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Bureaucracy in America: A Constitutional Approach to Administration

by

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Introduction and Summary

This is the first in a series of *Perspectives from FSF Scholars* papers recounting important moments in the development of the American administrative state, and explaining how those important moments should inform contemporary attempts to reform and constitutionalize our administrative state.

This opening paper draws from my recent book, *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government*,[1] and it describes the attempts to constitutionalize administration during the Revolutionary War and the years preceding it. While scholars have not given much attention to this period, a clear set of principles emerged during this period that constrain and structure administrative power to ensure it remains faithful to constitutional principles. In particular, lessons from this period reveal the importance of electoral accountability for regulatory power, the need for judicial review of administrators' decisions, and the foundations of the nondelegation doctrine and unitary executive principle.

[1] JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT (2017).

The debate over the legitimacy of the administrative state is deeply shaped by the historical record. In fact, it is impossible to separate the history of the administrative state from the question of its legitimacy. "Administrative skeptics" or "anti-administrativists" typically appeal to an earlier period of American history, particularly the American Founding, to show a dramatic contrast between the original Constitution's approach to administration and the contemporary approach.[2] These critics of the administrative state argue that it is a modern invention that emerged well after the creation and ratification of the U.S. Constitution, and that the administrative state is an innovation that exists in tension with the Constitution's design.[3]

Defenders of the administrative state, by contrast, often argue that there is great continuity between the early American approach to administration and today's. They often point to the fact that America had administrative agencies, and delegated power to those agencies, at the very beginning of its history. Jerry Mashaw, a Yale Law School professor, offers perhaps the most forceful defense of this view.[4] As he writes, "[f]rom the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and specifically authorized administrative rulemaking."[5] According to Mashaw, "[t]o the extent that we model our contemporary jurisprudence on the idea that the administrative state is sad evidence of the decline of American democracy and the rule of law, we imagine a non-administrative state that never was."[6] In the view of Mashaw and other similarly-minded scholars, the administrative state is far from a threat to American constitutionalism. It is, rather, the logical application of the principles of the constitutional system.

Other scholars who defend the administrative state admit that bureaucracy has the potential to threaten important principles like electoral accountability, separation of powers, and the rule of law. However, they offer the reassurance that administrative law, by imposing legal constraints on administrative agencies, has enabled us to have it both ways. We can have administrative governance within our constitutional system as long as we replicate its checks and balances through administrative law. In this explanation, the administrative state's threat to constitutional government has been overcome by the creation of a body of administrative law that reconciles administration and the rule of law.[7]

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[2] "Anti-Administrativism" is a term recently coined by Gillian Metzger, *The Supreme Court, 2016 Term – Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); "Administrative skepticism" is a term used by Jeffrey Pojanowski, "A New Classic in Administrative Skepticism," *Library of Law and Liberty*, March 13, 2018, http://www.libertylawsite.org/2018/03/13/a-new-classic-in-administrative-skepticism/.

[3] For the first, and one of the most forceful statements of this view, see Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

[4] JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012).

[5] Mashaw, *supra* note 4, at 5.

[6] Mashaw, *supra* note 4, at 312.

[7] DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA (2014); ANNE M. KORNHAUSER, DEBATING THE AMERICAN STATE: LIBERAL ANXIETIES AND THE NEW LEVIATHAN, 1930-1970 (2015).

Bureaucracy in America examines how questions surrounding the constitutionality of administrative power were addressed throughout the course of American history. Contrary to the arguments of the modern administrative state's defenders, my book concludes that the administrative state indeed represents a departure from important principles of American constitutionalism, and that administrative law has failed to reconcile the administrative state to our constitutional system.

In order to make that case, the book examines questions of administrative law that arose even prior to the creation of the Constitution, and takes readers up to the present day. This first paper explains that the Framers had extensive experience through colonial administration and the flawed model of administration under the Articles of Confederation, and that this experience informed their deliberations about structuring administrative power at the Constitutional Convention and during the ratification of the Constitution.

Colonial Administration: Keeping the Regulators Accountable

In colonial American government, administration was largely a *judicial* function, not an executive one. Most colonial governments were set up in the same manner: an elected, representative lower house of the legislature, and a royally-appointed governor along with an unrepresentative upper house of the legislature (whose members were typically appointed by the crown or the governor of the colony).

This upper house usually acted as an advisor's council to the governor, as part of the legislative branch, and also as the highest appeals court in the colony. Justices of the peace, county courts, and circuit courts served as lower courts beneath the council. These judicial officers, especially the local officers, exercised the most significant powers of colonial government.

Colonial Massachusetts is a good example of how power was exercised by these officers. At the lowest level, justices of the peace exercised civil and criminal jurisdiction in their county, and were authorized to impose small fines and criminal penalties. They were appointed by the governor and his council, but many state assemblies learned to use their fiscal powers to intrude upon this appointment power, so that they dictated the appointments rather than the governor. (South Carolina's governor complained in 1748 that his appointments were controlled by the elected assembly, which meant that "the people have the whole of administration in their hands."[8])

Justices of the peace exercised administrative as well as judicial functions, issuing licenses, supervising the building of roads, and collecting taxes. In the New England townships which eventually emerged, town selectmen exercised many of the regulatory responsibilities that justices of the peace carried out for the counties. Selectmen were more directly accountable to the people, typically through annual elections.

[8] Quoted in FORREST McDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY (1994), 109.

Other significant regulatory powers in colonial Massachusetts were held by county-based courts such as the Court of General Sessions of the Peace (often simply referred to as "Sessions" or "General Sessions"). These courts were composed of all of the justices of the peace in each county, sitting together, and in Massachusetts they met on a quarterly basis. Sessions courts regulated highways, inns and taverns, and other local matters. As William Nelson has explained: "Sessions was, in effect, the county government; the only significant regulatory power it lacked was that of control over public health procedures, especially over the licensing of smallpox inoculation hospitals and the imposition of quarantines for smallpox."[9]

The structure of local government in the American colonies was based primarily upon two principles. The first principle was local accountability. Local justices of the peace were the regulators, and while they were appointed by the governor because of the nature of the colonial charters, legislative assemblies sought to control their appointment to ensure their accountability to the people. Justices of the peace were deeply connected to the communities they regulated. They were not outsiders dictating rules to communities. In practice, and as a general rule, administrative officers could enforce their decisions only insofar as the community accepted those decisions.

The second principle was to limit and constrain administrative discretion through courts of law. In most cases, the courts themselves were the regulators. Some administrative officers, however, had authority to affect citizens' legal obligations in various ways. For instance, tax assessors could place a value on property and thereby determine a citizen's tax burden. Constables and jailers could detain citizens, and sheriffs could arrest citizens and search their property. In these cases, citizens relied upon courts to review the decisions of officers and provide remedies in cases of wrongdoing.

Many cases of judicial review appear similar to those we see today: an officer makes a decision that is subject to judicial review to ensure the "reasonableness" of the decision. In colonial Massachusetts, for instance, courts often granted tax abatements if an assessor unreasonably assessed too much tax on a citizen. Officers were also subject to a stronger type of judicial review through common law damage actions. If a jailer lost a prisoner, he could be sued. Illegal searches of property were subject to damage actions. Citizens could sue tax collectors to recover the excess tax that was collected from them.

These kinds of damage actions empowered citizens to challenge administrative power and, in turn, they established strong incentives for officers to exercise their power carefully. Citizens understood the importance of their right to seek relief and resisted the efforts of the British Parliament to establish "writs of assistance" that shielded officers from liability. It might even be said that resistance to these writs of assistance was as central to the American Revolution as the resistance to "taxation without representation."[10]

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[9] WILLIAM E. NELSON, THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975), 15.
[10] See Postell, BUREAUCRACY IN AMERICA, *supra* note 1, at 16-18, for further discussion of the resistance to the writs of assistance.

In short, the American colonies were highly concerned about the problem of excessive administrative power and devised legal principles to constrain that power. Above all, they were concerned about keeping administrators accountable through elections, judicial review, and popular control of regulatory officers. Morton Keller, the distinguished historian, explains that during the colonial period "American politics was not just a carbon copy of English ways." The colonists Americanized the British system. "Instruments of self-governance abounded. Virginia's county courts and local justices of the peace, New England towns and their magistrates and selectmen, and colonial assemblies everywhere were virtually autonomous governing bodies," he concludes.[11]

Revolutionary Experience: Reasserting the Executive Power

Because of the peculiarity of colonial governance – in which elected and accountable legislative assemblies clashed with royally-appointed governors and their councils in the upper house of the legislature – during the American Revolution there was a pervasive distrust of executive power. This distrust produced early state constitutions that weakened governors. Thomas Jefferson wrote that: "Before the Revolution we were all good English Whigs, cordial in their free principles, and in their jealousies of their executive magistrates. These jealousies are all very apparent in all our state constitutions."[12] The Founders' distrust of executive power was also apparent in the Articles of Confederation, which provided for no executive power at all.

Disaster resulted and the fear of executive power nearly scuttled the American Revolution. Most immediately, states set up "Committees of Public Safety" to carry out the military tasks necessary to win the Revolutionary War. These committees were composed of many members (from eleven in Virginia to sixteen in Maryland). They were given wide powers over military affairs, but their decisions were subject to legislative approval. Thus, these were not independent executive committees but multi-member bodies which were servants of the state legislatures.

New York's Committee of Safety was especially problematic. It consistently provoked the ire – and the veto – of the state's Council of Revision, a body composed of Governor George Clinton and several members of the judiciary. One of these vetoes advanced the nondelegation principle – nearly a decade before the framing of the U.S. Constitution. The Council's veto of a measure "to prevent the exportation of flour, meal, and grain" asserted that "all legislative power is to be exercised by the immediate representatives of the people, in Senate and Assembly, in the mode prescribed by the [state] Constitution."[13] The New York Constitution declared that "no authority shall…be exercised over the people or members of this state, but such as shall be derived from and granted by them."

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[11] MORTON KELLER, AMERICA'S THREE REGIMES: A NEW POLITICAL HISTORY (2007), 20.
[12] THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), available at http://avalon.law.yale.edu/19th_century/jeffauto.asp.
[13] ALFRED BILLINGS STREET, THE COUNCIL OF REVISION OF THE STATE OF NEW YORK (1859), 204.

This veto, in other words, made the case that the power to legislate cannot be delegated to bodies like a Committee of Safety, on two grounds. First, only "immediate representatives of the people" can exercise legislative power. Second, legitimate authority can only be exercised if it has been granted by the people. If the people vest authority in a political body, that is where the authority must lie, until the people vest it elsewhere by changing the constitution.[14]

These Committees of Public Safety prompted other constitutional objections, especially regarding the separation of powers. Some states came to see that these committees dangerously combined legislative and executive power, and undermined the control that chief executives ought to have over the executive branch. Pennsylvania's Council of Revision, for example, protested in 1780 against "the interference of [the legislature] in matters merely of an executive nature."[15] New York's Council of Revision vetoed a bill in 1780 on the grounds that "the person administering the government is by the bill subjected, in the execution of his office, to the control of a Council, when by the Constitution" executive power is vested in the Governor.[16] In both of these cases, executives asserted the need for unitary control of execution by the chief executive.

The need for unitary control of execution was especially apparent at the national level, due to the deficiencies of the Articles of Confederation. The Articles of Confederation failed to establish executive or judicial power, creating only a Continental Congress. Because it was too cumbersome to carry out the wartime functions through Congress acting as a whole, the legislature ultimately established thousands of *ad hoc* committees to handle the details of the war effort, all of which were directly supervised by the entire Continental Congress. Congress created committees to secure ammunition, to supply and raise troops, to engage in foreign relations, and so forth, but subjected all of them to the control of the legislature as a whole.

As would be expected, this system was a colossal failure. Not only was it inefficient; it also shielded accountability. Nobody was in charge of specific functions, so nobody knew who to hold responsible for failure. Joseph Trumbull, who as the first Commissary General of the Continental Army was in charge of supplying the troops, resigned in frustration because of the meddling of Congress. Because Congress did not want to establish an independent executive power, it set up four deputies in Trumbull's department who were not removable by Trumbull himself. These deputies reported to Congress, not to Trumbull. In his resignation letter to Congress, Trumbull complained bitterly of Congress's decision to insulate his deputies from his removal power. He insisted, "the head of every department ought to have control of it. In this establishment, an *imperium in imperio* is created."[17]

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[14] Although the Council of Revision's veto was overturned in this instance, the Council continued to make the case for nondelegation over the course of several years, and ultimately prevailed. See Postell, BUREAUCRACY IN AMERICA, *supra* note 1, at 22-24.
[15] PENN. ARCHIVES, FOURTH SERIES (1900), 3:762.
[16] MESSAGES FROM THE GOVERNORS (C.Z. Lincoln, ed., 1909), 2:113-14.
[17] Quoted in CHARLES THACH, THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY (reprint 2010), 57.

Congress eventually got the message, and the leaders of the Revolution learned from their mistaken fear of independent executive power. The Commissary General's office was reorganized, giving the head of the department full power to appoint and remove subordinates at will. Most significantly, in what might be called the "Revolution of 1781," the Continental Congress began to establish single-headed, independent executive departments.

Alexander Hamilton was primarily responsible for this revolution. He wrote to Robert Morris in 1780: "We want a Minister of War, a Minister of Foreign Affairs, a Minister of Finance, and a Minister of Marine. There is always more decision, more dispatch, more secrecy, more responsibility, where single men, than where bodies are concerned."[18] In February 1781 the Continental Congress set up single-member secretaries of War and Marine, and a superintendent of Finance. A secretary of Foreign Affairs had been created the previous month, but the first secretary of War, Benjamin Lincoln, was not appointed until October 1781, days after the British surrendered at Yorktown.

America survived the Revolutionary War and won independence in spite of, not because of, the weakness and dependence of the executive on the legislature. The leading statesmen of the Founding period knew this well. They would not repeat the same mistake when creating the U.S. Constitution in 1787.

Conclusion: Nascent Administrative Law

Even before the U.S. Constitution was written and ratified, experience had revealed several important principles of nascent administrative law in the minds of many of its Framers. Some of these principles conflicted with each other. For instance, at the local level, lawmaking powers were often combined with executive power. But local governments counteracted this problem by insisting upon accountability in local officers, and subjecting them to judicial review, including personal liability through common law damage actions.

At the state and national levels, by contrast, the emphasis was on the separation of legislative and executive power, and the insistence upon nondelegation of legislative power as well as independent and unitary executive power. State governors, especially in New York, insisted successfully that regulations carrying the force of law could only be made by legislatures vested with legislative power by the people through the constitution. At the same time, they also insisted that legislatures could not vest executive power in independent subordinate officers, because the executive power was given to the governor by the constitution.

The need for unitary control of the execution of law was especially apparent to those who served in the Continental Congress, as illustrated by the Revolution of 1781. Joseph Trumbull's objection to the creation of independent subordinate officers in his department, and the miserable experience with weak and dependent executive departments in general, persuaded the Congress of the importance of executive power.

[18] Alexander Hamilton to Robert Morris, early 1780, in WORKS OF ALEXANDER HAMILTON (John C. Hamilton, ed., 1850), I: 127.

There are important lessons contained in this history. Today, administrative law is based upon principles that are almost diametrically opposed to those that emerged in the colonial and revolutionary periods. Instead of insisting upon local accountability, today's administrative state is highly centralized and disconnected from the people it regulates. Instead of subjecting administrative officers to robust judicial review and personal liability, modern administrative law is based on judicial deference to many administrative determinations and official immunity from liability. Instead of giving the heads of executive departments unitary control over their subordinates, modern administrative law allows for the routine insulation of administrative officers from removal by the chief executive.

The Framers of our Constitution understood the ramifications of establishing unaccountable administrative officers with wide discretion who were subjected to only weak judicial review. For those who are concerned about the constitutionality of our modern administrative state, understanding the history they experienced, and how it led them to create a different model for administration, is critical to explaining the problem we confront today. The papers that follow in this *Perspectives from FSF Scholars* series will further explore the Framers' model for constitutional administration.

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