

MAKING SENSE OF ABSENCE:  
INTERPRETING THE APA’S FAILURE TO  
PROVIDE FOR COURT REVIEW OF  
PRESIDENTIAL ADMINISTRATION

Noah A. Rosenblum\*

*Federal governance is increasingly characterized by presidential direction of administration. Yet the main statute that governs court review of administrative action, the Administrative Procedure Act, has strikingly little to say about the President.*

*This Essay seeks to make sense of this absence. It uses a brief survey of historical materials from the new Bremer-Kovacs Collection to sound the depths of the Administrative Procedure Act’s silence on the President. It then seeks to explain this omission by reference to contemporaneous discussions of the place of the president in the administrative state. The Essay hypothesizes that, at the time, the presidency was not a driver of administrative action in the way it is now, and that, when it was involved in the minutiae of administration, it was often in service of the same goals as the Administrative Procedure Act.*

*This history highlights some of the limitations of the Administrative Procedure Act for contemporary administrative law. It suggests the value of more research into the history of administration and raises questions about the possibility of returning to the world of governance the Administrative Procedure Act presumed. Despite the Act’s long history and success—marked by this recent celebration of its seventy-fifth anniversary—to keep court review of agency action at the center of administrative law might require new legal forms better adapted to an age of plebiscitary presidentialism.*

INTRODUCTION.....2144  
I. THE PRESIDENT IN THE ADMINISTRATIVE STATE.....2147

---

© 2023 Noah A. Rosenblum. Individuals and nonprofit institutions may reproduce and distribute copies of this Essay in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

\* Assistant Professor of Law, NYU School of Law. For questions and conversation, thanks to Nicholas Bagley, Aditya Bamzai, Patricia Bellia, Evan Bernick, Emily Bremer, Dan Ernst, Jill Family, John Ferejohn, Kristin Hickman, Ron Levin, Jeff Pojanowski, Jay Tidmarsh, Chris Walker, and all the attendees at the great *Notre Dame Law Review* Symposium on the History of the Administrative Procedure Act and Judicial Review. For invaluable research assistance, thanks to Pieter Brower, Miranda Litwak, Angelo Pis-Dudot, and Rachel Stewart. Special thanks to Nicholas D’Andrea, Michael Verdichizzi, and the rest of the *Notre Dame Law Review* staff for superlative editing.

A.	<i>Presidential Administration Today</i> .....	2147
B.	<i>Presidential Administration's Recent Triumph</i> .....	2149
C.	<i>The Roberts Court and Presidential Legitimation</i> .....	2151
II.	JUDICIAL REVIEW IN THE ADMINISTRATIVE STATE.....	2153
A.	<i>The Development of American Administration</i> .....	2153
B.	<i>Judicial Review, Historical Keystone of Administrative     Legality</i> .....	2157
C.	<i>Judicial Review and the APA</i> .....	2159
III.	(NO) JUDICIAL REVIEW OF PRESIDENTIAL ADMINISTRATION? 2162	
A.	<i>Sounding the Silence</i> .....	2162
B.	<i>The ABA's Special Committee on Administrative Law</i> .....	2163
C.	<i>The Attorney General's Committee on Administrative     Procedure</i> .....	2165
D.	<i>Congressional Hearings</i> .....	2166
E.	<i>The Attorney General's Manual on the APA</i> .....	2167
IV.	EXPLAINING THE MISSING PRESIDENT.....	2169
A.	<i>Two Hypotheses</i> .....	2169
B.	<i>One Entailment</i> .....	2172
C.	<i>Three Paths Forward</i> .....	2173
	CONCLUSION.....	2174

## INTRODUCTION

Where is the President in the APA?

The question is in earnest. Modern government is agency government. But much of the most significant agency action today is driven by the President. Yet the most important law governing agency action is oddly silent about the Chief Executive.

The puzzle is especially striking when we focus on what the Administrative Procedure Act (APA) does and why it is so important. As the academic literature has repeatedly emphasized, the APA memorialized a basic administrative law settlement. Regulated parties would get a “day in commission” instead of a “day in court.”<sup>1</sup> But they could appeal to judges post-facto to check administrative overreach. This model—allowing for limited judicial review of agency action in the name of protecting basic rights—found its way into the organic acts and practices of several pre-APA agencies. And it became the core of the APA itself. Agencies came to act in the shadow of judicial review.

---

1 DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940*, at 5 (2014); see also Noah Rosenblum, *Administration and Legal Orthodoxy: A Review of Tocqueville's Nightmare*, SOC'Y FOR U.S. INTELL. HIST. BLOG (Nov. 30, 2014) (reviewing ERNST, *supra*), <https://s-usih.org/2014/11/administration-and-legal-orthodoxy-a-review-of-tocquevilles-nightmare/> [<https://perma.cc/7D9E-E6RG>].

This makes the APA's silence about court review of the President troubling. For the past seventy-five years, the statute has helped structure the administrative state, giving it a statutory frame, if not an actual constitution. Yet it leaves today's leading administrative actor out.

Hence our difficulty. Where is the President in the APA? How can it be that the most important statute for governing administration should be silent on the most important factor in administrative action? What is this alleged statutory constitution that it could be so defective? And what does it mean for the legacy of this venerable Act?

This Essay motivates these questions and offers a tentative historical answer. The Essay hypothesizes that the President is missing from the APA because he was not the kind of administrative actor the APA worried about. This in turn suggests that the President played a different role in administration at the time the APA was enacted, and that the purposes of judicial review then may have been different too. At the time, court review of administrative action was justified as a last-ditch, stop-gap measure to ensure government action was not arbitrary and did not trench on protected rights. To ensure those goals, courts did not need to review presidential administration, for two reasons: first, because the President was not the prime director of administrative action; and second, because when the Presidency was involved in administration, it was in service of the APA's goals rather than in tension with them.

If these conclusions are correct, they tell us something obvious but important about the APA: it embodies a wholly different vision of government from the one we live with now. In other words, the APA is not only part of a "lost world" of administrative law but also a component piece of a lost governance regime.<sup>2</sup> Its diamond jubilee gives us occasion to mark how much our government differs from the one it responded to and to begin imagining a new administrative law adequate to our new administrative realities.

Part I begins this project by identifying the importance of the President in the administrative state. It shows how, as a matter of practice, presidential involvement in administrative action has become a central feature of American government. It then shows how law has evolved to keep pace. In a series of recent cases, the Supreme Court has made presidential administration the foundation for the lawfulness of the administrative state itself.

Part II turns to how administration has traditionally been legitimated: not through the Presidency but through courts. The Part

---

2 Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014).

begins by briefly recapitulating the history of administrative law, to show how judicial review came to legitimate American administration. Allowing impacted parties to contest agency action before federal judges helped make administration acceptable by reassuring regulated interests, pacifying opposition from lawyers, and harmonizing regulatory goals with conservative conceptions of the rule of law. It also checked arbitrariness and so guarded against authoritarianism, a particularly important goal at the time the APA was developed. This model of administrative law, with judicial review at its center, was enshrined in the APA and has remained central to administrative law.

Part III draws out the implicit tension between Parts I and II to frame this Essay's puzzle: If the President is so central to administration, and the way to legitimate administration is through judicial review, why doesn't the APA cover the President? It looks at historical sources from the Bremer-Kovacs collection to confirm that the absence of the President is not accidental. A brief canvass of some of the key documents from the legislative history of the APA suggests that the Presidency was hardly discussed in conjunction with the APA and that, when it was, it had little to do with presidential administration.

Part IV develops two hypotheses to explain why neither the APA itself nor the actors involved in its passage worried overmuch about the role of the President in administrative action. First, and most obviously: the President simply was not an important driver of administrative action. Second, and more subtly: insofar as the President was involved in administrative action, he was perceived to be advancing the same goals the APA sought to address through judicial review. The Part concludes by drawing out what these two hypotheses would mean for administrative law and the legacy of the APA. In brief: the APA is inadequate to our needs and we will need a new administrative law to account for a new world of presidential administration. This in turn suggests three different paths for scholars of administrative law in a presidentialist age—one scholarly, based in research; another hopeful, grounded in democratic reform; and a third realist, looking for the rule of law in an era of executive unilateralism.

A brief Conclusion recapitulates the meaning of the APA's silence on judicial review of presidential administration.

## I. THE PRESIDENT IN THE ADMINISTRATIVE STATE

### A. *Presidential Administration Today*

“President Obama has a new phrase he’s been using a lot lately,” NPR reported in 2014: “I’ve got a pen, and I’ve got a phone.”<sup>3</sup> The expression, much referenced by Obama and his team in the face of an opposition Congress, captured the president’s plan to drive change on his own. “[W]ith the stroke of a pen,” he could sign executive orders, making policy unilaterally.<sup>4</sup> With his phone, he could serve as the nation’s chief convener, if not its executive, bringing stakeholders together to take collective action.<sup>5</sup> With his pen and his phone, Obama implied, he would be able to work around a recalcitrant legislature to realize his agenda. As he summarized his approach: “I am going to be working with Congress where I can . . . but I am also going to act on my own if Congress is deadlocked.”<sup>6</sup>

Obama would go on to realize important objectives unilaterally. But, with the benefit of hindsight, his most important victories seem independent of his pen-and-phone strategy. They were not the result of unilateral executive action or stakeholder convenings, but the product of administrative processes.

Consider Deferred Action for Childhood Arrivals, Obama’s transformational immigration policy, which enabled millions of undocumented Americans to live and work without fear of imminent deportation. It was announced by the President in a Rose Garden ceremony, remains closely associated with Obama himself, and was

---

3 Tamara Keith, *Wielding a Pen and a Phone, Obama Goes It Alone*, NPR (Jan. 20, 2014, 3:36 AM), <https://www.npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone> [<https://perma.cc/8MUG-8RHV>].

4 KENNETH R. MAYER, *WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER* (2d prtg. 2002). In practice, executive orders are often much less unilateral and reflect significant agency involvement. See ANDREW RUDALEVIGE, *BY EXECUTIVE ORDER* 8 (2021); Noah A. Rosenblum, *Pluralizing the Executive*, *YALE J. ON REGUL.: NOTICE & COMMENT* (Oct. 28, 2021), <https://www.yalejreg.com/nc/symposium-by-executive-order-06/> [<https://perma.cc/38QK-MG2L>].

5 Although the President most associated with the use of the convening power is probably the Republican Herbert Hoover, Democratic operatives had been focused on the President’s ability to achieve policy victories by bringing together stakeholders prior to Obama’s election. On Hoover’s pursuit of an associational state, see ELLIS W. HAWLEY, *THE GREAT WAR AND THE SEARCH FOR A MODERN ORDER* 160–62 (1992); Ellis W. Hawley, *Herbert Hoover, the Commerce Secretariat, and the Vision of an “Associative State,” 1921–1928*, 61 *J. AM. HIST.* 116 (1974). On Democratic presidential use of the convening power, see John D. Podesta, *Forward to CTR. FOR AM. PROGRESS, THE POWER OF THE PRESIDENT* (2010). See also Jackie Calmes, *Obama Counts on Power of Convening People for Change*, *N.Y. TIMES*, Jan. 11, 2014, at A10.

6 Keith, *supra* note 3.

explicitly designed to get around a stonewalling Congress.<sup>7</sup> Yet it was not the result of a convening. And it did not bear Obama's signature. The formal document containing the new policy was styled as an internal administrative memorandum, issued by the Secretary of Homeland Security, announcing new standards for the exercise of prosecutorial discretion in her department.<sup>8</sup> This was not presidential pen-and-phone. This was agency action.

Obama's legacy should not surprise us. He made policy the same way most recent Presidents have: through presidential administration. President Bill Clinton, Obama's democratic predecessor, had famously used his position to encourage agency action, for which he then took credit.<sup>9</sup> His approach was remarkably successful. After the Republicans took Congress in 1994, Clinton's legislative agenda seemed dead.<sup>10</sup> He was forced to rely on agency action to advance his policy priorities. Presidential administration allowed him to rack up significant achievements.<sup>11</sup> He went on to win reelection by a decisive margin.<sup>12</sup>

Presidents who followed Clinton learned from his success. As he had showed, presidential administration was a strategy particularly well-suited to divided government. As his successors found themselves in similar situations, they fell back on similar tools. Thus, after his party lost control of Congress in 2006, President George W. Bush advanced his major domestic policies through agency directives, including in particular on environmental regulation and stem-cell research.<sup>13</sup> Obama famously resorted to agency action to advance his immigration agenda after Congress refused to pass the DREAM Act, as already noted. And President Donald Trump notoriously pursued several initiatives over congressional objections, including most infamously his instructions to federal agencies to prohibit entry of travelers from

---

7 See Remarks on Immigration Reform and an Exchange with Reporters, 1 PUB. PAPERS 800 (June 15, 2012). On the continuing connection between DACA and Obama, see *Ten Years of DACA*, OBAMA FOUND., <https://www.obama.org/daca-10-years/> [<https://perma.cc/9KBR-U8CK>].

8 Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot.; Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs.; & John Morton, Dir., U.S. Immigr. & Customs Enf't (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/5RQF-HETL>].

9 See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250 (2001).

10 See *id.* at 2312–13.

11 See *id.* at 2313.

12 See MICHAEL NELSON, CLINTON'S ELECTIONS 202–03 (2020).

13 See, e.g., Exec. Order No. 13,435, 3 C.F.R. 222 (2008) (stem cells); Exec. Order No. 13,432, 3 C.F.R. 215 (2008) (environmental regulation).

certain countries into the United States and to construct a wall at the border with Mexico.<sup>14</sup>

Presidential administration has thus become a central tool of modern governance. Every President in recent history has sought to realize central campaign pledges by directing, influencing, or obstructing administrative action. The tactic has become so common, it is no longer reserved for divided government. In 2022, the Department of Education unveiled an ambitious student loan forgiveness plan, which would fulfil one of President Joe Biden's campaign pledges.<sup>15</sup> Biden announced the Department of Education's plan himself, before it was released,<sup>16</sup> and defended the plan after it came under attack.<sup>17</sup> These are standard moves from the modern presidential administration playbook.<sup>18</sup> What makes his actions notable is the political context in which he took them. Biden chose to implement his campaign pledge through administrative action despite unified Democratic control of government. Presidential administration is now so central to governance, Presidents embrace it over legislating.

### *B. Presidential Administration's Recent Triumph*

The ubiquity and extent of presidential involvement in agency action can make it seem an almost natural part of American government. But there is evidence to suggest it is of recent heritage. In previous work, I have traced the roots of presidential administration to the early twentieth century, and, in particular, to reorganization proposals from the 1930s.<sup>19</sup> Presidential involvement in administration continued to develop over the next decades.<sup>20</sup> Yet, even

---

14 See Exec. Order No. 13,769, 3 C.F.R. 272 (2018) (foreign travelers); Exec. Order No. 13,767, 3 C.F.R. 263 (2018) (border wall).

15 See Press Release, The White House, FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most (Aug. 24, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/> [<https://perma.cc/CNU2-3LYL>].

16 See Remarks on Student Loan Debt Relief and an Exchange with Reporters, 2022 DAILY COMP. PRESS. DOC. (Aug. 24, 2022).

17 Remarks on the Federal Student Loan Debt Relief Program in Dover, Delaware, DAILY COMP. PRESS. DOC. (Oct. 21, 2022).

18 For a typology of the tools of presidential administration, see Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265 (2019).

19 Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1 (2022).

20 In forthcoming work, Ash Ahmed, Lev Menand, and I reconstruct the three phases of presidential involvement in the administrative state and their shifting legal rationales. For an early draft, see Ashraf Ahmed, Lev Menand, & Noah Rosenblum, *The Tragedy of*

fifty years later, the question of the President's role in directing or influencing administration remained unsettled.

A telling anecdote from Professor Peter Shane's new book illustrates the point. In the late 1970s, Shane was working as an attorney-adviser in the Office of Legal Counsel. While there, "the office received a formal inquiry from the secretary of the interior regarding whether he and members of his department's Office of Surface Mining Reclamation and Enforcement had acted lawfully in meeting with members of the president's Council of Economic Advisers to discuss a proposed rule."<sup>21</sup> From our perspective today, the request is puzzling. The Department of the Interior is clearly an executive agency. The Secretary serves at the President's pleasure. And the rule his office was developing would have had major political, economic, and social impacts. This is precisely the kind of administrative action a President today would seek to direct or at least influence. And yet, "whether it had been permissible" for the agency "to meet off the record *at all* with White House advisers . . . was not considered a question with an obvious answer."<sup>22</sup> Certainly it worried the Secretary of the Interior enough that he wanted formal guidance.

Shane's experience reminds us that presidential administration has a history and is the product of institutional development. Decades after Progressive Era public administration scholars sketched a vision of presidential administrative superintendence, the government still lacked the legal and institutional tools to realize it.<sup>23</sup> It would take several rounds of legislation, along with shifts in ideas, legal doctrine, personnel, and political expectations, to make presidential administration possible.<sup>24</sup> And even then, the transformation remained partial and contested.<sup>25</sup>

---

*Presidential Administration* (Antonin Scalia L. Sch. Ctr. for the Study of the Admin. State Working Paper No. 21-39, 2021), <https://administrativestate.gmu.edu/wp-content/uploads/2021/09/Ahmed-Menand-Rosenblum-The-Tragedy-of-Presidential-Administration.pdf> [<https://perma.cc/A6QE-DU9M>].

21 PETER M. SHANE, *DEMOCRACY'S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY* 103 (2022).

22 *Id.*

23 On Progressive Era origins of the President as administrator-in-chief, see Rosenblum, *supra* note 19. See also Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief: Myers and the Progressive Presidency*, *COLUM. L. REV.* (forthcoming 2023–2024) (on file with author).

24 See generally JOHN A. DEARBORN, *POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION* (2021); Noah A. Rosenblum, *Presidential Administration: An Intellectual and Legal History, 1888–1938* (2023) (Ph.D dissertation, Columbia University). See also Noah A. Rosenblum, *Doctrine and Democratic Deconsolidation: On David Driesen's Specter of Dictatorship*, 72 *SYRACUSE L. REV.* 1433, 1436–52 (2022).

25 See Ahmed et al., *supra* note 20.



### C. *The Roberts Court and Presidential Legitimation*

Despite its recency and lingering questions about its legal foundations, presidential administration has been embraced by the Supreme Court. For years, legal scholars have suggested that presidential oversight of administration is at least a good idea and possibly legally required.<sup>26</sup> Judges and political scientists, for their part, have long referenced the President's democratic credentials as a source of legitimacy for government action.<sup>27</sup> But what is happening now is new. The Roberts Court's recent neoformalist turn in separation of powers law has made the President the foundation for the administrative state's legitimacy.<sup>28</sup>

Signs of the coming shift were apparent as early as *Free Enterprise Fund v. Public Company Accounting Oversight Board*.<sup>29</sup> In that case, the Court struck down two layers of for-cause removal protection on the grounds that they unduly interfered with the President's constitutional responsibilities under Article II.<sup>30</sup> The President's democratic mandate was central to the Court's reasoning. "The people do not vote for the 'Officers of the United States,'" it observed.<sup>31</sup> "They instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'"<sup>32</sup>

In *Seila Law v. CFPB*, the Roberts Court embraced this plebiscitarian understanding of democracy wholesale. The case concerned the removability of the head of the Consumer Financial Protection Bureau, a new agency created in the aftermath of the 2008 financial crisis.<sup>33</sup> The agency was led by a single individual, who enjoyed for-cause removal protection by statute.<sup>34</sup> By a vote of 5–4, the Supreme Court held this arrangement unconstitutional.<sup>35</sup>

---

26 See, e.g., Gillian B. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1875–99 (2015).

27 This argument has deep, Progressive Era roots. See James Hart, *The President and Federal Administration*, in *ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION: A VOLUME IN HONOR OF FRANK JOHNSON* 47, 63–64 (Charles G. Haines & Marshall E. Dimock eds., 1935).

28 On the Roberts' Court's new separation-of-powers-law formalism, see Noah Rosenblum, *The Missing Montesquieu: History and Fetishism in the New Separation of Powers Formalism* (Feb. 14, 2023) (unpublished manuscript) (on file with author).

29 561 U.S. 477 (2010).

30 See *id.* at 496.

31 *Id.* at 497–98 (quoting U.S. CONST. art. II, § 2, cl. 2).

32 *Id.* at 498 (quoting THE FEDERALIST NO. 72, at 487 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

33 See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192–93 (2020).

34 See 12 U.S.C. § 5491(b)(1), (c)(1), (c)(3) (2018).

35 *Seila L.*, 140 S. Ct. at 2211.

The opinion's logic followed and extended the argument of *Free Enterprise Fund*. “[T]he Framers made the President the most democratic and politically accountable official in Government,” the majority explained.<sup>36</sup> His “political accountability is enhanced” by placing him alone at the head of the executive branch, and making him and the Vice President the “[o]nly” political actors “elected by the entire Nation.”<sup>37</sup> “The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections.”<sup>38</sup>

On this theory, the rest of the government derives its legitimacy from the President's own democratic credentials. Administrative actors may “still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President.”<sup>39</sup> The key, the Court explained, quoting then-Representative James Madison, was to preserve “the chain of dependence” which made “the lowest officers, the middle grade, and the highest . . . depend . . . on the President, and the President on the community.”<sup>40</sup> Since an agency headed by a single director enjoying for-cause removal protection did not “depend” on the President, the design was antidemocratic, and so unconstitutional.

What this new, president-centered, plebiscitary conception of democracy will mean for the design of administrative agencies is not yet clear. It seems likely, however, that the Court will soon require important agency adjudications be subject to review by the President or an appointee he can remove at pleasure to be lawful. That, at least, is the upshot of its decision from last term in *United States v. Arthrex, Inc.*<sup>41</sup> The case concerned whether the Patent Trial and Appeal Board could issue binding decisions. The Board heard its cases in panels of three, staffed by Administrative Patent Judges who enjoy for-cause removal protection and some independence from the presidentially appointed director of the Patent and Trademark Office.<sup>42</sup> The Board's decisions were not subject to further agency review.

This, the Court concluded, was an unconstitutional arrangement. “Given the insulation of [Board] decisions from any executive review, the President can neither oversee [the Board] himself nor ‘attribute

---

36 *Id.* at 2203.

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.* (quoting 1 ANNALS OF CONG. 499 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison)).

41 141 S. Ct. 1970 (2021).

42 *See id.* at 1977, 1982.

the Board's failings to those whom he can oversee."<sup>43</sup> This broke the "chain of dependence" that *Seila Law* held undergirded the legitimacy of administrative action.<sup>44</sup>

The Court decided to remedy the violation by reconstituting the chain. If decisions by the Board were reviewable by an actor accountable to the President, then the Board's actions would be traceable back to the President, and dependence would be restored.<sup>45</sup> The Court thus reached into the agency and rearranged its reporting lines, granting the Director authority to "review final [Board] decisions and, upon review, . . . issue decisions himself."<sup>46</sup> "In this way, the President remains responsible for the exercise of executive power—and through him, the exercise of executive power remains accountable to the people."<sup>47</sup>

We see here how the Court is simultaneously blessing presidential administration and using it to legitimize administration as such. Before *Free Enterprise Fund*, *Seila Law*, and *Arthrex*, Presidents were already using agency processes to realize their policy aims. But the legal foundations for their involvement in agency actions were contested. The Roberts Court's new doctrine suggests that presidential administration is not only allowable but in some sense required. According to these cases, agency action acquires its democratic legitimacy from the President. Attempts to keep the President from directing or influencing administration are therefore legally suspect. It is precisely to the extent that the agency's actions are fairly attributable to the President himself that administration is lawful.

## II. JUDICIAL REVIEW IN THE ADMINISTRATIVE STATE

### A. *The Development of American Administration*

The Court's decision to legitimate administration through presidential diktat comes as something of a surprise, for normative and historical reasons. Normatively, reasoned decisionmaking by experts has often been thought preferable to partisan-driven flip-flopping.<sup>48</sup>

---

43 *Id.* at 1982 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496 (2010)) (emphasis omitted).

44 *See id.*; *see also id.* at 1979 (discussing the chain of dependence); *id.* at 1981 (emphasizing the need for a top-down "chain of command").

45 *See id.* at 1986.

46 *Id.* at 1987.

47 *Id.* at 1988.

48 Cristina Rodríguez has recently defended, on normative grounds, shifts in executive-driven administrative action. *See* Cristina M. Rodríguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1 (2021). Her thought-provoking account has been challenged. *See* Ashraf Ahmed & Karen M. Tani, *Presidential Primacy Amidst Democratic Decline*, 135 HARV. L.

Historically, it was not through the President that administration was legitimated, but the courts.

These two dimensions of administrative legitimacy are related. As a matter of history, one of the most powerful objections to administrative action, in the United States, was its alleged lack of accountability. Lawyers connected with the American Bar Association especially decried the way administrators could unleash coercive state power on the basis of mere whim.<sup>49</sup> To check this “administrative absolutism,” they championed judicial review of administrative action.<sup>50</sup> Court supervision would make administration nonarbitrary. In other words, as a historical matter, judicial review was thought to solve a major normative problem with American administration.

This was the outcome of a long developmental process, which culminated with the APA. In the nineteenth century, the main doctrine that regulated administration was known as the “law of officers.” And its approach to administration was fundamentally different and did not privilege an appellate model of judicial review.

This older model was based around notions of individual liability, as Professor Jane Manners has skillfully and persuasively reconstructed.<sup>51</sup> Individual government officers would post bonds and offer sureties to enter into government service. If, in the course of their work, they took action that led a private party to feel aggrieved, they might face suit. Private parties could sue government officers for trenching on their rights.<sup>52</sup> Government officers might try to defend themselves by arguing that their actions were within the law and pursuant to their legal authority, but they might face liability anyway.<sup>53</sup> If so, they might have to forfeit their bond, face additional proceedings

---

REV. F. 39 (2021). For an alternative normative argument, stressing the way expert-led, reasoned decisionmaking deepens democracy, see Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019 (2019); BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* (2019).

49 See JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS* 231–32, 252–64 (2007).

50 See *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 345–51, 361 (1938).

51 See Jane Manners, *The Great New York Fire of 1835 and the Legal Architecture of Disaster*, in *RETHINKING AMERICAN DISASTERS* 81 (Cynthia A. Kierner, Matthew Mulcahy & Liz Skilton eds., 2023) [hereinafter Manners, *The Great New York Fire*]; Jane Manners, *Executive Power and the Rule of Law in the Marshall Court: A Rereading of Little v. Barreme and Murray v. Schooner Charming Betsy*, 89 FORDHAM L. REV. 1941 (2021); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021).

52 See Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1299 (2014).

53 See *id.*; see also Manners, *The Great New York Fire*, supra note 51, at 83.

involving their sureties, and so on.<sup>54</sup> They could apply to the legislature for indemnification, “[b]ut legislative indemnification often took months or years, and it was far from assured.”<sup>55</sup>

There were some advantages to this approach to regulating government action. For one, it did not require a complicated apparatus to implement. Officers faced ordinary suits in ordinary courts.<sup>56</sup> The government did not need to create an elaborate hierarchy to supervise the exercise of discretion, internally police agents’ actions, or elaborate a specialized body of administrative law. It was cheap too. It put the burden on officers to make their conduct conform to law. If they screwed up, they would be liable unless they could convince the legislature to indemnify them.

But there were some structural weaknesses to approaching administration by regulating the actions of individual government agents. Most obviously, it created a bias against action. A government agent would only face liability for affirmatively trenching on individual rights. Framing a suit for money damages for inaction would be much harder.<sup>57</sup> Prudent government officers would thus be hesitant to act unless they had near absolute certainty they were within their legal authority or would receive indemnification.

More generally, the law of officers was not well suited to policing bureaucracies. Holding individual officers individually responsible might make sense if they were acting on the basis of individual discretion. But it was not useful for bureaucratic agents carrying out department orders. Agency bureaucrats might well exceed their legal authority. But the fault would lie with the department and its policies, which the bureaucrats were following, not with the particular government agent acting *ultra vires*. It was the bureau that needed to be fixed and disciplined, not the individual officer.

The turn of the twentieth century witnessed two massive institutional changes, which helped speed the transformation of the law of officers into modern administrative law. The first is what Professor Nicholas Parrillo has termed the “salary revolution” in American government.<sup>58</sup> The second was the expansion of the sphere of state activity during the Progressive Era, as the project of building a “New Democracy” put the federal government into a new regulatory

---

54 See Bagley, *supra* note 52, at 1299.

55 Manners, *The Great New York Fire*, *supra* note 51, at 83.

56 See Bagley, *supra* note 52, at 1299.

57 See *id.*

58 NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* (2013).

posture.<sup>59</sup> The growth of the policy space created new opportunities for administrative action, which in context meant the development of new, expert-led bureaucracies to realize governance goals.<sup>60</sup>

The salary revolution first. As Parrillo has described in arresting detail, the organization of government employment underwent a remarkable change over the course of the nineteenth century even before the rise of civil service reform.<sup>61</sup> In the early republic, government agents worked largely on a fee-for-service model.<sup>62</sup> Private citizens seeking government action would offer agents “facilitative payments.”<sup>63</sup> To incentivize officers to engage in difficult or anti-social behavior, legislatures offered them “bounties.”<sup>64</sup> These two payment regimes differed in particulars, but they contributed to a sense that government officers pursued government service for private ends.<sup>65</sup> A government officer worked for himself, and followed the law for personal profit.

This was not optimal. It fomented distrust between the government and the population it governed.<sup>66</sup> And it created opportunities for corruption.<sup>67</sup>

To overcome these difficulties, legislatures shifted officers to a new form of payment: the salary, the condition precedent to a professional government workforce.<sup>68</sup> At the same time, government expanded. The nineteenth-century federal government was, famously, “out of sight,” committed to supporting white settler colonial expansion without engaging in extensive regulation of state and society.<sup>69</sup> Industrialization shifted expectations.<sup>70</sup> Americans looked to their political leaders to help tame the horrors of unregulated capitalism.<sup>71</sup> Governments at all levels—city, state, and federal—

---

59 WILLIAM J. NOVAK, *NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE* (2022).

60 See KAREN ORREN & STEPHEN SKOWRONEK, *THE POLICY STATE: AN AMERICAN PREDICAMENT* 152–56 (2017).

61 PARRILLO, *supra* note 58, at 1–2, 379 n.24.

62 See *id.* at 1–2.

63 *Id.* at 2 (emphasis omitted).

64 See *id.* (emphasis omitted).

65 See *id.* at 2–4.

66 *Id.* at 2–4, 91.

67 *Id.* at 2–3, 16.

68 *Id.* at 2–4.

69 See BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* 11–14 (2009).

70 See DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* 367 (1998).

71 See NOVAK, *supra* note 59, at 180–217.

launched into new activist postures to ensure public health, fair competition, and the promise of mass egalitarian democracy.<sup>72</sup>

By the first decades of the new century, the federal government was transformed. In place of individual agents implementing federal law on their own in a few discrete policy areas, there were massive bureaucracies of salaried state officers, regulating many facets of the economy.<sup>73</sup> The early state, a government with agencies, was rapidly giving way to agency government.<sup>74</sup> The law of officers was rendered anachronistic. A new administrative law for this new administrative state was beginning to emerge.

### *B. Judicial Review, Historical Keystone of Administrative Legality*

Exactly how administrative law reacted to and encouraged these transformative institutional developments remains an area of active scholarly investigation. We know that there was significant experimentation in both state and federal court, as judges entertained numerous challenges to government action through a mix of statutory causes of action, cases brought under the old law of officers, and other legal proceedings.<sup>75</sup> In their opinions, they began to elaborate a new common law of administration.<sup>76</sup> At the same time, scholars argued over what the new administrative law should look like, with some self-consciously seeking to adapt relevant foreign law (especially from the European continent) to an American context.<sup>77</sup>

By the 1920s, the contours of a new administrative law built around a model of appellate review were in place.<sup>78</sup> Regulated parties would have to face government administrators, who wielded far-reaching powers over how they could conduct their business. The parties would get their “day in commission,” though. And if they disagreed with the regulators’ actions, they could contest it before a federal court, which would not hear all their claims anew, but would

72 *See id.*

73 *See* ORREN & SKOWRONEK, *supra* note 60, at 173.

74 I adapt this opposition from Ira Berlin’s distinction between “societies *with* slaves” and “slav[e] societies.” IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 22 (1998).

75 *See, e.g.*, Bagley, *supra* note 52, at 1294–1303 and sources cited therein.

76 For a particularly telling illustration, see ROBERT C. POST, *THE TAFT COURT: THE AMBIVALENT CONSTRUCTION OF THE MODERN STATE, 1921–1930* (forthcoming 2023) (manuscript at 810–27) (on file with author).

77 *See* Daniel R. Ernst, *Ernst Freund, Felix Frankfurter, and the American Rechtsstaat: A Transatlantic Shipwreck, 1894–1932*, 23 *STUD. AM. POL. DEV.* 171, 178 (2009).

78 *See* ERNST, *supra* note 1, at 44–45; Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 *COLUM. L. REV.* 939, 942–43 (2011).

review the agency's action to make sure it was legal, often according aspects of its decision substantial deference.

This appellate model of review was less a peace treaty than a framework for continued battle. The substantive law for which it was elaborated was not neutral. It sought to subject capitalist enterprises to pro-social checks.<sup>79</sup> The Interstate Commerce Commission (ICC) and other rate-setting agencies were particularly important in generating the legal disagreements that led to the model's continued elaboration.<sup>80</sup> The posture of these cases was usually the same: some regulated industry—often a railroad or a power utility—would object that the rate the commission said it could charge was too low for it to return a fair rate of profit.<sup>81</sup> Administrative law developed as judges sought to manage these conflicts.

Of course, the politics of the underlying fights affected the politics of the emerging administrative law.<sup>82</sup> Regulated industries saw administration as a threat to their profits. They were supported in their antiadministrativism by liberals and Social Darwinists who trusted in the market to make the right decisions about the allocation of scarce resources and were suspicious of government efforts to intervene on behalf of the poor or vulnerable, which they felt could only be counterproductive.<sup>83</sup>

Lawyers and judges played a special role in this distinctive political economy. The law became the last redoubt for regulated parties in their quest to resist regulation.<sup>84</sup> The legislation they sought to resist was duly enacted, reflecting their enemies' power in state and federal legislatures and executive chambers.<sup>85</sup> But the courts remained more sympathetic to their position. The federal bench in particular was staffed with lawyers who had made their careers working for the very large firms and industries now subject to regulation.<sup>86</sup>

This helps explain the attraction of the appellate model of judicial review. It incorporated the new agencies with their bureaucracies into a world of common-law courts. But it did so without decisively coming

---

79 See NOVAK, *supra* note 59, at 219.

80 See ERNST, *supra* note 1, at 37–50; Merrill, *supra* note 78, at 942–43, 953–63.

81 On the political economy of administrative law, see Jack Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599 (2018).

82 See generally Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

83 See Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 300–01 (1985).

84 See generally WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937* (1994).

85 See *id.* at 45 (describing contemporary perception that “business interests that had failed to work their will on the legislature sought refuge in the courts”).

86 See *id.* at 86–87.



down in favor of regulated industries or their regulators. Even if doctrine afforded some deference to agencies, it staged conflicts over agency decisions in a forum regulated parties found sympathetic. And it offered a way to neutralize opposition from a very powerful interest group, namely elite lawyers.<sup>87</sup> These were conservative by disposition, connected to the regulated industries that paid their legal bills, and risked losing out on business (and perhaps status) without some form of judicial review.<sup>88</sup> Subjecting agency decisions to court appeal helped reconcile them to administration too.

The language used to celebrate this arrangement sounded in the rule of law. Conservative critics of Progressive Era administrative activism, like the influential Victorian legal scholar Albert Venn Dicey, lamented the way administration departed from the principles of the common law.<sup>89</sup> He feared that new agency practices and the law they generated were a foreign import, a misguided attempt to implant French *droit administratif* into an English tradition of judge-made law.<sup>90</sup> The consequences would be baleful, including the decline of liberal freedom.<sup>91</sup>

Judicial review would protect against Dicey's nightmare.<sup>92</sup> Allowing regulated parties to bring agencies to court would reconcile agency action with common-law courts. Judicial review would ensure administration did not undermine the rule of law, but became part of it.

### C. *Judicial Review and the APA*

The APA has usually been read to embody this conviction. Whether it enacted a deep agreement, as Professors William Eskridge and John Ferejohn have recently put it,<sup>93</sup> a “fierce compromise,” in the influential formulation of Professor George Shepherd,<sup>94</sup> or a conservative retrenchment as Professor Evan Bernick has recently

---

87 See Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHI.-KENT L. REV. 1119 (1997).

88 See *id.*; see also JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 14, 191 (1976).

89 See ERNST, *supra* note 1, at 30–31. On Dicey's commitment to “liberal individualis[m],” see Gregory Conti, *Introduction to ALBERT VENN DICEY, WRITINGS ON DEMOCRACY AND THE REFERENDUM*, at vii, xiii (Gregory Conti ed., 2023).

90 ERNST, *supra* note 78, at 30–31.

91 See *id.*

92 See *id.* at 32.

93 See William N. Eskridge Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893 (2023).

94 George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

argued,<sup>95</sup> it made judicial review central. Professor Joanna Grisinger, a leading scholar of the institutional development of the administrative state, put the point plainly in what remains the essential history of the period: the APA was championed by conservative, anti-New Deal forces who embraced judicial review as a technical way to ensure the legitimacy of administrative action.<sup>96</sup> This is how the APA was understood at the time, how it was read by courts, and how it went on to affect the development of American administrative law.<sup>97</sup>

In historical context, the possibility of judicial review was particularly important for providing a check against arbitrary action. The danger of arbitrariness loomed large in the late 1930s, as fears of authoritarianism dominated popular imagination and political debate.<sup>98</sup> This was the backdrop against which the APA took shape. The American Bar Association Special Committee authored hysterical reports throughout the 1930s, evoking parallels between dictatorship and unaccountable administration.<sup>99</sup> The President's Committee on Administrative Management recommended significant administrative reorganization in the name of securing democracy from fascist threats.<sup>100</sup> And the Attorney General launched his study of

---

95 See Evan D. Bernick, *Movement Administrative Procedure*, 98 NOTRE DAME L. REV. 2177, 2198–2202 (2023).

96 See JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* (2012). Of course, the Administrative Procedure Act (APA) was not championed only by conservative anti-New Deal forces. See Shepherd, *supra* note 94, at 1560–61.

97 Nicholas Bagley has provocatively (and largely persuasively) argued that the APA should not be read to embody a presumption of reviewability. Applying traditional tools of statutory interpretation, he concludes that neither the text nor the legislative history of the Act (nor, for that matter, other legal considerations) support the position that the Act changed the background rule which did not allow for judicial review of agency action for arbitrariness. See Bagley, *supra* note 52, at 1287.

As a threshold matter, I am not sure Bagley takes sufficient account of the shifts in administrative law in the 1920s mentioned in this Essay. I also wonder whether a broader historical contextualization would support his point.

In any case, Bagley's argument is in keeping with the point of this Essay. Bagley's argument implies that the presumption of reviewability was invented by judges. See *id.* at 1289–94. That is of a piece with the claims in this Essay that elite lawyers and judges made their peace with administration by subjecting administrative action to judicial review. See *supra* text accompanying notes 75–89. Bagley is focused on explaining how the APA should be read by judges now. This Essay's discussion of the APA has a different focus, aiming to understand how it helped legitimize administration at the time.

98 See IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 12 (2013); BENJAMIN L. ALPERS, *DICTATORS, DEMOCRACY, AND AMERICAN PUBLIC CULTURE: ENVISIONING THE TOTALITARIAN ENEMY, 1920S–1950S*, at 77–78 (2003).

99 See *Report of the Special Committee on Administrative Law*, *supra* note 50, at 340, 349–51; GRISINGER, *supra* note 96, at 21; WITT, *supra* note 49, at 232.

100 Rosenblum, *supra* note 19, at 43–66.

administrative procedure as Europe and East Asia fell under Axis domination.<sup>101</sup> These were key documents in the history of the development of the APA.<sup>102</sup> And they were marked by the need to check authoritarianism.

Small wonder, then, that the APA itself had as one of its goals guarding against arbitrary action. The key institutional feature that would do that was judicial review. Professor Kati Kovacs has recovered this “anti-authoritarian” lineage in the APA.<sup>103</sup> It “infused” the discussion of the Walter-Logan Bill, the APA’s immediate predecessor.<sup>104</sup> And while “[m]ost of the anti-authoritarian rhetoric was too general to tie to any particular provisions of the Bill,” Kovacs tracks specific language that shows how “supporters saw judicial review as an antidote to administrative absolutism.”<sup>105</sup> More generally, “independent adjudicators [were seen as] key to avoiding authoritarianism.”<sup>106</sup>

Famously, the Walter-Logan Bill passed Congress only to face President Franklin Roosevelt’s veto.<sup>107</sup> But its ideas about how to stem authoritarianism and check arbitrary action would get a second life. They found their way into the *Attorney General’s Report on Administrative Procedure*, which “endorsed judicial review” as a check on unaccountable executive power and emphasized the importance of independent adjudication.<sup>108</sup> And they informed the design of the APA itself. That bill reprised earlier proposals for independent adjudication and clear administrative procedures. And it made judicial review central.<sup>109</sup> Debate around the APA itself may have mostly lacked the fiery rhetoric of the American Bar Association Reports or the fights over the Walter-Logan Bill.<sup>110</sup> But the stakes were

---

101 See COMM. ON ADMIN. PROC., ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 4–5 (1941) [hereinafter 1941 ATTORNEY GENERAL REPORT].

102 See Emily S. Bremer & Kathryn E. Kovacs, *Introduction to the Bremer-Kovacs Collection: Historic Documents Related to the Administrative Procedure Act of 1946* (HeinOnline 2021), 106 MINN. L. REV. HEADNOTES 218, 218–19 (2022).

103 Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 GEO. MASON L. REV. 573, 573 (2021).

104 *Id.* at 587.

105 *Id.* at 589.

106 *Id.* at 590.

107 *Id.*

108 See *id.* at 591–92.

109 See *id.* at 597, 599.

110 See *id.* at 596. But see *id.* at 598 (“[T]he only inflammatory rhetoric during the floor debates on the APA came when Representative Sam Russell of Texas said that limiting judicial review would preserve agencies’ ‘dictatorial powers.’” (quoting S. DOC. NO. 79-248, at 386 (1946))).

as clear as ever. “Judicial review was the key to preventing agencies from becoming the pawns of a dictator.”<sup>111</sup>

### III. (NO) JUDICIAL REVIEW OF PRESIDENTIAL ADMINISTRATION?

#### A. *Sounding the Silence*

The centrality of judicial review to the legitimation of American administration makes the APA’s silence about the President puzzling. It is black letter administrative law that the President is not an agency subject to review under the APA.<sup>112</sup> And while under D.C. Circuit precedent presidential involvement in informal rulemaking may have to be docketed, the requirement is flexible and not especially constraining.<sup>113</sup> In fact, presidential rulemaking has largely been celebrated and remains free from stringent review.<sup>114</sup> Federal courts have occasionally found ways to subject acts of presidential administration to judicial scrutiny, but their approach has been clunky, piecemeal, and often legally unsatisfying.<sup>115</sup>

This breakdown is mysterious. The APA is widely hailed as the administrative state’s constitution.<sup>116</sup> It embodies general principles of administrative law that are reflected across the government’s many agencies. It reflects a decades-long dialogue involve the legislature, courts, the executive branch, the bar, regulated parties, technical experts, law professors, public administration scholars, and many other stakeholders. It made judicial review central to administrative legitimacy. And yet it appears to have left out the President—the single actor who would come to drive administrative action and on whom the

111 *Id.* at 597.

112 *See* *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

113 *See* *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981); *see also* Erin Okuno, *A Look Back at Sierra Club v. Costle: Balancing Legal, Political, and Ethical Interests in Informal Rulemaking*, ADMIN. & REGUL. L. NEWS, Spring 2019, at 18, 19.

114 *See* Peter L. Strauss, *Presidential Rulemaking*, 72 CHI-KENT L. REV. 965, 968 (1997).

115 *See, e.g.*, *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (observing that “the evidence [before the courts] tells a story that does not match the explanation the Secretary gave for his decision”); *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018) (acknowledging that the question of reviewability was “difficult” and “assum[ing] without deciding” that the claims could be reviewed). *See generally* DAVID M. DRIESEN, *THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER* (2021) (reviewing the evolving doctrine of court review of presidential acts).

116 *See, e.g.*, Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1215 (2014) (“[A]dministrative law provides an unwritten constitution governing federal administrative agencies.”); Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351, 1351 (“The standard narrative envisions administrative law as a quasi-constitutional field with the Administrative Procedure Act (APA) as its superstatute backbone.”).

Supreme Court would come to rest the democratic *bona fides* of the administrative state itself.<sup>117</sup> How can this be?

It does not appear to be an accident. Thanks to the selfless, heroic work of Professors Kovacs and Emily Bremer, scholars of administrative law have easy access to many of the most important historical documents that influenced the development of the APA. A brief canvass of those sources confirms that the Presidency was simply not an important factor in the Act's conceptualization or target for its framework.

### B. *The ABA's Special Committee on Administrative Law*

Start with the reports of the ABA Select Committee on Administrative Law. In 1933, the American Bar Association chartered a committee to consider the many "problems raised by the growing

---

117 Kovacs has provocatively argued that this reading of the APA is incorrect—that *Franklin*, the case that holds that the President is not an agency for purposes of the APA, was wrongly decided, and that therefore the APA should be read to cover the President. See Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 87, 89, 98 (2020). Kovacs' textual, structural, and normative arguments for allowing review of presidential action under the APA are compelling. Her historical account is less persuasive, however.

Kovacs' historical argument rests on three strong pieces of evidence: (1) the Walter-Logan explicitly exempted the Presidency, but was vetoed, and the APA, which replaced it, did not reprise that bill's explicit presidential exemption, *id.* at 86–87; (2) the relevant Senate Judiciary Committee Print stated bluntly that "agency" should be taken to have the same meaning as the term had in the Federal Register Act of 1935 and related regulations, which defined "agency" to include the President, *id.* at 87–88; and finally (3) the Attorney General's monograph interpreting the APA suggested that presidential actions under the Tariff Act were unreviewable under the APA not because they were taken by the President but rather because the Act had committed tariff decisions to presidential discretion, *id.* at 88.

The evidence is not dispositive, however, for two reasons. First, each of these three pieces of evidence is equivocal: (1) the Walter-Logan Bill and the APA differed in many particulars, and in general the Walter-Logan Bill was more restrictive of administrative action and more committed to judicial review, making it hard to draw meaning from this particular "rejected proposal"; (2) the Senate Print was not enacted into law and the purpose of Federal Register Act of 1935—information forcing—was much narrower than the APA, making it difficult to rely on it for the purpose of deciding the ambit of appropriate judicial review; and (3) the Attorney General's monograph ultimately concluded that the Tariff Act was not reviewable, not that other presidential decisions were reviewable. Second, Kovacs cannot muster any evidence of court review of presidential administration before the APA, yet the APA codified many existing practices of administrative law.

As a historical matter, then, it was at least not clear that presidential action was subject to review under the APA. For more on the Attorney General's monograph and the Tariff Act, see *infra*, Part III.E.

multiplicity of administrative tribunals.”<sup>118</sup> Over the next thirteen years, the Committee wrestled with what American administrative law should look like, disbanding only after the APA was finally enacted.<sup>119</sup>

In general, the Committee was harshly critical of much administrative practice, with a particular focus on the place of adjudication in administrative decisionmaking.<sup>120</sup> How could administrative tribunals render impartial justice, the Committee decried, when adjudicators were “classed as patronage” appointments by politicians and “a political sword of Damocles” hung over them in the form of reassignment and removal.<sup>121</sup> To overcome this dire threat to principles of due process, the Committee variously championed separating adjudication from other agency action, offering civil service protection for agency adjudicators, and creating an administrative court—all ways of insulating adjudication from political control.<sup>122</sup> But from the beginning the Committee focused on the importance of judicial review.<sup>123</sup> The absence of judicial review was a major flaw of American administration, undermining uniformity, creating confusion, and vitiating the promise of the rule of law.

And yet, the Committee hardly discussed the Presidency at all. Of its many reports, most included no or merely passing discussions of the Presidency. Only four reports engaged with the role of the executive in agency action—those from 1933, 1934, 1936, and 1937. And those did not consider subjecting presidential administration to court review. Discussion focused either on the need to insulate agency adjudicators from presidential supervision in the name of vindicating rule-of-law values or, reprising Progressive Era public administration nostrums, the benefits of subjecting quasi-legislative and quasi-executive action to presidential superintendence.<sup>124</sup>

---

118 *Report of the Special Committee on Administrative Law*, 56 ANN. REP. A.B.A. 407, 407 (1933).

119 *See Report of the Special Committee on Administrative Law*, 71 ANN. REP. A.B.A. 213, 213 (1946). The Committee was replaced by the ABA Section on Administrative Law. *See id.*

120 The Committee was particularly exercised by the vesting of quasi-judicial functions in agency officials who also engaged in other governance tasks. “When judicial power is combined with executive or legislative power, a maxim fundamental to the administration of justice is disregarded, that a man should not be permitted to adjudge his own case.” *Report of the Special Committee on Administrative Law*, 57 ANN. REP. A.B.A. 539, 545 (1934).

121 *Id.* at 546.

122 *See, e.g., id.* at 541 (advocating that adjudicators enjoy tenure during good behavior); *Report of the Special Committee on Administrative Law*, 62 ANN. REP. A.B.A. 789, 790 (1937) (advocating for civil service protection for those “engaged in quasi-judicial work”); *Report of the Special Committee on Administrative Law*, 70 ANN. REP. A.B.A. 270, 270 (1945) (discussing ABA’s prior endorsement of an administrative court).

123 *See Report of the Special Committee on Administrative Law, supra* note 118, at 414.

124 *See, e.g., Report of the Special Committee on Administrative Law, supra* note 120 at 541 (demanding that adjudicators “should in no event be terminable by the Executive”); *Report*

C. *The Attorney General's Committee on Administrative Procedure*

The *Final Report* of the Attorney General's Committee on Administrative Procedure was essentially as silent. Roosevelt commissioned the Committee in 1939 in an attempt to head off the ABA and preempt congressional regulation.<sup>125</sup> Its staff, led by Walter Gellhorn, produced twenty-seven monographic studies of individual agency action, which “formed the *intellectual* foundation’ for the Committee’s Final Report and, ultimately, the APA.”<sup>126</sup> The Committee’s massive *Final Report*, which included a minority statement and proposed legislative text, has always been recognized as highly influential in the crafting of the APA.<sup>127</sup>

Despite originating in the White House and representing the President’s position, the *Final Report* was nearly as silent on the place of the Presidency in the administrative state as the ABA Special Committee. Surprisingly, it agreed with the ABA on the importance of adjudicators’ independence, and proposed granting them “tenure, substantial salaries, [and] full power to control and conduct hearings.”<sup>128</sup> And it seemed to agree with the ABA about the appropriateness of executive control for certain kinds of government activities. The Report distinguished between “executive” and “administrative” actions. An agency like the Works Progress Administration was purely executive in nature, since the statute that set it up was “so framed that it confers upon individuals no ‘rights’ to relief in stated circumstances”; it was thus up to the President to implement in a “fluid executive fashion” without issuing “regulations giving notice of how [the agency] will act or limiting its own discretion.”<sup>129</sup> The Veterans’ Administration, by contrast, adjudicated rights; it was an administrative tribunal engaged in administrative action.<sup>130</sup>

When it came to executive actions, the President lawfully acted with nearly a free hand. But of the President’s involvement in administrative action, the Report said little, and what it did say did not

---

of the Special Committee on Administrative Law, *supra* note 118, at 415 (calling for centralizing quasi-legislative and quasi-executive functions in hands of officers responsible to the President). On Progressive Era roots of calls for centralization of administration in hands of officers responsible to the President, see Katz & Rosenblum, *supra* note 23.

125 See Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 396–97 (2021).

126 *Id.* at 401 (quoting Kenneth Culp Davis, Walter Gellhorn & Paul Verkuil, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 507, 513–14 (1986)).

127 See Davis et al., *supra* note 126.

128 1941 ATTORNEY GENERAL REPORT, *supra* note 101, at 6.

129 *Id.* at 11.

130 See *id.*

seem to countenance judicial review. The Report acknowledged that, occasionally, Congress delegated “exceptional types of rule-making” to the President.<sup>131</sup> But, according to the Report, this was only in emergency situations, and, when the emergency subsided, these powers should rightly be considered of an ordinary administrative type.<sup>132</sup> They would, then, be subject to regular congressional legislation. Courts could police administrative action to ensure that agencies did not overstep their authority.<sup>133</sup> But judges on their own would never be enough:

To assure enforcement of the laws by administrative agencies within the bounds of their authority, reliance must be placed on controls other than judicial review—internal controls in the agency, responsibility to the legislature or the executive, careful selection of personnel, pressure from interested parties, and professional or lay criticism of the agency’s work.<sup>134</sup>

The *Final Report* of the Attorney General’s Committee, then, put some trust in judicial review to keep agency administrative action in line. But it did not afford it the same significance as the ABA did. And, like the ABA, the *Final Report* did not seem to think judicial review had much of a role to play in policing presidential involvement in administration.

#### D. Congressional Hearings

The hearings on the APA reflected this same attitude toward the President and judicial review. Legislative consideration of bills related to the APA stretched from 1938 through the eventual enactment of the APA by the seventy-ninth Congress. It included hearings by committees and subcommittees, written statements and witness testimony, and reports from all manner of agency officials. Yet across this vast body of legislative history, there was not a single sustained discussion of the place of the President in the administrative state. Some hearings unfolded without a single substantive mention of the President at all.<sup>135</sup>

With respect to debate on the APA itself, there is a single statement on point. And it suggests that, while the question of judicial review may have been brought to the attention of Congress, it did not consume much attention. Clyde Aitchison, a Commissioner of the ICC, appeared at a hearing before the House Committee on the

---

131 *Id.* at 100.

132 *See id.* at 101.

133 *See id.* at 76–77.

134 *Id.* at 76.

135 *See, e.g., United States Court of Appeals for Administration: Hearing on S. 3676 Before a Subcomm. of the S. Comm. on the Judiciary, 75th Cong. (1938).*



Judiciary on Tuesday, June 26, 1945.<sup>136</sup> In the course of long testimony, he expressed some concerns about the definition of “agency” in the bill under consideration. “Now, I want to ask this and split hairs again,” he opened.<sup>137</sup> “Is the President [an agency]? He makes rules; he makes adjudications of the type which are referred to in this act . . . . I do not know what the intent is, of course.”<sup>138</sup> Republican Congressman John Jennings Jr. of Tennessee responded: “Well, if [the Act] operates to forbid the President from operating as a legislative agency, I would say it is good law.”<sup>139</sup> Aitchison refused to debate the point, noting it was “out entirely of my sphere,” and the conversation moved on.<sup>140</sup>

What can we make of this short exchange? As a matter of statutory interpretation, it could show that one member of the House of Representatives, not of the President’s party, thought the bill might impose limits on the President’s ability to engage in rulemaking. But the Representative’s own statement was conditional—it could be as much a political observation as a legal one—and in any case on an ancillary point. The APA and its champions were much more focused on adjudication than rulemaking. The statement hardly seems probative of the real intent of the Act.

More telling is just how small and unimportant the point Aitchison raised seemed to be. The ICC Commissioner had observed that the Act risked drawing the President into its orbit. And the reaction from the Judiciary Committee was largely a shrug; the conversation moved on.

### *E. The Attorney General’s Manual on the APA*

We see a similar lack of concern in the Attorney General’s 1947 manual on the APA. Although published after the APA’s enactment, the manual was an important source for making sense of the new Act, especially within the government. Yet it, too, thought the APA had little to do with the President.

The Manual discussed the President three times, and not once systematically.<sup>141</sup> The first reference was truly irrelevant.<sup>142</sup> In the

136 See *Administrative Procedure: Hearing on the Subject of Federal Administrative Procedure and on H.R. 184, H.R. 339, H.R. 1117, H.R. 1203, H.R. 1206, and H.R. 2602 Before the H. Comm. on the Judiciary*, 79th Cong. 69 (1945).

137 *Id.* at 77.

138 *Id.*

139 *Id.*

140 *Id.*

141 See U.S. DEP’T OF JUST., ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 11–12, 18, 94 (1947) [hereinafter ATTORNEY GENERAL’S MANUAL].

142 See *id.* at 10.

second, the Manual observed that “interdepartmental committees which are established by the President for the handling of internal management problems” should be exempt from publication requirements since they did not concern “public information.”<sup>143</sup> Here, the manual recognized the President’s role as administrator-in-chief. But there was no suggestion that these acts had bearing on policy and should be subject to judicial review. In fact, just the opposite: internal management was taken to be a quintessential example of internal matters with so little public effect they did not even need to be published.

The final mention is the best evidence in the whole corpus for the possibility of a presidential administrative role that should be subject to judicial review.<sup>144</sup> But the evidence is fleeting and admits of contrary meaning. In discussing Section 10 of the APA, which subjected administration to judicial review, the Manual noted the exception for “agency action . . . by law committed to agency discretion.”<sup>145</sup> As an example, it cited to *United States v. George S. Bush & Co.*, a tariff case from 1940, noting, in a parenthetical remark, that the Tariff Act delegated power to the President to act “‘if in his judgment such action is necessary.’”<sup>146</sup> The implication was that the Tariff Act was an example of committing discretion to the President by law. This could imply that the only reason such an act of presidential administration was not reviewable was because it qualified for the exception to judicial review for “agency action . . . by law committed to . . . discretion.” In other words, presidential administration would be presumptively reviewable, unless it fit into an exception, such as that in Section 10.

The reading, while plausible, is ultimately unpersuasive. It would be a bold decision for the Attorney General to hide a strong statement about presidential reviewability in a parenthetical remark to a section on unusual exceptions to judicial review. Moreover, the subsequent discussion in the Manual adds useful context. It goes on to treat other situations in which discretion is so wholly assigned to an agency that judicial review would be inappropriate.<sup>147</sup> In other words, in context, the parenthetical seems to mean nothing more than that, where a statute assigns full discretion, there is no question of judicial review. This might indeed open the door to reviewing presidential action where the President is tasked with implementing a statute that does

---

143 *Id.* at 18.

144 *Cf.* Kovacs, *supra* note 117, at 88.

145 ATTORNEY GENERAL’S MANUAL, *supra* note 141, at 94 (quoting Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946)).

146 *Id.* (quoting *United States v. George S. Bush & Co.*, 130 U.S. 371, 376 (1940)).

147 *See id.* at 94–95.

not commit to him full discretion.<sup>148</sup> But it could not stand for a general presumption of reviewability for presidential involvement in agency decisionmaking.

\* \* \*

The foregoing survey of documents from the Bremer-Kovacs Collection is more suggestive than dispositive. But it is enough to establish two simple points. The place of the President in the administrative state was not a major focus of discussion in the crafting of the APA. And subjecting presidential administration to judicial review was not a major goal of the APA either.

#### IV. EXPLAINING THE MISSING PRESIDENT

##### A. *Two Hypotheses*

The APA built on a tradition of American administrative law using judicial review to check and to legitimate government action. Yet it hardly took account of the most important administrative actor today, the President of the United States. And the canvass of historical sources suggests this was no accidental oversight, but the result of a pervasive silence. Judicial review of presidential administration simply was not one of the APA's concerns. How do we make sense of what, to modern eyes, seems inexplicable?

To ask this question is to wonder about the place of the President in the administrative state in the first half of the twentieth century. We can explain the absence of judicial review for presidential involvement in agency action with two historical hypotheses—one thin, the other thick. The thin hypothesis: what we now call presidential administration simply was not an important factor in administration in the 1930s and '40s. The thick hypothesis: when the President was involved in administration, it was in service of the very goals the APA sought to promote.

The thin hypothesis is slightly counterintuitive. After all, the APA was developed against the backdrop of Roosevelt's activist government, in which the President is often thought to have played an oversized role.<sup>149</sup> Even so, the New Deal was not characterized by the kind of

---

148 Accord Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006); Kovacs, *supra* note 117. This would be a special case of what Kevin Stack has called the "statutory presiden[cy]." See Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539 (2005).

149 On the outsized role of the presidency in the New Deal, see, for example, JASON SCOTT SMITH, *A CONCISE HISTORY OF THE NEW DEAL* 30–31 (2014). On executive action as the backdrop for the development of the APA, see GRISINGER, *supra* note 96, at 59.

presidential administration we see today. Roosevelt simply lacked the tools. To dominate the administrative state, the President needs legal and institutional support. This is provided, today, by a mix of executive orders and justifying memoranda from the Office of Legal Counsel; staff housed in the White House and Executive Office of the President, especially the Office of Management and Budget; and, in the background, various laws and constitutional theories, including the Paperwork Reduction Act and, increasingly, the Unitary Theory of Article II.<sup>150</sup> Most of these did not exist during the New Deal; the President had remarkably few tools with which to influence administrative action at all.<sup>151</sup>

This did not mean that the President was at the mercy of the rest of the state. Since the dawn of the republic, Presidents had relied on the appointment power to shape the execution of policy. This remained the President's most important tool for shaping administration throughout the nineteenth and early twentieth century.<sup>152</sup> Roosevelt famously made good use of it.<sup>153</sup>

He also went to Congress though. From Roosevelt's first election until 1946 the Democrats enjoyed unified political control of the federal government. If Roosevelt wanted to change the direction of policy he did not need to rely on his influence over agency processes. He could simply go to Congress and urge them to pass a law.<sup>154</sup>

This points us toward the thick hypothesis. The close working relationship between the President and Congress seems to have led administrative law mavens of the time to conceptualize the place of the President in the administrative state differently than we do today. He was not a runaway actor with his own agenda who needed to be checked by courts. Rather, he was Congress's ally, working with courts and the legislature to make the administrative state more accountable and efficacious.

Evidence for this understanding of the Presidency is scattered throughout the historical materials. The strongest source may be an unusual provision of the proposed draft minority bill included as an appendix to the Attorney General's Committee on Administrative Procedure. Section 111 of the bill was a savings clause, which would have allowed the President to suspend the application of any part of what would become the APA, subject to various internal checks and a congressional veto, if he thought the Act's procedures would be

---

150 See Ahmed et al., *supra* note 20.

151 See Rosenblum, *supra* note 19, at 68–70.

152 See Katz & Rosenblum, *supra* note 23 (manuscript at 30–82).

153 See Rosenblum, *supra* note 19, at 55–60.

154 On the importance of Congress to the New Deal, see KATZNELSON, *supra* note 98, at 9, 17–18.

“unworkable or impracticable” as applied to some particular agency action, so long as the President simultaneously promulgated “some other form of fair procedure as nearly as may be in accordance with the policies declared by this act.”<sup>155</sup>

The clause is remarkable. Its sponsors defended it on the grounds that it would give the President the ability “[t]o care for all possible contingencies.”<sup>156</sup> Its drafters thought it essential to the Bill.<sup>157</sup> In subsequent hearings, several witnesses focused on Section 111 and many agreed with the rationale they had advanced. John Foster Dulles, then Chairman of the New York City Bar Association’s Committee on Administrative Law, was apparently alone in recognizing it might create political pressure on the President to exempt certain agency activities.<sup>158</sup> Other witnesses either defended the provision as a good way to promote due process,<sup>159</sup> or thought Congress should further specify itself which agency processes should be exempted.<sup>160</sup>

The assumptions of this discussion are more important than its particular outcome. The bill presumed that the President would use his suspension power to further the aims of the Act by promoting good administrative procedure. And debate in Congress did not challenge this basic premise. It concerned only whether it might be better for Congress to make the specifications rather than the President.

This makes sense in context. A major goal of administrative procedure reform was to check arbitrary action. This, as detailed in Part II, underscored the importance of judicial review. But judicial review has limits. Judges do not like second guessing the discretion of government agents.<sup>161</sup> And in any case they were difficult to access.<sup>162</sup> This helps explain the appeal of a specialized administrative court to check administrative action.<sup>163</sup> But it also highlights the importance of executive superintendence. The President could provide political checks and coordination to ensure that administration stayed within the law.<sup>164</sup> A responsible President—the dream of Progressive Era and

---

155 1941 ATTORNEY GENERAL REPORT, *supra* note 101, at 223 app.

156 *Id.* at 216.

157 *See id.*

158 *See Administrative Procedure: Hearing on S. 674, S. 675, and S. 918 Before a Subcomm. of the S. Comm. on the Judiciary*, 77th Cong. 1148 (1941).

159 *See, e.g., id.* at 1376, 1380–81.

160 *See, e.g., id.* at 1541.

161 *See* James Hart, *The President and Federal Administration*, in CHARLES G. HAINES & MARSHALL E. DIMOCK, *ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION* 47, 81 (1935).

162 *See id.* at 79.

163 *See id.* at 78.

164 *See id.* at 72–73.

New Deal reform—was not a threat to administrative legitimacy, but its champion.

### B. *One Entailment*

If either the thin or the thick hypothesis is correct, one entailment necessarily follows: that the APA envisions a radically different political regime from the one we live in. Enacted against the backdrop of nearly fifteen years of unified government, it reflected a very different understanding of how governance happens. In the APA's time, the President either did not take significant administrative action, or took it in furtherance of the APA's own goals. Courts did not need to worry overmuch about the President overstepping the bounds of legality, since, if a case was doubtful, the President could always go to Congress for new legislation. In such a regime, the President could be presumed to be acting pursuant to congressional authorization. President and Congress might disagree over particular activities, but that was a political disagreement to be settled between those branches.<sup>165</sup> This was not a question for courts. Judicial review existed to protect individual interests and keep runaway administrators in check. This was a goal both Congress and the President could support.

This is not the world we live in today. The acts of presidential administration detailed in Part I took place largely as a result of divided government and in the face of a recalcitrant Congress. No longer can the President be presumed to be acting in line with congressional intent. Indeed, court review of presidential administration has become an exercise in discerning whether the executive is going beyond what Congress wanted. When a major presidential policy winds up in court, the problem is no longer runaway administrators or the violation of individual rights. Administrators are presumed to be acting pursuant to presidential direction. And the suits have often been brought on behalf of states, led by governors and attorneys general from the political party opposite the President, alleging far-fetched theories of standing with only a tangential connection to individual harm. The question for the courts is whether the President is exploiting a law and control over agencies to realize a policy Congress would not have authorized. This is a political scenario and use of judicial review that the APA simply did not entertain.

In an influential article from last decade, Professors Daniel A. Farber and Anne Joseph O'Connell observed that the APA presumed a model of administration that was outdated. "[T]he actual workings

---

<sup>165</sup> Note Section 111's congressional veto provisions: the President could suspend the application of the Act, but had to notify Congress, which could overrule his suspension. The section did not include any mention of court review or involvement.

of the administrative state have increasingly diverged from the assumptions animating the APA and classic judicial decisions that followed.”<sup>166</sup> Ten years later, it seems the departure is even greater than they had anticipated. The problem is not simply a divergence between the practices of administrative law imagined by the APA and administration as it is practiced today. It is, rather, a shift in underlying political arrangements. We have lost not simply the world of the APA, but the political regime of which it was a part.

### C. *Three Paths Forward*

Where do we go from here? I see three paths forward for law professors in the face of our present presidential predicament. We must begin from the premise that the APA is fundamentally outdated and no longer suited to the political situation in which we find ourselves.

A first response is scholarly. This Essay is based on a superficial survey of a half-dozen primary sources. It does not comprehensively reconstruct the place of the President in administration in the 1930s and '40s. The small study it has conducted suggests rich possibilities for future research, which could revise our understanding. Where did Section 111 come from? What happened to it? How did its drafters think it related to then-extant presidential involvement in administration? A comprehensive answer to these questions would tell us more about how the President of the time was understood, and so how he was to fit into the new administrative law. Perhaps further research will show the hypotheses of Part IV, Section A are mistaken, that judicial review of presidential administration was contemplated, and that the APA was more prescient than this Essay has suggested.

I remain skeptical, however. If further research bears out this Essay's conclusion, a second response for lawyers and law professors is reformist.<sup>167</sup> The APA's goals were laudable. Administrative action should be subject to oversight and control. That the political regime that made the APA's approach sensible is gone requires change. We could work to reinvigorate the political model that made the APA's approach work: a President and Congress working together to enact policy, a deferential judicial branch focused on the protection of individual rights and checking runaway administrators. The APA itself would need to be amended to account for the new processes of administrative decisionmaking described by Farber and O'Connell. But if we can return to a prelapsarian world of shared governance, we can surely make changes to the APA.

---

166 Farber & O'Connell, *supra* note 2, at 1140.

167 See generally PAUL W. KAHN, CULTURAL STUDY OF LAW (1999).

There are reasons to be hesitant about a reformist project, though. The lost regime of the APA was lost for a reason. Decades of political changes have buried that old world. History cannot be turned back. Institutional reform might be able to turn us away from the new world of presidentialism. But its march has appeared inexorable. And it will take more than new ideas to change its trajectory.

Cue a third response: acceptance. All republics die. The appeal of a plebiscitary leader in a time of rapid social change and deep division is a historical cliché. Politicians across the political spectrum have embraced presidential unilateralism for their own projects, from Green New Dealers, who see presidential administration as a way to respond to the climate crisis in the face of a sclerotic Congress, to conservative culture warriors who hope to instore neotraditionalist values to combat the new “wokeism.”

Can we learn to stop worrying and love the imperial President? If we do, the project of reforming administrative law only becomes more urgent. Classical political theorists recognized that even in governments dominated by a single leader, the polity could be governed well or poorly.<sup>168</sup> The rule of law has meaning even in a monarchy. I do not know what judicial review of administrative action should look like in an empire. But neither, of course, does the APA.

#### CONCLUSION

The seventy-fifth anniversary of the APA offers us a chance to celebrate and reflect. For three quarters of a century, it has provided a basic legitimizing framework for administrative action. Enacted at the end of one of the greatest periods of institutional creativity in American governance, it consolidated a then-emerging law of administration into a distinctive American model.

At that model’s heart was court review of agency action. Subjecting administration to judicial scrutiny would ensure that it was not arbitrary. It would allow for outside actors to make sure agencies followed internal procedures, did not go beyond their authorizing statutes, and protected individual rights.

Yet, puzzlingly, the Act was silent on an important consideration: review of presidential involvement in administration. The silence was not accidental, as a review of historical sources confirms. Presidential administration simply was not a major consideration at the time of the APA’s enactment. It did not include provisions for judicial review of presidential involvement in agencies because this was not a major feature of American administration at the time. When the President

---

<sup>168</sup> See, e.g., ARISTOTLE, POLITICS 70 (Jonathan Barnes ed., B. Jowett trans., Princeton Univ. Press 2016) (c. 350 B.C.E.).



was involved in agency action, it was generally in pursuit of the same rule of law goals advanced by the APA itself.

This has made the APA outdated. Today, administration is presidential administration. As a result of a long historical process, the executive has come to dominate many facets of administrative action. Presidential administration is now a governance tool used to fulfill key campaign promises in times of united and divided government alike.

How administrative law should respond to this development is perhaps the most pressing problem for contemporary administrative law scholars. We still need to fill in the historical story to understand how we found ourselves here. Perhaps better history will reveal overlooked resources in the laws we already have. Barring such discoveries, we will need to update our laws to reflect our new reality, whether by changing our political institutions or making peace with administration in an age of presidential unilateralism. Only by confronting the problem head on, with integrity and honesty, can we hope to generate a new solution as successful as the APA itself.

