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# Is Administrative Law at War with Itself?

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Dick Stewart's classic 1975 article, *The Reformation of American Administrative Law*, ends with the following marvelous sentences:

> The instinct for satisfying integration may remain a vain shuttlecock between no longer tenable conceptions of administrative legitimacy and the exigent difficulties of the present, which have so far eluded a consistent general theory. Given "the undefined foreboding of something unknown", we can know only that we must spurn superficial analysis and simplistic remedies, girding ourselves to shoulder for the indefinite future, the intellectual and social burdens of a dense complexity."[1]

Since Dick wrote those rather unsettling lines, much has changed. But one thing has stayed the same: A consistent general theory of administrative legitimacy still eludes us. Indeed, I want to argue in this brief essay that the two main directions of development in administrative law since 1975 seem deeply contradictory.

On the one hand we have seen the rise of "presidentialism" or "presidential administration". Beginning soon after Dick published *Reformation*, presidents began to exercise ever more ambitious attempts at White House control of administration.[2] This has been true of both Democratic and Republican presidential administrations. These presidential efforts may seem explicable merely as a pragmatic response to making good on campaign promises in an increasingly administrative state with a sclerotic and often divided legislative process. But

[1] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1813 (1975).
[2] These events are chronicled in JERRY L. MASHAW, ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, 271-318 (2019).

presidentialism has its own legitimating theory – the President's connection to an electoral process in which presidents are the only officials elected by the whole of the nation.

The other development, which had begun prior to 1975, was an increasing demand for reason-giving as necessary to the legality of administrative action. Dick saw this development as a critical element in the construction of his "interest representation" theory of the legitimacy of the administrative state.[3] The demand for reasoned administration has only accelerated since 1975.[4] The sense of reasoning as the touchstone of administrative legitimacy has been fostered, not only by increasingly stringent demands for reason-giving by reviewing courts, but also by Congress in framework analytic statutes that demand comprehensive analysis of various potential side effects of administrative action and, indeed, by presidents as a part of their program for gaining control over a sprawling bureaucracy. And, while again, there are pragmatic and strategic reasons for these reason-giving requirements, reason-giving has its own claim to legitimate the administrative state on democratic grounds.[5]

As I have explained in more detail elsewhere, reasoned administration—administrative action that must be explained in terms of how it satisfies legislative goals given the facts as articulated in a participatory administrative process—makes two different claims to democratic legitimacy. On the one hand, these reasons are required so as to demonstrate that administrative

[3] *See* Stewart, supra note 1; *see also* Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U.L. REV. 437, 442 (2003) (describing "an 'interest representation' model that seeks to assure an informed, reasoned exercise of agency discretion that is responsive to the concerns of all affected interests").
[4] These events are chronicled in JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 15-143 (2018). (Hereinafter MASHAW, REASONED ADMINISTRATION).
[5] For an articulation of the relationship between reason-giving and democratic governance, see Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99 (2007).

officials have implemented some plausible effectuation of the goals that Congress imbedded in the statutes that have given those officials the authority to act. Reasons thus reinforce an electoral pedigree for administrative action that is tied, not to presidential elections, but to those for representatives and senators. Equally fundamentally, reason-giving connects administration to fundamental values in a liberal democracy. Those values include the avoidance of arbitrary political coercion and the exercise of state power through processes that are both participatory and deliberative. Dick alludes to this second ground of democratic legitimacy in his *Reformation* article,[6] but as I read him, he sees his interest representation model more as a process of pluralistic bargaining than democratic deliberation. Fair enough, but this too is a vision of democracy that Robert Dahl famously labeled "Polyarchy."[7]

At an abstract theoretical level, presidential administration and reasoned administration as models of the operation of the administrative state both embody claims to a vision of democratic legitimacy. But these two approaches to administrative governance hardly provide the unified theory of administrative law that Dick longed for in 1975. For, as I seek to explain in the remainder of this essay, these two visions are often at war with each other. Let me first briefly sketch the developments that have produced both presidentialism and reasoned administration as models of administrative governance and then say a bit more about their competition.

*The Rise of Presidentialism*

[6] *See* Stewart, *supra* note 1, at 1760 ("[A]dministrative law must devise a process, distinct from either traditional political or judicial models, that both reconciles the competing private interests at stake and justifies the ultimately coercive exercise of governmental authority. The notion of adequate consideration of all affected interests is one ideal of such a process.").

[7] ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1971).

Several background conditions have contributed to the prominence of presidential administration. One is a constant: presidents make promises and want to be seen to have fulfilled them. In an ideal vision of separated powers, fulfilling presidential promises would mean making policy suggestions to Congress and getting those suggestions enacted into law. That is not the way that presidentialism in administration functions. Or, at best, that description is enormously over-simplified. Presidential administration means taking existing statutory authority for administrative action and seeking to ensure that that authority is exercised in ways that satisfy, and are seen to satisfy, White House policy preferences.[8] In order for that to work, administrative authority, as created by congressional statutes, must leave substantial discretionary authority with administrators who are susceptible to White House direction. In the modern administrative state, most statutes are of that sort. Even massive pieces of legislation like the Affordable Care Act[9] or the Dodd-Frank financial reform legislation,[10] statutes that go on for hundreds of pages, demand that yet more hundreds of pages of rules be adopted by administrators to make them operational. Every such exercise of administrative authority inevitably involves some, often broad, discretion about what policy to adopt.

Finally, contemporary gridlock in Congress has meant that modern presidents often must act administratively if they are to carry out their policy agendas. Most federal public law is made by administrators, not by Congress.Modern presidents have seized these opportunities for presidential policy making in increasingly aggressive ways. Beginning with Jimmy Carter, every subsequent president has monitored, and sought to influence, administrative rulemaking through

[8] See generally, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); *see also* Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 270 (2019) (maintaining that "presidential administration is stronger than ever").
[9] Patient Protection and Affordable Care Act, PUB. L. NO. 111-148, 124 Stat. 119 (2010).
[10] Dodd-Frank Wall Street Reform and Consumer Protection Act, PUB. L. NO. 111-203, 124 Stat. 1376 (2010).

Office of Management and Budget (OMB) review of all major regulations.[11] Those reviews have been inflected differently in pro-regulatory versus deregulatory administrations. But the effort to bring administrative rulemaking under White House control has been unrelenting.

The ability of presidents to mold the direction of administrative action is facilitated by the tendency of Congress to lodge the appointments power over thousands of high-level administrators in the President. To be sure, many of these high-level officials must also be approved by the Senate. But when a majority of the Senate and the President are of the same political party, this approval is little more than a rubber stamp. Presidents have also found ways to cut the Senate out of the loop. One device is to appoint special policy "czars" lodged in the Executive Office of the President with mandates to oversee policy making in particular agencies or subject matters.[12] Another device, a particular favorite of President Trump's, is to leave major administrative offices open and to designate presidential loyalists as acting heads of agencies.[13] This not only avoids Senate involvement in the appointment, but avoids any restrictions that the Congress might have placed on the President's removal power over the head of a particular agency.

Finally, presidents themselves have been delegated statutory authority in a number of policy areas. This is particularly true in defense and foreign affairs,[14] but also with respect to immigration policy,[15] the management of public land[16] and federal procurement policy. And multiple statutes authorize extraordinary presidential or agency action when the President

[11] *See* Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016).
[12] See discussion in Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549 (2018).
[13] On the use of acting agency heads, see generally Ann Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613 (2020).
[14] *See* John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 L. & CONTEMP. PROB. 293 (1993).
[15] *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).
[16] *See*, *e.g.*, The Antiquities Act, 54 U.S.C. § 320301 (2018).

declares an emergency. It is hard to find a period in recent decades in which some form of emergency has not been declared.

One might well ask whether all this presidential power is lawful, or even constitutional. For the most part the answer is yes. Presidential Executive Orders or memoranda instructing department or agency heads to exercise their authority in particular ways routinely contain a caveat that they are to do so consistent with their statutory authority. And, although any administrative action under statute requires an interpretation of the statute's meaning, the administrator's interpretation need only be reasonable in the eyes of a reviewing court, not necessarily the interpretation the court thinks would be the best one.[17] Under existing Supreme Court doctrine,[18] changes in the interpretive gloss put on existing statutes by new administrations face no heightened standard of review merely because the new policy contradicts an old one. In addition to regulatory or rulemaking authority, enforcement priorities and agendas are almost completely within the control of the current administration. It is a rare statute that forces administrators to take action when they prefer not to do so because enforcement or the adoption of new regulatory requirements is inconsistent with the President's program.

Finally, the contemporary Supreme Court has become increasingly skeptical of congressional attempts to give administrators some independence from presidential control by limiting the grounds on which they can be removed. This jurisprudence remains something of a muddle, but seems to be trending in the direction of a unitary executive theory that treats all delegations of authority to administrators as if they were delegations to the President.[19]

[17] Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
[18] Federal Communications Comm'n v. Fox Television Stations, Inc., 556 U.S. 502 (2009).
[19] Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 427 (2019).

This combination of presidential ambition, political circumstances, statutory capaciousness, and limited legal restrictions on the exercise of presidential power has produced a robust model of presidential administration which is much in evidence in contemporary public policy. For instance, faced with a recalcitrant Congress and enjoying the allegiance of compliant administrators, President Barack Obama launched an ambitious campaign of environmental protections, clean energy development, immigration reform, and equal rights protection. In his four years in office, President Donald Trump has dismantled much of the Obama legacy. As Alexander Hamilton might have put it, presidential administration provides energy in government, but ease of action can yield ease of reversal.[20] This ability to quickly build and rebuild could have negative consequences; indeed, in Federalist 72, Hamilton defended the re-electability of presidents under the Constitution as necessary to legal and political stability precisely because of the likelihood that new presidents would be motivated to undo the work of their predecessors.[21] Unstable public policy is not necessarily good public policy in the long run, and many also fear that presidentialism can easily veer into authoritarianism.

I hasten to add that not everything presidents try to do through exercises of presidential administration is unrestrained by law. If the lawyers in relevant departments and in the Office of Legal Counsel at the Department of Justice are doing their jobs, some unquantifiable proportion of presidential initiatives will be aborted as legally inadvisable. And many, many more will be modified to fit a decent understanding of existing statutory authorities. Moreover, the courts are not entirely acquiescent. The Trump administration, for example, has had a particularly spotty record in defending its policies in federal courts. The Institute for Policy Integrity at the New York University School of Law has been keeping a running tally of successes and failures in

[20] On these developments see Mashaw & Berke, *supra* note 8.
[21] THE FEDERALIST NO. 72 (Alexander Hamilton).

court by Trump Administration officials seeking to implement administration policy through regulations, guidance documents and agency memoranda. Of 110 lawsuits in their survey, they found that the Trump Administration was successful in 12 and unsuccessful in 98.[22] The legal grounds for invalidating the Trump Administration's actions include constitutional violations and over-aggressive interpretation or reinterpretation of statutory mandates. A substantial number of the cases that went to judgment also sent the agencies back to the drawing boards for failure to provide a reasoned explanation for the administration's policy per the Administrative Procedure Act (APA).[23] Notably, judicial enforcement of the APA's requirement for nonarbitrary administrative action through reasoned explanation is a major part of the competing model of administrative legitimacy that I outlined earlier and to which we now turn.

*The Model of Reasoned Administration*

As Dick Stewart noted in *Reformation*, a focus on the reasoning provided for administrative decisions, particularly in rulemaking, was already emerging as an important strain in the so-called "hard look" approach to judicial review of administrative action. In succeeding decades, particularly following the iconic decision in the *State Farm* case,[24] it became clear that the model of reasoned decision-making had multiple sources.

Constitutional due process requires that reasons be given for administrative adjudications whenever private parties have rights to some form of adjudicatory hearing.[25] The Administrative Procedure Act, and other more specific statutes, demand reason-giving in connection with a host of agency functions including virtually any agency action that has either individual or general

[22] *Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY (2020), policyintegrity.org/trump-court-roundup [https://perma.cc/BQG8-6DN9].
[23] The Federal Administrative Procedure Act is at 5 U.S.C. §551, et. Seq.
[24] Motor Vehicle Mfr. Ass'n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983).
[25] The basic requirements for administrative due process are elaborated in *Goldberg v. Kelly*, 97 U.S. 254 (1970).

legal effect. These requirements are premised on the need to facilitate appropriate judicial review in a system of separated powers and to protect an individual right of participation in agency proceedings.

Over time these requirements for reason-giving have become increasingly demanding. On judicial review, agencies may not rely on facts or arguments not previously ventilated in the administrative record.[26] Agency processes must give adequate notice of the issues to be decided[27] and agency decisions must explain their consideration and acceptance or rejection of the facts or arguments offered by participants in their proceedings. In rulemaking proceedings, any interested person may participate and agencies must respond to petitions for the adoption, amendment, or rescission of a rule.

Many of these requirements emanate from judicial decisions, but both statutes and executive orders have broadened the topics about which administrators must reason when making decisions.[28] The demand that agencies consider environmental effects, cost effectiveness, the balance of costs and benefits, effects of agency action on small entities and vulnerable populations, the distributional effects of governmental action, or effects on the balance of authority between state and federal government, all broaden the range of topics that mission-specific agencies must reason about and, simultaneously, the individual and group interests that they must take into account. In a broad sense these anti-tunnel-vision requirements are focused on making administrative action, which might be instrumentally rational from the

[26] Securities and Exchange Comm'n v. Chenery, Corp., 332 U.S. 194 (1947).
[27] *See, e.g.*, United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2nd Cir. 1977).
[28] These requirements are embodied in a number of statutes and executive orders. *See*, *e.g.*, the National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 91970) (codified at 42 U.S.C. §4321 et seq. The Regulatory Reflexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §601 et seq.) An Executive Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3, 821 (2011).

perspective of an agency's particular mission, more substantively reasonable when viewed from the broader perspective of competing public goals and values.

To be sure, this description paints with a broad brush, and we will not here pursue further the details of these legal demands for agency reason-giving and for attention to the claims, evidence and arguments of outside parties. But, taken together, administrative law's contemporary reasonableness demands aspire to construct a system of administrative governance that is well-informed, highly participatory, complexly interconnected with political and legal monitors, and insulated against, although surely not immune from, the seizure of public power for private or partisan gain. And, as I have argued at length elsewhere[29], these requirements construct a regime of administrative governance that, whatever its faults, yields forms of public action that are democratically legitimate viewed from the perspective of either theories of electoral or aggregate democracy or theories that focus more on the availability of participatory and deliberative processes.

*Competitive Models of Legitimacy*

For now, however, we need to focus on the ways in which reasoned administration challenges presidentialism. At one level this competition is obvious. Absent those cases in which the President has either constitutional or statutory authority to act unilaterally, administrators cannot simply say "the President made me do it" as a justification for administrative action. For example, President Clinton famously proclaimed in the Rose Garden that he had authorized the Food and Drug Administration to regulate tobacco pursuant to the Food, Drug and Cosmetic Act.[30] In the litigation following the FDA's efforts to do so, the

[29] MASHAW, REASONED ADMINISTRATION, *supra* note 4, at 163-79.
[30] *See* Kagan, *supra* note 8, at 2282-84.

President's purported "authorization" was not mentioned. The FDA was required to approach the question of regulating tobacco within the parameters of the relevant statutes. And, notwithstanding the capaciousness of the definition of "drug" under the Food, Drug and Cosmetic Act, the Supreme Court was quite clear that Congress had not intended to include tobacco products in that definition.[31]

This limitation on political direction should not be over read. In an important decision, the late Judge Patricia Wald of the District of Columbia Court of Appeals made clear that political judgment, including the basic policies of a contemporary presidential administration, would inevitably color the decisions made by administrative agencies faced with conflicting statutory demands and uncertain factual or scientific predicates.[32] But that is quite different from saying that political considerations themselves are justificatory. And, while courts are reluctant to probe whether decisions that are otherwise appropriately reasoned are in fact based on different and illicit or irrelevant political motives, the Supreme Court seems increasingly hospitable to claims that agency action taken to align with presidential preferences may be investigated to determine whether the reasons given are a mere pretext for political motivations not relevant to an agency's statutory mandates. In *Trump v. Hawaii*,[33] for example, the Supreme Court was willing, over strenuous objection, to entertain the question of whether the Trump Administration's ban on travel from six predominately Muslim countries was predicated on an illicit religious animus, a propensity that President Trump had exhibited throughout his campaign for President. The travel ban, in its third and much more restricted form, was approved, but on the basis of a lengthy multi-agency study of the national security implications of allowing travel

[31] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[32] Public Citizen v. Young, 831 F.2d 1108 (D.C. Cir. 1987).
[33] 138 S. Ct. 2392 (2018).

from nations with large numbers of potential terrorists and inadequate systems for vetting travelers to the United States.

*Department of Commerce v. New York*,[34] carried this hospitality toward claims of pretextual justifications one step further when it invalidated the Department of Commerce's attempt to add a citizenship question to the 2020 census. The complaining parties were allowed to demonstrate that the purported justification for adding the citizenship question simply had no basis in fact. As Chief Justice John Roberts wrote, in a sentence that surely understated the clarity with which the facts demonstrated that the government's rationale was false, "We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decision-making process."[35]

Finally, in *Department of Homeland Security v. Regents of the University of California*,[36] the Supreme Court invalidated the government's attempt to rescind the Obama Administration's Deferred Action for Childhood Arrivals (DACA) program. The Court, again via an opinion by the Chief Justice, relied almost exclusively on the failure of the Department to provide adequate reasons for its rescission. Not only was the rescission predicated on an inadequate legal conclusion, the agency had failed to consider a number of other matters that the Court viewed as essential to reasoned decision-making.

The transparency of the Trump Administration's attempts to take actions that align with the President's view of immigrants and immigration policy surely contributed to the Supreme Court's willingness to enter the troubled waters of uncovering pretextual political reasons. But these cases illustrate the general idea that reason-giving has now become fundamental to the

[34] 139 S. Ct. 2551 (2019).
[35] *Id*. at 2575.
[36] 140 S. Ct. 1891 (2020).

legitimacy of administrative action. As the Chief Justice put it in the census case, "The reasoned explanation required by administrative law is meant to ensure that agencies offer genuine justifications for important decisions . . . . Accepting contrived reasons would defeat the purpose of the enterprise."[37]

*Conclusion*

Administrative law is arguably moving fairly strongly in two directions at once: One exalts the claims of presidential accountability, the other, the legitimating force of reasoned administration. As I noted earlier, these two strains of thought, or more grandly, models of administrative governance, can be harmonized at the abstract level of normative appeal to some vision of democratic governance. But, they clearly clash in concrete domains of administrative action. Indeed this is clear at the slightly less abstract level of democratic theory. Presidentialism appeals to electoral or aggregate democracy and locates democratic legitimacy in the Office of the President. Reasoned administration appeals to electoral democracy as well, but locates democratic legitimacy in assembly government and statutory authorization. It also appeals to a vision of deliberative democracy. That makes sense in a presidentialist system only if the President is viewed, as Peter Strauss has memorably put it, as an overseer of faithful execution of the law, not as a decider imposing presidential preferences on administrative decision-making that would otherwise be tethered to agency understandings of congressional policy and reasoned engagement with the views of participants in the administrative process. [38]

The tension between these models of administrative legitimacy can really only managed, not resolved. This I take to be an important dimension of the "dense complexity" Dick identified

[37] *Department of Commerce*, 139 S. Ct. at 2575-76.
[38] *See* Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965 (1997); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

in 1975 and within which we now seek to make good on our Constitution's promise of both democracy and the rule of law. Yet, on a more optimistic note, this tension and administrative attempts to balance the competing claims of presidentialism and reasoned administration also reflect a dense and complexly articulated regime of administrative accountability to democratic values that belies broad claims that the modern administrative state is at war with the Constitution.[39]

[39] I make this argument in more detail in Jerry L. Mashaw, *Structuring a "Dense Complexity": Accountability and the Project of Administrative Law*, 5 ISSUES IN LEGAL SCHOLARSHIP 1 (2005).