewing, Federal Security Agency Subject File, General Correspondence, Comptroller General's European Trip, Folder 1, Box 29).

26. *Id.*

27. See, e.g., Douglas S. Onley, Note, *Treading on Sacred Ground: Congress's Power to Subject White House Advisers to Senate Confirmation*, 37 WM. & MARY L. REV. 1183, 1194–95 (1996) ("The fight over presidential appointees—the question of which branch of government controls their service—dates to the earliest days of our democracy. Before the Reorganization Act of 1939, no law 'authorized' the President to select his own staff, and the legislative history of the law confirms that Congress was oblivious to the Article II gap that had existed for the previous 150 years. . . . The history of the act indicates that lawmakers did not intend it to apply to presidential counselors such as Roosevelt advisers Harry Hopkins or Samuel Rosenman, who was the first White House legal adviser. '[N]othing changed the fact that presidential aides with special entree who were confidants of the President would have great influence, whether or not they held an official title.'" (citations omitted).

Ehrlichman and Henry Kissinger in the Nixon Administration,²⁸ and Roger Porter in the George H. W. Bush Administration.²⁹

Moreover, this discussion within the executive branch has not occurred within a judicial vacuum. Reading cases ranging from *United States v. Midwest Oil Co.*³⁰ and *United States v. Curtiss-Wright Export Corp.*³¹ to *Youngstown Sheet & Tube Co. v. Sawyer*³² and *Dames & Moore v. Regan*,³³ both law students and executive branch officials themselves no doubt soon recognize that courts view the executive branch as far more than a mere mechanistic implementer of rigidly written legislative statutes. These cases reflect a judicial recognition of the special role of the executive in both domestic and international affairs, even if that role is ultimately one that must be reconciled with the importance assigned to congressionally enacted statutes.

28. See, e.g., Kevin Sholette, Note, *The American Czars*, 20 CORNELL J.L. & PUB. POL'Y 219, 223 (2010) (noting that Senator Byrd, who cited appointments made by the Nixon and Bush Administrations as demonstrating the problems that "czars" have caused, stated as follows: "In the Nixon White House, Henry Kissinger directed foreign policy through the National Security Council as an assistant to the President, and Peter Flanagan did the same for economic policy through the newly established Council on International Economic Policy. John Ehrlichman took responsibility for domestic policy through a new Domestic Council.") (citations omitted).

29. See Maureen Dowd, *Washington at Work; Bush's Advisor on Domestic Policy: The Perfect Person to Win the Point*, N.Y. TIMES, Mar. 29, 1990, at A18 (profiling Roger Porter, President George H. W. Bush's Advisor for Economic and Domestic policy).

30. *United States v. Midwest Oil Co.*, 236 U.S. 459, 471–72, 474 (1915) ("[T]he absence of express statutory authority was the occasion of doubt being expressed as to the power of the President to make these orders [withholding land specifically designated by Congress for private acquisition] The power of the Executive, as agent in charge, to retain that property from sale need not necessarily be expressed in writing.").

31. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936) ("[W]e are here dealing . . . with . . . the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . [which] must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.").

32. See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (containing seven separate opinions on the power of the President to seize steel mills without congressional authorization).

33. *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) ("As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act [T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to invite measures on independent presidential responsibility.") (citations omitted) (internal quotation marks omitted).

Thus, certain changes in the statutory context of executive power may prove to have lasting consequences for the presidency. To the extent that the concept of presidential power is implemented differently over time, such changes in implementation are driven partly by legislators' decisions about how to write statutes and how to organize the legislature. When lawmakers write statutes that include expansive provisions permitting agencies to waive the applicability of certain requirements (as with the Elementary and Secondary Education Act,³⁴ or the REAL ID Act³⁵), they enhance executive power. Such provisions may have sensible policy rationales in some cases, but they also transfer to the executive branch responsibility for difficult judgments, and create dilemmas for the President and subordinates regarding the responsibility for such decisions within the executive branch. Moreover, statutes often reflect competition among different congressional committees to enlarge the jurisdictions of particular agencies, resulting in an executive branch that often involves agencies with overlapping jurisdictions. These overlapping jurisdictions may often place the President in a quasi-adjudicatory role, where the role of the President is in part to deconflict—to figure out how to coordinate—different agencies and in part to oversee sensitive decisions regarding the waiver of statutory provisions with far-reaching implications.

Article III courts remain central players in policing this system, and rightly so. But it would be a mistake to treat courts as the only or even the most important mechanism for supervising, constraining, and promoting the integrity of decisions involving the use of executive power. It makes no sense to shoehorn all executive decisions into the conventional framework of judicial review.³⁶ By consequence, courts face constraints in supervising executive action. Some of those constraints are prudential, reflecting the role of the political question doctrine, unreviewability, nonconstitutional standing constraints, and deference to certain agency judgments. Courts nonetheless retain a unique role as constitutionally protected

34. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965).

35. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005).

36. See Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 258–65 (2006).

adjudicators of individual claims and participants in a larger civic process shaping the law's evolution.

At the core of that process, however, remain the enormously consequential decisions of executive branch officials and of the electorate in whose name those officials act. The rule of law is very much in the hands of the people who are appointed to executive agencies—appointees whose judgments must sometimes thread the needle between assigning to the presidency its pivotal role in overseeing executive decisions and retaining enough individual responsibility to determine when it is time to say, “This is not what I signed up for; this is not what it means to be loyal to the Constitution; I am leaving this job.” It is in the choices of these appointees, and ultimately in the hands of the American people who visit the ballot box, where much of the stewardship of executive power remains.