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Avoiding Authoritarianism in the Administrative Procedure Act

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AVOIDING AUTHORITARIANISM IN THE ADMINISTRATIVE PROCEDURE ACT

By Kathryn E. Kovacs*

INTRODUCTION

In the 1930s and 1940s, while Congress deliberated how to control the exploding federal bureaucracy, authoritarian regimes grew overseas, raising the specter that the United States would follow suit. Many Americans viewed the New Deal as "dictatorial central planning" and feared that President Franklin Delano Roosevelt ("FDR") would become the United States' first authoritarian leader.[1] That fear shaped the Administrative Procedure Act of 1946 ("APA").[2] Congress designed the APA's constraints on agency procedure and provisions for judicial oversight to prevent agencies from becoming the tools of a dictator. Now the APA operates as the constitution for the Administrative State and has earned the title "superstatute."[3] Yet, seventy-five years after its enactment, the APA has failed to forestall the United States' slide toward authoritarianism. This Article traces the APA's anti-authoritarian lineage and begins to explore why it failed to live up to its billing.

Following the lead of many political scientists, this Article uses "authoritarianism" as an umbrella term to encompass totalitarian, fascist, dictatorial, and communist regimes.[4] Modern liberal democracy is grounded on free and fair elections.[5] Authoritarianism, in contrast, refers to non-democratic systems that often "rely on a mix of legitimacy and coercion."[6] An authoritarian government need not be totalitarian. Totalitarianism "seeks to subordinate all aspects of individual life to the authority of the state."[7] Authoritarianism, on the other hand, may allow individual freedoms, conduct elections, and "admit the existence of democratic institutions."[8] Indeed, "[e]lections are used as a tool of

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[1] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559 (1996).

[2] Pub. L. No. 79-404, 60 Stat. 237 (1946).

[3] Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015).

[4] See Elena Dragomir, *Authoritarianism*, in BRUCE A. ARRIGO, ED., THE SAGE ENCYCLOPEDIA OF SURVEILLANCE, SECURITY, AND PRIVACY 2 (Thousand Oaks 2018).

[5] Edward Webb, *Totalitarianism and Authoritarianism*, *in* JOHN T. ISHIYAMA & MARIJKE BREUNING EDS., 21ST CENTURY POLITICAL SCIENCE: A REFERENCE HANDBOOK 2 (SAGE Publications, Thousand Oaks 2020).

[6] Webb, *supra* note 5, at 3.

[7] *Totalitarianism*, BRITANNICA.COM, https://www.britannica.com/topic/totalitarianism (last visited Nov. 14, 2020); *see also* Webb, *supra* note 5, at 5; *Field Listing: Government Type*, CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/fields/299.html (last visited Nov. 14, 2020); *Authoritarianism*, BRITANNICA.COM; https://www.britannica.com/topic/authoritarianism (last visited Nov. 14, 2020); Robert Longley, *Totalitarianism, Authoritarianism, and Fascism*, THOUGHTCO. (June 5, 2020), https://www.thoughtco.com/totalitarianism-authoritarianism-fascism-4147699.

[8] Dragomir, *supra* note 4, at 3; *see also* TOM GINSBURG AND AZIZ HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 23 (2018).

legitimation by virtually all regimes, given the almost universal need to claim to rule on behalf of the people."[9] Likewise, authoritarian governments may have "written constitutions, courts, or other rule-of-law accoutrements," but they use those elements to maintain their power.[10]

Authoritarianism need not blossom overnight, but can result from the attrition of democratic norms. Nancy Bermeo of Oxford and Princeton Universities explained that "democratic backsliding"[11] may be gradual and yield governments that are "ambiguously democratic or hybrid."[12] The "hallmark" of democratic backsliding "is a steady accretion of power in the chief executive."[13] The classic coup d'état has been replaced by what Bermeo calls "executive aggrandizement" wherein an elected executive uses legal channels to disassemble institutional checks on executive power and interbranch accountability.[14]

Despite its origin in anti-authoritarian sentiment, the APA has not prevented the United States from sliding toward authoritarianism. As this author explained elsewhere, the United States has seen a steady rise in executive power across Democratic and Republican administrations over the past fifty years.[15] Others, too, have noted the growth of authoritarianism in the United States,[16] and the accretion of power to the executive branch shows no signs of slowing.[17] This Article lays the foundation for understanding why the APA failed to forestall that development. In tracing the anti-authoritarian elements of the APA, this Article also informs interpretations of this superstatute and the discussions surrounding its reformation.

Part I of this Article begins with a combined history of anti-authoritarianism and administrative reform from FDR's inauguration in

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[9] Webb, *supra* note 5, at 3.

[10] Ginsburg & Huq, *supra* note 8, at 23.

[11] Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5 (2016).

[12] *Id.* at 6.

[13] James A. Gardner, *Illiberalism and Authoritarianism in the American States*, 70 AM. U. L. REV. __ (forthcoming), draft at 38, http://ssrn.com/abstract=3656508.

[14] Bermeo, *supra* note 11, at 10–11; *see also* Ginsburg & Huq, *supra* note 8, at 73, 95, 150.

[15] Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 516, 560–62 (2018); Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 67, 97–98 (2020).

[16] DALIBOR ROHAC, LIZ KENNEDY, AND VIKRAM SINGH, DRIVERS OF AUTHORITARIAN POPULISM IN THE UNITED STATES (2018), available at https://www.americanprogress.org/issues/democracy/reports/2018/05/10/450552/drivers-authoritarian-populism-united-states/; Errol Morris, *Anatomy of a Photograph: Authoritarianism in America*, THE ATLANTIC (Aug. 22, 2020), https://www.theatlantic.com/ideas/archive/2020/08/errol-morris-this-is-what-authoritarianism-looks-like/615181/; Henry A. Giroux, *The Emerging Authoritarianism in the United States: Political Culture under the Bush/Cheney Administration*, 14 SYMPLOKĒ 98 (2006); Joshua Keating, *Dictators Without Borders*, SLATE.COM (Jan. 21, 2020), https://slate.com/news-and-politics/2020/01/authoritarianism-democracy-trump-borders.html; *see also* Anna Lührmann, Juraj Medzihorsky, Garry Hindle & Staffan I. Lindberg, *New Global Data on Political Parties: V-Party*, V-DEM.NET (Oct. 26, 2020), https://www.v-dem.net/media/filer_public/b6/55/b6553f85-5c5d-45ec-be63-a48a2abe3f62/briefing_paper_9.pdf ("the Republican party in the US has retreated from upholding democratic norms in recent years. Its rhetoric is closer to authoritarian parties").

[17] *See* Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1810 (2019); *see also* Scott Detrow, *Obama White House Veterans Urge Biden To Embrace Executive Action*, NPR.ORG (Nov. 14, 2020), https://www.npr.org/2020/11/14/934656049/obama-white-house-veterans-urge-biden-to-embrace-executive-action; Matt Viser, Seung Min Kim, & Annie Linskey, *Biden plans immediate flurry of executive orders to reverse Trump policies*, WASHINGTONPOST.COM (Nov. 7, 2020), https://www.washingtonpost.com/politics/biden-first-executive-orders-measures/2020/11/07/9fb9c1d0-210b-11eb-b532-05c751cd5dc2_story.html.

1933 to President Truman's signing of the APA in 1946. Part II explains how the fear of authoritarianism shaped the APA. Finally, Part III explores why the APA has not prevented the United States' democracy from backsliding into increasingly authoritarian leanings.

I. FEAR OF AUTHORITARIANISM IN THE APA'S FORMATIVE YEARS

A. The Early New Deal Era

Long before FDR's inauguration in 1933, Progressives from several political parties sought to make the federal government more responsive, efficacious, and accountable by empowering the President.[18] Giving the President more authority over government agencies, Progressives believed, would make those agencies more responsible.[19] Republican administrations from 1921 to 1933, aided by Republican Congresses and "a Republican-dominated Supreme Court,"[20] designed government programs to take advantage of "presidential initiative and administrative capacity."[21]

New Dealers inherited those Progressive ends and means. The Great Depression demanded even more effective governance, spurring New Dealers to expand Presidential power even further.[22] Indeed, at the start of the FDR administration, "American intellectuals were surprisingly accepting of dictatorial forms of government."[23] During the early New Deal, "American reformers sometimes drew inspiration from fascist innovations, and admiration for fascism and fascist heroes was not taboo."[24] Accordingly, FDR's supporters pushed for "a united executive branch, President and bureaucracy bonded together with the President in the driver's seat."[25] Along with a strong executive, New Dealers endorsed deferential courts; ideally, the courts would defer to Congress, and Congress would defer to the President.[26]

New Dealers also inherited from Progressives a vision of "an army of experts" at the President's command.[27] FDR's supporters believed that "properly trained experts could find objectively correct solutions to the myriad of social problems extant in a rapidly industrializing, increasingly fractious society."[28] To them, the Great Depression represented the failure of laissez-faire government; federal agencies would have to control the

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[18] Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration* (forthcoming) (on file with the author), draft at 4, 22, 28, 30–31.

[19] *Id.* at 32.

[20] James E. Brazier, *An Anti-New Dealer Legacy: The Administrative Procedure Act*, 8 J. POLICY HIST. 206, 207 (1996).

[21] Stephen Skowronek, *The Conservation Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2074–75 (2009).

[22] Brazier, *supra* note 20, at 208; Rosenblum, *supra* note 17; Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 450 (1986).

[23] Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 76 (2000).

[24] Rosenblum, *supra* note 17, at 55.

[25] Shapiro, *supra* note 22, at 458.

[26] *Id.* at 451.

[27] *Id.* at 458.

[28] Schiller, *Free Speech*, *supra* note 23, at 14.

economy to avoid the free market's destruction.[29] "[A]dministrative government was a scientific solution to an economic and social crisis of unparalleled proportions."[30] Thus, during the New Deal, the federal government exploded with sixty new agencies created in FDR's first sixteen months in office. From the summer of 1933 to the summer of 1936, the number of federal employees expanded by fifty percent, and federal expenditures nearly doubled.[31]

In this New Deal vision, administrators would exercise legislative, executive, and judicial power, unconstrained by precedent or adversarial procedure.[32] The New Deal's opponents, on the other hand, considered this "the very antithesis of the rule of law."[33]

In May 1933, just two months after FDR's inauguration, the American Bar Association ("ABA") created a Special Committee on Administrative Law ("ABA Committee") to study "the growing multiplicity of administrative tribunals and . . . the apparently irresistible tendency to delegate" rulemaking and adjudication responsibilities to those tribunals.[34] This Committee played a starring role in the formulation of the APA. From the beginning, the ABA Committee expressed concern about the combination of functions in agencies, which it saw as a departure from separation-of-powers doctrine; the absence of due process in agency adjudications; and the lack of judicial review of agency decisions.[35] The ABA Committee also noted in its first report in the summer of 1933 the "marked tendency to concentrate administrative functions . . . in the Executive,"[36] including the authority to promulgate rules having the force of law and to adjudicate disputes without any guarantee of judicial review.[37]

B. The Mid-1930s

1. Growing Totalitarianism Abroad Spurred Fear at Home

As Professor Reuel Schiller documented, by the mid-1930s, American sympathy for authoritarian government as a means to combat the United States' unprecedented economic emergency had waned.[38] "During the three middle years of the decade totalitarianism showed its

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[29] Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 414 (2007); Schiller, *Free Speech*, *supra* note 23, at 14–15; Shepherd, *supra* note 1, at 1561.

[30] Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration in* DANIEL R. ERNST & VICTOR JEW, EDS., TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II 201 (2002).

[31] Rosenblum, *supra* note 17, at 18; *see also* DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940 56 (Oxford 2014) ("At their birth, the new agencies were ambiguous affairs, hastily created to save an economy that had ground to a halt.").

[32] Daniel R. Ernst, *The Politics of Administrative Law: New York's Anti-Bureaucracy Clause and the O'Brian-Wagner Campaign of 1938*, 27 LAW & HIST. REV. 331, 332–33 (2009).

[33] *Id.* at 333.

[34] 58 Report of the Fifty-Sixth Annual Meeting of the American Bar Association 407 (1933).

[35] 58 Report of the Fifty-Sixth Annual Meeting of the American Bar Association 409, 414, 415 (1933).

[36] 58 Report of the Fifty-Sixth Annual Meeting of the American Bar Association 416 (1933).

[37] *Id.* at 420, 423, 424.

[38] Schiller, *Free Speech*, *supra* note 23, at 78.

true face: the Italian invasion of Ethiopia, Stalin's Show Trials, as well as the trio of Nazi atrocities—the Night of the Long Knives, Kristallnacht, and the passage of the Nuremberg Laws."[39] Simultaneously, the growing bureaucracy in the United States seemed out of control. The New Deal had spawned "extensive, intrusive, centrally directed public bureaucracies" led by unelected and unconstrained officials.[40] Hence, a significant portion of the populace feared that authoritarianism could grow in the United States.[41] Forty-five percent of respondents in a 1936 poll believed that FDR's policies could lead to a dictatorship.[42] Americans viewed fascism as "a very real threat, not just abroad but at home too."[43] Fulfilling the Progressive vision of a unified executive branch under strong presidential leadership stoked fears that the federal government would become "nothing but an extension of the personality of the chief executive"—the very essence of fascism.[44]

At the same time, growing fascism abroad made it even more important to have a responsible, effective, and accountable democracy at home to "stand up" to Europe's dictators.[45] To distinguish the United States from those regimes, American intellectuals[46] emphasized that the rule of law and constitutionalism would prevent totalitarianism from taking hold.[47] In contrast to Europe's authoritarian regimes, they billed America as individualistic and pluralist[48] and thus more resistant to the perils those nations faced.

2. The Brownlow Committee

FDR took several actions in the mid-1930s that fed the fear of his authoritarian tendencies. During his first term, he grew more liberal and moved away from industrialists, toward labor, immigrants, and the urban poor. At the 1936 Democratic Convention, he spoke about "reform and redistribution,"[49] which probably sounded ominous to his opponents. Also in 1936, FDR worked to reorganize the more than one hundred executive branch agencies to make them more accountable and effective.[50] He established the President's Committee on Administrative Management—which came to be known as the "Brownlow Committee" after its Chair, Louis Brownlow—acknowledging that "he saw the Committee's work as an alternative to calling a constitutional convention."[51]

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[39] *Id.*; *see also* Rosenblum, *supra* note 17, at 55 ("Mussolini's invasion of Ethiopia in 1935 was perhaps the critical event in turning Americans decisively against totalitarian dictatorship.").

[40] Daniel R. Ernst, *ñ I n a D e m o c r a c y W e S h o u l d D i s t r i b u t e t h e L a w y e r s Federal Legal Service, 1933-1945*, 58 AM. J. LEGAL HIST. 4, 5 (2018).

[41] Schiller, *Free Speech*, *supra* note 23, at 78.

[42] *Id.*

[43] Rosenblum, *supra* note 17, at 55.

[44] *Id.* at 5; *see also id.* at 34, 46.

[45] *Id.* at 34.

[46] Schiller, *Free Speech*, *supra* note 23, at 77.

[47] *Id.*

[48] *Id.* at 78; Schiller, *Reining*, *supra* note 30, at 188.

[49] Shepherd, *supra* note 1, at 1564.

[50] Rosenblum, *supra* note 17, at 15; Shepherd, *supra* note 1, at 1584

[51] Rosenblum, *supra* note 17, at 18.

In its report, which FDR transmitted to Congress on January 12, 1937,[52] the Brownlow Committee embraced Progressive Era thinking that government could be made more accountable and efficacious by empowering the executive.[53] It proposed to give the President more tools for personnel management, budgeting, and planning, with an increased White House staff.[54] At the same time, the Brownlow Committee proposed adding checks on presidential power "to strike a balance between empowering the executive and preventing it from overreaching."[55] The Committee was particularly concerned about the President treating agencies "as an extension of his personality" like the autocrats in Europe.[56] Although FDR expressly denied that he was seeking to "increase the powers of the Presidency,"[57] the Brownlow Committee's report came to be seen as an attempt to accrue dictatorial power to the President.[58]

Among other proposals, the Brownlow Committee recommended eliminating the General Accounting Office and increasing the President's involvement in the budget process.[59] The Committee also recommended extending the merit-based civil service system "upward, outward and downward to cover practically all non-policy-determining posts."[60] The Committee's goal was to create a professional and highly competent federal workforce protected from political interference.[61] This would allow the President "to effectively lead the bureaucracy" and enable the government to attract and retain "the best talent of the Nation."[62]

Both of those proposals "could be interpreted as a desire for executive supremacy."[63] Members of Congress "came to see meritocratic hiring as part of a larger scheme to shift power from Congress to the President and his 'janizaries.'"[64] Even those who favored civil service reform expressed concerns about giving the President too much discretion to decide which positions would be "policy determining" and thus exempt from civil service protections.[65] They also objected to the idea of replacing the Civil

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[52] REORGANIZATION OF THE EXECUTIVE DEPARTMENTS, S. DOC. NO. 75-8 (1937).

[53] THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES (1937), *in* REORGANIZATION OF THE EXECUTIVE DEPARTMENTS, S. DOC. NO. 75-8 (1937); *see also* Rosenblum, *supra* note 17, at 33.

[54] S. DOC. NO. 75-8, at 3; Rosenblum, *supra* note 17, at 38, 39.

[55] Rosenblum, *supra* note 17, at 70; see also id. at 33.

[56] *Id.* at 70; *see also id.* at 3, 5.

[57] S. DOC. NO. 75-8, at 4.

[58] *See generally* JOHN DEARBORN, POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION 111–33 (Chicago 2021) (examining congressional reactions to the Brownlow Committee's report).

[59] S. DOC. NO. 75-8 at 46–48; Brazier, *supra* note 20, at 208.

[60] *Id.* at 3; Rosenblum, *supra* note 17, at 51–52

[61] Rosenblum, *supra* note 17, at 52.

[62] S. DOC. NO. 75–8 at 17; Rosenblum, *supra* note 17, at 52.

[63] Brazier, *supra* note 20, at 208; James Edward Brazier, *Who Controls the Administrative State? Congress and the President Adopt the Administrative Procedure Act of 1946*, at 90 (1993) (unpublished Ph.D. dissertation, Michigan State University).

[64] Ernst, *In a Democracy*, *supra* note 40, at 6.

[65] See, e.g., Cong. Rec. 3728 (March 21, 1938) (Sen. King); Reorganization of the Executive Departments, Hearings before the Joint Committee on Government Organization, 75th Congress, 1st Session 107, 109, 111 (1937).

Service Commission with a single administrator appointed by the President.[66]

The Brownlow Committee's opposition to independent agencies contributed to the view of its report as an attempt to advance authoritarian power. The Committee emphasized that the Constitution vests "the whole executive power" in "the President alone,"[67] along with the responsibility "to coordinate and manage" government agencies.[68] According to the Brownlow Committee, independent agencies contradicted the constitutional design; they constituted "a headless 'fourth branch' of the Government, responsible to no one" and impossible to coordinate with the policies of the peoples' "duly elected representatives."[69] Independent agencies also troubled the Committee because such agencies were "vested with duties of administration and policy determination . . . and at the same time they are given important judicial work."[70]

To cure these problems, the Brownlow Committee recommended separating independent agencies' administrative and judicial functions. The former would be subject to presidential oversight; the latter would not.[71] The Committee further proposed to give the President both the power to divide the work of government among twelve executive departments and the "responsibility for the continuous administrative reorganization of the Government."[72]

Opponents of the Brownlow Committee's proposal saw it as a reflection of FDR's "dictatorial designs" and compared it to Hitler's invasion of Austria.[73] Indeed, "when Congress got around to debating it in 1938, just months after Germany's annexation of Austria, the parallels were too obvious to be ignored."[74] Members of Congress argued that giving FDR continuous reorganization power would undermine Congress's ability to check the President and take the United States "one more long step on the road to American fascism."[75] A popular Harper's Magazine columnist wrote that the proposals "would destroy all the effective barriers to totalitarianism."[76] Even moderate Democrat Senator Burton Wheeler of Montana "crusaded against the plan as totalitarianism."[77]

FDR only made matters worse when he released a letter to an anonymous friend saying:

> 1. As you well know I am as much opposed to American Dictatorship as you are, for three simple reasons.

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[66] See, e.g., Cong. Rec. 3728 (March 21, 1938) (Sen. King); *see also* RICHARD POLENBERG, REORGANIZING ROOSEVELT'S GOVERNMENT: THE CONTROVERSY OVER EXECUTIVE REORGANIZATION, 1936-1939 83 (Cambridge, MA 1966).

[67] S. DOC. NO. 75-8, at 55.

[68] *Id*. at 2.

[69] *Id*. at 56; *see also* Rosenblum, *supra* note 17, at 41

[70] S. DOC. NO. 75-8, at 67; *see also* Rosenblum, *supra* note 17, at 41, 52.

[71] S. Doc. No. 75-8, at 69; *see also* Rosenblum, *supra* note 17, at 53.

[72] S. Doc. No. 75-8, at 62; *see also id.* at 58; Rosenblum, *supra* note 17, at 37.

[73] Shepherd, *supra* note 1, at 1585.

[74] Schiller, *Free Speech*, *supra* note 23, at 79; *see also* Brazier dissertation, *supra* note **Error! Bookmark not defined.**, at 90.

[75] JAMES T. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL 218 (University Press of Kentucky 2014).

[76] Bernard DeVoto, *Desertion from the New Deal*, HARPER'S 557, 559 (Oct. 1937).

[77] Brazier, *supra* note 20, at 208.

> A: I have no inclination to be a dictator.
> B: I have none of the qualifications which would make me a successful dictator.
> C: I have too much historical background and too much knowledge of existing dictatorships to make me desire any form of dictatorship for a democracy like the United States of America.[78]

As Professor James Patterson observed, "[t]his remarkable statement, so unnecessary and so plaintive, revealed that the charges of dictatorship had not fallen upon deaf ears."[79]

Initially, Congress rejected the Brownlow Committee's proposals, but a year later it passed the Reorganization Act of 1939, giving FDR some of the authority he sought.[80] The Act allowed the President to prepare plans to reorganize the executive branch, which would go into effect sixty days after their submission to Congress unless vetoed by a concurrent resolution.[81] The Act exempted independent agencies from presidential reorganization, along with the Civil Service Commission and the General Accounting Office,[82] thus rejecting the Brownlow Committee's recommendations on those points.[83]

Three weeks later, FDR transmitted his first reorganization plan to Congress.[84] That plan created the Executive Office of the President, which political scientist Stephen Skowronek dubbed "the institutional capstone of the progressive presidency."[85] In Skowronek's view, the Executive Office of the President gave the President "new resources for policy development and administrative oversight," but "was less an instrument of unitary command and control than an instrument of institutional coordination and collective action."[86] Legal historian Noah Rosenblum observed that the Executive Office of the President gave the President "the tools to realize what has become presidential administration."[87]

3. F D R ô os urt-P Gacking Plan

On February 5, 1937, a few weeks after FDR transmitted the Brownlow Committee report to Congress and well before passage of the Reorganization Act, FDR sent Congress a bill that would, among other things, increase the number of justices on the Supreme Court.[88] The so-

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[78] Franklin D. Roosevelt, The President Refutes Dictatorship Charges Connected with Pending Reorganization Bill (Mar. 29, 1938), *in* 7 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 179 (Samuel I. Rosenman ed., 1941).

[79] PATTERSON, *supra* note 75, at 225; *see also* Rosenblum, *supra* note 17, at 60.

[80] Pub. L. No. 76-19, 53 Stat. 561 (1939); Joanna Lynn Grisinger, *Reforming the State: Reorganization and the Federal Government, 1937-1964*, at 205 (Aug. 2005) (unpublished Ph.D. dissertation, University of Chicago).

[81] Pub. L. No. 76-19 §§ 4 & 5, 53 Stat. 561, 562–63 (1939).

[82] *Id.* § 3(b), 53 Stat. 561.

[83] *See* PATTERSON, *supra* note 75, at 300.

[84] Franklin Delano Roosevelt, The President Presents Plan No. 1 to Carry Out the Provisions of the Roeganization Act (Apr. 25, 1939), *in* 8 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 245 (Samuel I. Rosenman ed., 1941).

[85] Skowronek, *supra* note 21, at 2091.

[86] *Id.*

[87] Rosenblum, *supra* note 17, at 12.

[88] Franklin Delano Roosevelt, The President Presents a Plan for the Reorganization of the Judicial Branch of the Government (Feb. 5, 1937), *in* 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 51 (Samuel I. Rosenman ed., 1941); *see also* Brazier, *supra* note 20, at 208; Daniel R. Ernst, *The Shallow State: The Federal Communications Commission and the New Deal*, 4 U. PA. J.L. & PUB. AFF. 403, 429 (2019).

called "court packing plan" exacerbated the fear of FDR's authoritarian tendencies.[89] "To some, FDR appeared intoxicated with his power and seemed ready to introduce Hitlerism into America."[90] Given recent events in Europe, those fears "were often real . . . not empty rhetoric."[91] Even Democrats feared FDR's ambitions.[92] As one Southern Democrat Senator said: "The President controls Congress . . . . He is now seeking to control the Court . . . . Give the President control over Congress and the Court and you will have a one man government. It may not be a dictatorship. A rose by any other name would smell as sweet."[93]

FDR did not alleviate these concerns when he attempted (unsuccessfully) to "purge" anti-Roosevelt Democrats in the primary elections of 1938.[94] Also in 1938, "the partisan use of Works Progress Administration funds" exploded into a scandal resulting in a congressional investigation, and NLRB rulings in favor of the Congress of Industrial Organizations—a labor union that backed FDR—"looked like the quid pro quo for the [union's] $470,000 contribution to his reelection campaign in 1936."[95]

4. The ABA Committeeô s 1930s Reports

In its 1934 report, the ABA Committee recognized the necessity of delegating some lawmaking functions to expert agencies.[96] The "multitude of uncorrelated agencies" that had come to characterize the executive branch, however, created a "labyrinth in which the rights of individuals, while preserved in form, [could] be easily nullified in practice."[97] Thus, the ABA Committee recommended that federal agencies should be organized "under a limited number of executives responsible to the Chief Executive."[98] The ABA Committee also continued to emphasize separating agencies' legislative and judicial functions simply because "a man should not be permitted to adjudge his own case."[99] The Committee felt that adjudicators should be independent: "[i]t is not easy to maintain judicial independence or high standards of judicial conduct when a political sword of Damocles continually threatens the judge's source of livelihood."[100]

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[89] ERNST, *supra* note 31, at 7 ("Professional politicians in Congress concluded from Roosevelt's all-out campaign to pass the measure and from a series of other moves in its wake that FDR wanted to convert administrative agencies into an independent source of presidential power."); Brazier, *supra* note 20, at 209.

[90] Shepherd, *supra* note 1, at 1581.

[91] *Id.*

[92] Rosenblum, *supra* note 17, at 60.

[93] PATTERSON, *supra* note 75, at 97 (quoting Josiah W. Bailey to Thurmond Chatham, April 13, 1937, Bailey MSS, General File); *see also id.* at 12 (explaining that Bailey was a Senator from South Carolina).

[94] Ernst, *Politics*, *supra* note 32, at 335, 358.

[95] *Id.* at 335.

[96] 59 ABA 543, 563 (1934).

[97] *Id.* at 563.

[98] *Id.* at 551.

[99] *Id.* at 545; *see also id.* at 539.

[100] *Id.* at 546; *see also id.* at 541.

The following year, the ABA Committee Chair, Louis G. Caldwell, adopted a more aggressive tone.[101] He denounced criticisms of the Committee's 1934 report as "founded on a belief in absolutism in government as a necessary prelude to so-called economic planning and on a 'scrap-of-paper' attitude toward the Constitution."[102] He argued that allowing "some 73 midget courts in Washington, most of them exercising legislative and executive as well as judicial powers" "dispense[d] with our principal safeguard against autocracy in government."[103]

The ABA Committee's 1936 report pursued those themes further. The report explained that separation-of-powers doctrine "raises the principal barrier against accumulation of autocratic power."[104] Comingling legislative, executive, and judicial functions in agencies, the Committee believed, produces evils "analogous to those against which [separation-of-powers] doctrine is directed," "leav[ing] the individual almost defenseless."[105] The solution was to segregate agency functions, protect adjudicators' tenure and compensation, and provide for judicial review of questions of law and fact.[106]

The following year, the ABA Committee began to endorse agency rulemaking as a way to prevent courts from assuming legislative functions.[107] Officers "who are familiar with the administrative problems and processes" also would be better equipped to fill in statutory details through agency rules.[108] Notice and comment procedures in rulemaking would help to safeguard against improper use of the powers Congress delegated to agencies.[109]

C. The Late 1930s to the Early 1940s

From the late 1930s into the early 1940s, the fear that authoritarianism might take hold in the United States spread to a broader swath of the American public.[110] FDR's court-packing and reorganization plans, along with Hitler's and Mussolini's economic and military successes, "caused mainstream commentators to worry not only about FDR's ambitions but also about whether economic desperation resulting from the Great Depression might cause the American people to clamor for a dictator."[111] That fear was bipartisan.[112] Administrative reform "became for many a righteous fight to defend democracy from dictatorship."[113] It was in this atmosphere in 1938 that the House of Representatives created the Committee on Un-American Activities to investigate subversive

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[101] Caldwell was "the first Washington partner of the eminent Chicago law firm now known as Kirkland & Ellis." ERNST, *supra* note 31, at 119.

[102] 60 ABA 141 (1935).

[103] *Id.*

[104] 61 ABA 730 (1936).

[105] *Id.* at 731, 735; *see also id.* at 769.

[106] *Id.* at 736, 739, 740.

[107] 62 ABA 813 (1937).

[108] *Id.*

[109] *Id.* at 809–10. Interestingly, the Committee included a lengthy footnote discussing Italian and German rulemaking procedures without any apparent condemnation. *Id.* at 815 n.18.

[110] Schiller, *Reining*, *supra* note 30, at 188.

[111] *Id.* at 189; *see also* Shepherd, *supra* note 1, at 1590, 1593.

[112] Shepherd, *supra* note 1, at 1593, 1596.

[113] *Id.* at 1593.

activities;[114] the United States Court of Appeals for the District of Columbia reprimanded the Federal Communications Commission for employing "Star Chamber methods"[115]; and the ABA Committee issued its aggressive 1938 report.

1. The ABA Committeeô s 1938 Report

In 1938, Roscoe Pound, a prestigious scholar and former dean of Harvard Law School, chaired the ABA Committee.[116] Pound initially supported the New Deal, but by 1938, his "vituperative writings against the New Deal leaned heavily on associating the New Deal with foreign socialism."[117] He equated the welfare state with the totalitarian state and "warned that the new Deal threatened to produce 'a Duce or Fuhrer or superman head administrator.'"[118]

The ABA Committee's rhetoric at this time, reflecting the same fears, compared the FDR administration to a Soviet dictatorship.[119] The Committee's 1938 report inveighed against the New Deal's "administrative absolutism," which defined "law" as "whatever is done officially."[120] Administrative absolutism, the Committee said, is characterized by "a highly centralized administration set up under complete control of the executive[,] . . . relieved of judicial review and making its own rules."[121] Administrative officers enjoyed an "enormous concentration" of legislative, executive, and judicial power and answered only to the President, just like in fascist countries where "democracy has been brazenly cast aside."[122] Only an autocracy, the ABA Committee announced, would accept agencies controlled by the executive, subject to political pressure, willing to overrule experts, and free from review by an "independent tribunal."[123] Against the "Marxian idea" that "there are no laws[,] only administrative ordinances and orders," the ABA Committee advocated separating agency functions and judicial review to mimic separation of powers and due process of law.[124]

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[114] H.R. Res. 282, 75th Cong. (1938).

[115] In *Saginaw Broad. Co. v. F.C.C.*, 96 F.2d 554 (D.C. Cir. 1938)), the court said that the "FCC commissioners had not carefully read the trial examiner's report, lectured them on the proper way to find facts, scolded them for employing 'Star Chamber methods,' and urged them to do 'justice according to facts and law' rather than 'extralegal considerations.'" Ernst, *Shallow State*, *supra* note 88, at 435.

[116] Shepherd, *supra* note 1, at 1590; JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 211 (Harvard University Press, 2007).

[117] WITT, *supra* note 116, at 256.

[118] *Id.*

[119] Shepherd, *supra* note 1, at 1591. Professor Ernst called Roscoe Pound's arguments "a highbrow form of red-baiting" that were "recklessly inflammatory and intentionally provocative." ERNST, *supra* note 31, at 126, 127. The general counsel of the Securities and Exchange Commission thought Pound was "hitting below the belt." *Id.* at 131.

[120] 63 ABA 339 (1938). Professor Ernst reported that "Pound chortled that" the term "administrative absolutism" "affected law professors and agency lawyers 'very much as a red rag does a bull.'" ERNST, *supra* note 31, at 125.

[121] 63 ABA at 343.

[122] *Id.* at 344, 345.

[123] *Id.* at 359. Even the ABA president-elect "grouped the Roosevelt administration with fascist European governments" and "invited bar members to join a 'titanic struggle against those . . . who desire to invest the national Government with totalitarian powers in the teeth of Constitutional democracy.'" Shepherd, *supra* note 1, at 1592.

[124] 63 ABA 343, 346, 361.

2. The Walter-Logan Bill

The legislation that came to be known as the Walter-Logan Bill made its first appearance in 1939.[125] FDR's failures with the Brownlow Committee report and his court-packing plan had weakened him, and recession had returned.[126] Conservative Democrats teamed up with Republicans, who had gained congressional seats in the mid-term elections of 1938, to push for administrative reform.[127] The Walter-Logan Bill was based on the ABA Committee's proposal.[128] When it passed Congress in 1940,[129] it required agencies to implement statutes through rules, sometimes following notice and public hearings.[130] It required agencies to create administrative appeals boards whose members would take oaths of impartiality and not sit as judge in adjudications they had worked on in another capacity.[131] And it provided for judicial review of rulemaking and adjudications.[132]

Throughout the Walter-Logan Bill's journey through Congress, discussion surrounding it was infused with anti-authoritarian rhetoric.[133] "Supporters of the [Walter-Logan] bill placed it in the context of rising totalitarianism abroad, and argued that such procedural reform would prevent a similar system from gaining ground in the United States."[134] Those concerns provided much of the motivation for the Bill's provisions on judicial review, adjudicator independence, and administrative procedure.[135]

At the House Judiciary Committee hearings in March and April of 1939, the new chair of the ABA Administrative Law Committee, O.R. McGuire, gave a lengthy recitation that made the Committee's report on administrative absolutism sound gentle in comparison.[136] He accused "a considerable group among us, largely recruited from some of the universities"—an apparent reference to the Brownlow Committee—of wanting to impose a parliamentary government in the United States, which would give the President "absolute managerial control over the entire administrative machinery of the Federal Government" and lead to

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[125] H.R. 6324, 76th Cong. (3d Sess. 1939); Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 685 (2010).

[126] Kovacs, *A History*, *supra* note 125, at 683.

[127] *Id.*

[128] Kovacs, *Rules About Rulemaking*, *supra* note 15, at 521.

[129] 86 CONG. REC. 4742, 13,747–48, 13,815–16 (1940); *see also* Shepherd, *supra* note 1, at, *supra* note , at 1619, 1622.

[130] H.R. 6324 § 2.

[131] *Id.* § 4

[132] *Id.* §§ 3, 5

[133] Ernst asserted that even proponents of the Walter-Logan Bill conceded privately that it was poorly drafted. Nonetheless, New Deal critics could "make hay" with the bill and "'talk of dictatorship' in the general election of 1940." ERNST, *supra* note 31, at 132.

[134] Grisinger, *supra* note 236.

[135] *But see* ERNST, *supra* note 31, at 137 (asserting that the "hyperbolic dialogue" about the Walter-Logan Bill "accorded poorly with the [Bill's] reforms").

[136] Bills to Provide for the More Expeditious Settlement of Disputes with the United States, and for Other Purposes: Hearings on H.R. 4236, HR 6198, and H.R. 6324 Before the Subcomm. No. 4 of the H. Comm. on the Judiciary, 76th Cong. 14–34 (1939). Ollie Roscoe McGuire was counsel to the Comptroller General of the United States and was known as "Colonel" McGuire—"the honorific was the residue of some long-forgotten service to a Kentucky governor." ERNST, *supra* note 31, at 120.

dictatorship.[137] The Walter-Logan Bill would prevent that by providing for judicial review of agency rules to ensure that agencies acted within the bounds of their statutory authority[138] and by guaranteeing that politically independent boards would preside over adjudication of individual cases followed by an opportunity for judicial review.[139]

The Senate Judiciary Committee Report, issued the following month, began:

> The basic purpose of this administrative-law bill is to stem and, if possible, to reverse the drift into parliamentarism which, if it should succeed in any substantial degree in this country, could but result in totalitarianism . . . with the entire subordination of both the legislative and judicial branches of the Federal Government to the executive branch . . . .[140]

To avoid totalitarianism, agencies would be "required to both observe the terms of the statutes and to exercise good faith in their administration of such statutes."[141] "[U]niform rules of practice and procedure" for agency adjudication would likewise help keep agencies in line.[142]

The House Judiciary Committee report of July 1939 adopted a more neutral tone, asserting that "the regulators shall be regulated, if our present form of government is to endure."[143] The Committee accused some federal civil servants of developing "Messiah complexes" and becoming "contemptuous of both the Congress and the courts" and "disregardful of the rights of the governed."[144] To the House Judiciary Committee, the solution was more uniform administrative procedure. Requiring agencies to regularize their procedures would benefit both regulated parties and the courts.[145]

The House debated the Walter-Logan Bill from April 15 to 18, 1940, filling eighty-eight pages of the Congressional Record.[146] After Hitler began the London Blitz and FDR won reelection to a third term, the Senate followed with three days of debate in November, adding another thirty-three pages to the Congressional Record.[147] During the debates, "fierce political rhetoric flowed freely. As dictators' armies marched across Europe, many perceived the debate over administrative reform as a struggle not only for the life of the New Deal, but also about whether the country would move toward dictatorship."[148]

Most of the anti-authoritarian rhetoric was too general to tie to any particular provisions of the Bill. Nonetheless, several themes emerged.

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[137] *Id.* at 20, 21.

[138] *Id.* at 23–24, 25, 26.

[139] *Id.* at 31, 33.

[140] S. REP. NO. 76-442, at 5 (1939). As Professor Martin Shapiro explained, the early New Deal took "a parliamentary track." Shapiro, *supra* note 22, at 449–50. "Because prime ministers lead the majority party in parliament, they can determine what policies are enacted into law." Id. at 450. Parliamentary government features a strong executive and tends to delegate tremendous law-making power to the prime minister. *Id.* at 450–51. The early New Deal adopted those aspects of parliamentarism as well. *Id.*

[141] S. Rep. No. 76-552, at 9 (1939).

[142] *Id.* at 13.

[143] H.R. REP. No. 76-1149, at 2 (1939).

[144] *Id.*

[145] *Id.* at 3.

[146] 86 Cong. Rec. H.R. 4530–4744 (April 15–18, 1940).

[147] 86 Cong. Rec. 13,660–13,748 (Nov. 19–26, 1940); *see also* Kovacs, *A History*, *supra* note 125, at 689.

[148] Shepherd, *supra* note 1, at 1606.

First, supporters intended the Bill to rein in the executive branch and FDR himself.[149] Congressman Dudley White, a Republican from Ohio, for example, viewed the Bill as a "vitally important" means of counteracting FDR's ceaseless "greed for power."[150] If supporters thought the Bill would control the office of the President, however, they were mistaken; the Bill expressly exempted the President from its rulemaking provisions.[151]

Second, supporters saw judicial review as an antidote to administrative absolutism.[152] They viewed agencies as "arbitrary, tyrannical, and bitterly prejudiced."[153] Representative Eric Michener of Michigan observed that allowing agencies to issue rules that have the force of law without providing an appeal to a court was tantamount to totalitarianism.[154] Utah Senator William King gave a lengthy disquisition on the role of judicial review in distinguishing democracy from totalitarianism.[155] Judicial review, supporters argued, would counteract agencies' authoritarian tendencies.[156]

Third, supporters believed that "procedural safeguards" were a critical element of "the Anglo-American concept of government."[157] Forcing agencies to provide "the minimum safeguards of fair hearing" were an essential defense against authoritarianism.[158] Thus, agencies would be required to "follow the legislative practice of Congress" by holding "open public hearings" on proposed rules.[159] In adjudications, regulated entities would receive, among other things, notice of the agency's claims, an opportunity to examine witnesses, and a written decision upon the record.[160]

Finally, and relatedly, Walter-Logan supporters considered independent adjudicators a key to avoiding authoritarianism.[161] They viewed the combination of legislative, executive, and judicial functions within an agency as autocratic. Texas Representative Hatton Sumners said that the "power to make rules, . . . construe rules, [and] enforce rules is the same breed of power that Mussolini and Hitler have."[162] Hence, separating those functions in individual agencies was critical.[163]

The Walter-Logan Bill's opponents employed similar rhetoric. They charged that the Bill was "backed by the utilities fascisti, the most deadly enemy to economic democracy this country has ever seen."[164] Further

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[149] Brazier dissertation, *supra* note **Error! Bookmark not defined.**, at 135; Shepherd, *supra* note 1, at 1606.

[150] 86 Cong. Rec. H.R. 4668

[151] H.R. 6342, 76th Cong., §1(1), (2). In contrast, the plain language of the APA includes the President as an "agency." Kovacs, *Constraining*, *supra* note 15, at 83–86.

[152] 86 Cong. Rec. 4539–40 (Satterfield); 4600 (Robsion); 4649 (Reed), 4736–37 (Smith); 13667, 13676 (Sen. King).

[153] 86 cong. Rec. 4535 (Michener)

[154] 86 Cong. Rec. 4534 (Michener).

[155] 86 Cong. Rec. 13663–65 (King).

[156] 86 Cong. Rec. 4541 (Satterfield); *see also* 4593 (Springer); 13815 (Michener).

[157] 13667 (King).

[158] 13665 (King).

[159] 4591 (Hancock).

[160] 13665, 13667–68 (King).

[161] 13665, 13669 (King).

[162] 13952 (Sumners).

[163] 4593 (Angell), 13672, 13676 (King).

[164] 86 Cong. Rec. 4595 (Rankin); see also id. at 13948 (Rankin).

empowering unelected judges with lifetime appointments would create a "judicial fascisti."[165] Opponents anticipated that the Bill would "destroy democracy and . . . paralyze every governmental agency they did not like by interminable and endless litigation."[166] Their arguments did not prevent the House and Senate from passing the Bill.[167]

FDR vetoed the Walter-Logan Bill on December 18, 1940.[168] He defended administrative adjudication as a necessary "modern reform" and announced that he "could not conscientiously approve any bill which would . . . place the entire functioning of the Government at the mercy of never-ending lawsuits and subject all administrative acts and processes to the control of the judiciary."[169] FDR recognized the need for administrative reform but preferred to await the report of the committee he had asked the Attorney General to form the prior year to study "this complicated field."[170] Later that day, the House failed to override FDR's veto.[171]

3. The Attorney General's Committee Report

The Attorney General's Committee on Administrative Reform ("AG's Committee")—comprised of seven liberal and four conservative judges, professors, and practitioners—issued its report on January 22, 1941.[172] The 250-page report discussed the growth and characteristics of administrative agencies before addressing in turn public information, informal and formal adjudication, judicial review of adjudication, rulemaking, a proposed Office of Administrative Procedure, and recommendations concerning individual agencies. The report included a proposed bill and was supported by twenty-seven monographs describing in detail the practices of particular agencies.[173] Three of the AG's Committee's four conservatives joined a separate statement expressing Additional Views and Recommendations, including their own proposed bill.[174]

The AG's Committee Report presented the liberal majority's findings in a neutral, almost scientific tone. It forthrightly acknowledged the debate about administrative reform,[175] but only explicitly (or nearly so) addressed the concerns over agencies' authoritarian tendencies in a limited number of contexts. First, the majority acknowledged that the lack of published

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[165] 86 Cong. Reg. 4530, 13947 (Rankin); *see also* Shepherd, *supra* note 1, at 1592–93, 1628–29. Speaking about a proposed amendment to the New York Constitution, Mayor Fiorello La Guardia said, "In Germany they do it with robe a brown shirt, but here they do it with a black robe." Ernst, *Politics*, *supra* note 32 at 349.

[166] 86 Cong. Rec. 1940 (Rankin); Brazier dissertation, *supra* note **Error! Bookmark not defined.**, at 188; Shepherd, *supra* note 1, at 1629.

[167] 86 Cong. Rec. 4743 (Apr. 18, 1940); 86 Cong. Rec. 13,748 (Nov. 26, 1940).

[168] Franklin Delano Roosevelt, The President Vetoes the Bill Regulating Administrative Agencies, Note to the House of Representatives, Dec. 18, 1940, in 1940 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 616 (1941).

[169] *Id.* at 619.

[170] *Id.* at 619, 620.

[171] 86 Cong. Rec. 13,953 (1940).

[172] COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8 (1941); *see also* Shepherd, *supra* note 1, at 1632.

[173] S. DOC. NO. 77-8, at 4.

[174] *Id.* at 203–47. The final member of the AG's Committee, D. Lawrence Groner, drafted his own statement. *Id.* at 248.

[175] *Id.* at 1–2, 43.

information about agency operations led to complaints that agencies were "a government of men."[176] Where agency procedures were not "clearly outlined," the majority conceded, "charges of 'star-chamber proceedings' may be anticipated."[177] And where agency rules did not affirmatively provide "the basic outlines of a fair hearing," parties were unlikely to believe that a fair hearing would be afforded.[178] Thus, to the majority, one response to charges of agency authoritarianism was to require agencies to publish their rules of procedure.

Second, the liberal majority proposed that mandating competence and impartiality in formal agency adjudicators would meet "a great part of the criticisms of administrative agencies."[179]

Third, the majority addressed the "current discussions of the administrative process" by advocating separation of each agency's investigative and prosecutorial functions from its judging functions.[180] That separation would ensure that adjudicators would bring "that dispassionate judgment which Anglo-American tradition demands of officials who decide questions."[181]

Fourth, the majority suggested that opening formal adjudications to the public would prevent agencies from using "arbitrary methods."[182] "Star chamber methods cannot thrive where hearings are open to the scrutiny of all."[183]

Finally, the majority endorsed judicial review as a "check against excess of power and abusive exercise of power in derogation of private right."[184] While the majority believed that judicial review would prevent agencies from exceeding the bounds of their delegated authority, it did not think courts should have the power to undermine the values that led to the establishment of agencies in the first place.[185]

The AG's Committee's conservative minority also avoided the rhetorical flourishes that had previously dominated the congressional debate.[186] The minority statement began by acknowledging that "[a]dministrative agencies are staffed for the most part by intelligent, capable, hard-working, and conscientious men and women. No careful student of administrative law would impair their efficiency, yet all desire that their procedures promote justice, fairness, and responsiveness to the public will, as in a democracy they should."[187]

The minority emphasized that separating prosecutorial and adjudicative functions was part of "the essence of fair adjudication" in the governments of "English-speaking peoples."[188] Thus, for formal

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[176] *Id.* at 25.
[177] *Id.*
[178] *Id.*
[179] *Id.* at 43–44; *see also id.* at 46.
[180] *Id.* at 55.
[181] *Id.* at 56.
[182] *Id.* at 68.
[183] *Id.* at 68.
[184] *Id.* at 76.
[185] *Id.* at 77–78.
[186] Even the Committee's most conservative member, Lawrence Groner, Chief Justice of the United States Court of Appeals for the District of Columbia, avoided such rhetorical flourishes in his separate statement. *Id.* at 248–50.
[187] *Id.* at 203.
[188] *Id.*

adjudications, the minority preferred that there be both "internal" separation of functions within agencies and "review by an independent administrative tribunal or specialized court."[189]

The minority also endorsed judicial review as "one of the important balances in our governmental system."[190] The minority agreed with the majority that effective judicial review should check agency "error or abuse of power" without "hamper[ing] administrative efficiency."[191]

Finally, the minority advocated strongly for "a legislative statement of standards of fair procedure"—"not a detailed code, but a set of principles and a statement of legislative policy."[192] Any opposition to such legislation to govern agencies, the minority said, would be tantamount to "a recognition of rejected forms of government."[193]

The AG's Committee shifted the tone of the administrative reform debate considerably. Its report "won significant applause" and "reassured readers that the Administrative State was not, in fact, rife with violations of individual rights."[194] The AG's Committee succeeded in deflecting concerns about "administrative absolutism" and refocusing the discussion on "administrative capabilities."[195]

Subsequently, the Senate Judiciary Committee hearings in the spring of 1941 were largely devoid of the kind of political rhetoric that characterized earlier deliberations. The nearly seventeen hundred pages of transcripts and reports barely mention totalitarianism, fascism, dictatorship, or even absolutism, except in the testimony of ABA Committee Chair McGuire and in that Committee's reports, which were included in the hearing record.[196] In his testimony, McGuire queried whether the United States would "go totalitarian in an effort to escape pressure groups—to escape a Frankenstein of our own creation."[197] The ABA Committee's 1940 report warned that the United States was "the only oasis in a desert of totalitarianism."[198] "It is as sure as night follows day," the ABA Committee said, "that the continued statutory increase in the executive prerogative, at the expense of the two other coordinate branches of the government . . . will eventually destroy our federal system of government and convert it into an autocracy."[199] In its lengthy disquisition on the superiority of the United States' constitutional structure, the ABA Committee emphasized the need for judicial review of executive decisions, calling it "the essence of tyranny for an individual to be required to accept an administrative decision regardless of its injustice and error."[200] The report expressed support for the bill proposed by the

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[189] *Id.* at 208; *see also id.* at 205, 206.

[190] *Id.* at 209.

[191] *Id.* at 209–10.

[192] *Id.* at 214, 215.

[193] *Id*. at 215.

[194] Joanna Grisinger, *L a w i n A c t i o n : T h e A t t o r n e y G e n e r a l ô s C o m m i t t e Procedure*, 20 J. POLICY HISTORY 379, 403 (2008).

[195] *Id*. at 404.

[196] *Administrative Procedure: Hearings on S. 674, S. 675, and S. 918 Before a Subcomm. of the S. Comm. on the Judiciary*, 77th Cong. (1941).

[197] *Id.* at 955.

[198] 66 ABA 441 (*Administrative Procedure: Hearings on S. 674, S. 675, and S. 918 Before a Subcomm. of the S. Comm. on the Judiciary*, 77th Cong. 1085 (1941)).

[199] *Id*. at 444.

[200] *Id*. at 451; *see also id.* at 443, 450–51.

AG's Committee minority.[201] At its annual meeting in Indianapolis in Fall of 1941, the ABA officially endorsed the position of its own Administrative Law Committee.[202]

D. Wartime

The United States entered World War II on December 8, 1941, the day after the attack on Pearl Harbor. During the war, Americans' fear of authoritarianism intensified.[203] People were concerned that a citizenry regimented for the war effort might be "easily manipulated by a totalitarian dictator" or perhaps even "clamor[] for one."[204]

That fear was, in some instances, directed toward administrative agencies. As Professor Schiller documented, the wartime "encounter with totalitarianism—both abroad and on the home front—diminished people's trust in the Administrative State, which they began to associate with the unchecked power of fascism."[205] Where once Americans valued expertise, now expert agencies appeared to be a prelude to complete executive power.[206] "America's encounter with the bureaucratic totalitarianism of Hitler and Stalin sullied the promise of expert administration."[207]

Fear of the Administrative State's authoritarian tendencies reached "across the political spectrum and . . . entered mainstream culture."[208] Even New Deal liberals began to express such fears.[209] Academics previously sympathetic to the Administrative State began to voice concerns that agencies were overly bureaucratic, prone to prioritizing expertize over public participation, captured by the industries they regulated, and indifferent to "the wishes of the coordinate branches of government."[210]

Americans' fears intensified when the federal bureaucracy exploded with twenty-six new agencies related to the war effort.[211] The wartime agencies' incompetence, inefficiency, and intimidation did not help their reputations.[212] Nor did their secretiveness, their obscure and excessively detailed regulations, or their apparent disregard of the public interest and solicitude for the very industries they were meant to regulate.[213]

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[201] *Id*. at 449–53.

[202] *Id*. at 403–04.

[203] Schiller, *Reining*, *supra* note 30, at 189.

[204] Schiller, *Free Speech*, *supra* note 23, at 80; see also Schiller, *Reining*, *supra* note 30, at 189.

[205] Schiller, *Reining*, *supra* note 30, at 185, 189.

[206] *Id*. at 189.

[207] Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1404 (2000); *see also* Schiller, *Free Speech*, *supra* note 23, at 95.

[208] Schiller, *Reining*, *supra* note 30, at 190; see also Schiller, *Free Speech*, *supra* note 23, at 88–89.

[209] Schiller, *Reining*, *supra* note 30, at 189–90; Schiller, *Free Speech*, *supra* note 23, at 90; Schiller, *Enlarging*, *supra* note 207, at 1404.

[210] Schiller, *Reining*, *supra* note 30, at 194–95. *See generally* IRA KATZNELSON, DESOLATION AND ENLIGHTENMENT: POLITICAL KNOWLEDGE AFTER TOTAL WAR, TOTALITARIANISM, AND THE HOLOCAUST 113 (Columbia University Press 2003) (showing that intellectuals after World War II "were charged by anxiety, concerned for the stability and capacity of liberal democracy in the United States"); *see also id.* at 117.

[211] Kovacs, *A History*, *supra* note 125, at 695.

[212] Schiller, *Reining*, *supra* note 30, at 195.

[213] *Id*. at 192.

The wartime agencies' rationing and production controls became a "daily presence—and irritant—for consumers and businesspeople."[214] Indeed, the Office of Price Administration rationed over ninety percent of consumer goods during the war.[215] People blamed federal agencies for inflation and chronic shortages.[216] Volunteer price checkers who snitched on violators "reminded some observers of totalitarian block wardens or 'kitchen gestapo.'"[217] In 1943, the House of Representatives created the Select Committee to Investigate Acts of Executive Agencies Beyond the Scope of their Authority.[218] That Committee investigated the wartime agencies' abuse of authority, fanning antibureaucratic sentiment and spurring the FDR administration to work with the Senate Judiciary Committee on a compromise bill.[219]

E. The Administrative Procedure Act of 1946

Two weeks after Allied forces stormed the beaches of Normandy on D-Day in 1944, Senator Pat McCarran and Representative Hatton Sumners introduced the bill that became the APA.[220] The ABA Committee had drafted the bill as a compromise between the majority and minority proposals of the AG's Committee.[221] The history of that bill need not be repeated here.[222] It suffices to say that the debates lacked the vicious rhetoric of the pre-war years. Indeed, terms like totalitarianism, fascism, dictatorship, and absolutism make only the slightest appearances in the official legislative history of the APA.[223]

Harry Truman assumed the presidency on April 12, 1945, after FDR died three months into his fourth term.[224] Truman did not share FDR's objection to administrative reform.[225] As a Senator, Truman had initiated a three-year investigation of the United States' war preparedness and defense contracts,[226] which gave him an intimate understanding of "the defects both in the United States' war effort and in the agencies' role in the effort."[227] In addition, while the APA worked its way through

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[214] Ernst, *In a Democracy*, *supra* note 40, at 49; *see also* ERNST, *supra* note 31, at 138 (stating that Pearl Harbor "opened a new chapter in the history of the administrative state, with regulation that was far more extensive and intrusive than that of the New Deal").

[215] Kovacs, *A History*, *supra* note 125, at 695.

[216] Brazier, *supra* note 20, at 218; Kovacs, *A History*, *supra* note 125, at 695.

[217] Schiller, *Reining*, *supra* note 30, at 194.

[218] H. Res. 102, 78th Cong. (1943).

[219] Brazier, *supra* note 20, at 218.

[220] S. 2030, 78th Cong. (1944); H.R. 5081, 78th Cong. (1944).

[221] Kovacs, *Rules About Rulemaking*, *supra* note 15, at 528.

[222] *See generally* Kovacs, *A History*, *supra* note 125; Shepherd, *supra* note 1.

[223] During the floor debates, Representative Sam Russell of Texas objected that the phrase "[e]xcept as otherwise expressly required by statute" in the judicial review provision "would preserve the dictatorial powers of that agency or that authorization by law." ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 1944-46, at 386 (1946). Also included in the record is an article from the Denver and Colorado Bar Association's journal in which the author charged that advocates of administrative reform "have used, somewhat carelessly, clichés" like "dictatorship" and "tyranny." *Id.* at 328 (quoting Allen Moore, *The Proposed Administrative Procedure Act*, DICTA (Jan. 1945)); *see also id.* at 329, 336.

[224] Kovacs, *A History*, *supra* note 125, at 698.

[225] Shepherd, *supra* note 1, at 1677.

[226] JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 33–34 (2012); Shepherd, *supra* note 1, at 1658.

[227] Shepherd, *supra* note 1, at 1658.

Congress, other concerns occupied Truman. The House passed the APA when the national railroad unions were on strike and Truman "could devote neither attention nor political resources to the APA."[228] That distraction, along with the public's anti-bureaucratic sentiment and Attorney General Tom Clark's weak bargaining with congressional conservatives, "painted Truman into a corner."[229] He signed the APA into law on June 11, 1946.[230]

II. HOW FEARS OF AUTHORITARIANISM INFLUENCED THE APA

The fear of authoritarianism influenced the APA profoundly. Most fundamentally, the APA codified the consensus that the federal bureaucracy need not result in authoritarianism.[231] June 11, 1946, marked the moment when the United States accepted the existence of the "Administrative State." As this author has said elsewhere, "[t]he APA represents an extraordinary moment of deliberative democracy."[232] Following years of debate among the Supreme Court, Congress, the FDR and Truman administrations, the ABA, and other interested parties, the APA "essentially legitimated the administrative state."[233] In exchange for that affirmation, congressional conservatives and the Supreme Court demanded that federal agencies be procedurally constrained and subject to judicial oversight.[234] With those safeguards in place, the parties to this monumental legislative bargain agreed "to permit extensive government, but to avoid dictatorship and central planning."[235]

Judicial review was the key to preventing agencies from becoming the pawns of a dictator. As Professor Schiller explained, in the late 1930s and early 1940s, Americans increasingly turned to the courts to protect their civil liberties "from the deadly tide of totalitarianism."[236] From its creation in 1933, the ABA Committee highlighted the need for courts to oversee federal agencies.[237] Its influential 1938 report pinpointed as the central flaw of "administrative absolutism" the lack of judicial review of agency decisions.[238] O.R. McGuire's testimony on the Walter-Logan Bill emphasized that courts could prevent dictatorship by keeping agencies within the bounds of their statutory authority.[239] Supporters of the Bill picked up on that theme in the floor debates, equating the lack of judicial review with totalitarianism.[240] Even the liberal majority of the AG's

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[228] *Id.* at 1659; *see also* Brazier, *supra* note 20, at 219.

[229] Brazier, *supra* note 20, at 220.

[230] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

[231] *Cf.* Grisinger, *supra* note 226, at 60–61 ("The ABA and members of Congress used the APA to trumpet the fact that due process had been brought to the Administrative State, and to reassure Americans that the agencies and commissions had been brought under control.").

[232] Kovacs, *Constraining*, *supra* note 15, at 84.

[233] *Id.* at 65; *see also id.* at 84; Grisinger, *supra* note 226, at 11, 77 (2012); Shapiro, *supra* note 22, at 452–53

[234] Kovacs, *Constraining*, *supra* note 15, at 89–90; Rodriguez & Weingast 40, 42, 44; Schiller, *Reining*, *supra* note 30, at 201.

[235] Shepherd, *supra* note 1, at 1559.

[236] Schiller, *Free Speech*, *supra* note 23, at 75–76; *see also id.* at 81–82.

[237] *See supra* notes 35 & 106.

[238] *See supra* note 121 & 124.

[239] *See supra* note 138; *see also supra* note 200.

[240] *See supra* text accompanying notes 152–156.

Committee recognized judicial review as a necessary check on agency abuses of power.[241] Notably, the 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."[242] The grant of judicial review in section 10 of the APA for "[a]ny person suffering legal wrong because of any agency action"[243] would bring agencies "into harmony with the rule of law,"[244] protect private interests,[245] and preserve congressional control over agencies, [246] thus preventing executive overreach.

Also from the beginning of the debate about administrative reform, the ABA Committee and others viewed separation of functions as critical to preventing authoritarianism.[247] Analogizing to constitutional separation of powers, the ABA Committee insisted that agencies' legislative, executive, and judicial functions be segregated.[248] Combining those functions "dispensed with our principal safeguard against autocracy"[249] and was another essential characteristic of what the ABA Committee called "administrative absolutism."[250] Walter-Logan Bill supporters shared this view.[251] Even FDR's Brownlow Committee endorsed separation of functions in the context of independent agencies,[252] and no one on the AG's Committee disagreed.[253] Relatedly, proponents of administrative reform believed that independent adjudicators would temper agencies' authoritarian tendencies.[254] Again, liberals did not disagree; the AG's Committee majority recognized that adjudicators must demonstrate impartiality and "dispassionate judgment."[255]

Section 5(c) of the APA answered these concerns by prohibiting investigators and prosecutors from supervising adjudicating officers or participating in the decisionmaking process,[256] and section 7(a) added the requirement that formal hearings "be conducted in an impartial manner."[257] Republicans were not fully satisfied with these provisions, but felt they were "the first important step in the direction of dividing investigatory, regulatory, administrative, and judicial functions in Government agencies."[258]

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[241] *See supra* note 185.

[242] *See supra* note 223.

[243] PUB. L. NO. 79-404 § 10(a) (1946).

[244] Schiller, *Reining*, *supra* note 30, at 190; *see also* Ernst, *Politics*, *supra* note 32 at 334, 339.

[245] *See supra* notes 124 & 184.

[246] Brazier dissertation, *supra* note **Error! Bookmark not defined.**, at 135; Grisinger, *supra* note 194, at 386; Shepherd, *supra* note 1, at 1602, 1605, 1609.

[247] *See supra* notes 35–37, 99.

[248] *See supra* notes 103–106; Shepherd, *supra* note 1, at 1571.

[249] *See supra* note 103.

[250] *See supra* notes 122 & 124.

[251] *See supra* notes 162 & 163; Brazier, *supra* note 20, at 211 (explaining that Walter-Logan Bill supporters believed that enhancing separation of powers would redress executive supremacy).

[252] *See supra* note 71.

[253] *See supra* notes 180, 188–189; Grisinger, *supra* note 194, at 395; Schiller, *Reining*, *supra* note 30, at 198.

[254] *See supra* notes 100, 123, 139, 161.

[255] *See supra* notes 179 & 181.

[256] Pub. L. No. 79-404 § 5(c) (1946).

[257] Pub. L. No. 79-404, § 7(a).

[258] Shepherd, *supra* note 1, at 1671 (quoting 92 Cong. Rec. 5655 (1946) (Hancock)).

Though they played second fiddle to judicial review through much of the administrative reform debate, concerns about agency procedure persisted.[259] The ABA Committee expressed concern about the lack of due process in agency adjudications in its first report,[260] and it endorsed notice-and-comment rulemaking as a means of constraining agencies beginning in 1937.[261] Supporters of the Walter-Logan Bill saw uniform procedure as another way to "keep agencies in line."[262] By the time of the Walter-Logan floor debates, supporters had come to see procedural safeguards in both rulemaking and adjudication as a critical element of any effort to prevent authoritarianism.[263] They called for agencies to mimic Congress by providing public hearings on proposed rules and to mimic courts with notice, cross examination, and written decisions based on a record.[264]

The AG's Committee further shifted the focus of the administrative reform debate toward procedural reform.[265] By the time the Committee issued its report in 1941, courts were no longer "a safe haven for conservatives."[266] They "might delay agency action, but courts would no longer so surely strike down the agency action."[267] Thus, both the liberal majority and conservative minority on the AG's Committee recommended procedural reforms to prevent agencies from becoming authoritarian.[268] The majority suggested opening formal adjudications to the public to avoid allegations of "star chamber methods."[269] The minority went further, advocating a codification of "standards of fair procedure" to avoid slipping into a "rejected form[] of government."[270]

The APA answered these calls for procedural constraints to preserve democracy. In rulemaking, the APA mandated that agencies provide notice of the proposed rule, an opportunity for the public to express its views, consideration of the public comments, and publication of the final rule with "a concise general statement of [the rule's] basis and purpose."[271] In adjudications, the APA imposed "uniform standards . . . that made agencies behave more like courts."[272] It required notice of the time, place, and nature of proceedings, the legal authority upon which the agency

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[259] *See* Shepherd, *supra* note 1, at 1565, 1583.

[260] *See supra* note 35.

[261] *See supra* note 109.

[262] *See supra* note 142; see also supra note 145.

[263] *See supra* notes 158–160; *see also* Schiller, *Reining*, *supra* note 30, at 197–98 ("agencies had to be forced into the traditional legal molds (separation of powers, judicial review, rules of evidence, cross-examination) in order to protect liberty").

[264] *See supra* notes 159–160; *see also* Ernst, *Politics*, *supra* note 32 at 340, 369; Grisinger, *supra* note 194, at 383–84.

[265] Shepherd, *supra* note 1, at 1644–45; *see also* Grisinger, *supra* note 194, at 408 ("the work of the Attorney General's Committee helped to move the discussion away from administrative abuses and toward a more pragmatic discussion of the administrative process").

[266] Grisinger, *supra* note 194, at 404.

[267] Shepherd, *supra* note 1, at 1644.

[268] *See* Grisinger, *supra* note 194, at 404 ("Instead of relying on courts to protect individual rights, the members of the Attorney General's Committee demonstrated how well-designed administrative procedures could constrain administrative discretion."); *see also* Grisinger, *supra* note 226, at 55.

[269] *See supra* notes 182–183.

[270] *See supra* notes 192–193.

[271] Pub. L. No. 79-404, § 4(a), (b). These provisions reflected the Progressive idea that agencies could become "forums for pluralist bargaining among affected interest groups." Tushnet Administrative Law in the 1930s at 1626.

[272] Schiller, *Reining*, *supra* note 30, at 198–99.

relied, and "the matters of fact and law asserted."[273] The APA granted interested parties the opportunity to submit arguments and evidence.[274] It required that independent adjudicators with powers akin to those of a common law judge preside over formal hearings.[275] And it mandated that agencies base their decisions upon the record produced at the hearing[276] and include "findings and conclusions, as well as the reasons or basis therefor."[277]

Finally, the AG's Committee majority recognized that the opacity of agency operations fueled public suspicions. The majority believed that publication of agencies' procedural rules would build trust.[278] Thus, section 3 of the APA required agencies to publish descriptions of their organization and delegations of authority, their rules of procedure and forms, their substantive rules and policy statements, and their opinions or orders in adjudications.[279]

III. WHY THE APA FAILED TO PREVENT DEMOCRATIC BACKSLIDING

The fear of authoritarianism shaped the APA profoundly. Yet, the APA has failed to prevent democratic backsliding in the United States. Certainly, many factors have contributed to the growth of executive power at the expense of Congress and the courts. This Part identifies ways in which the APA itself failed to forestall that development. Of course, hindsight is 20/20.[280] The objective here is not to criticize the 79th Congress, but rather to inform a discussion of how the APA should be interpreted and amended to assist in preserving a healthy balance of powers in American democracy.

A. The President

The APA did not exert adequate control over the President to prevent "a steady accretion of power in the chief executive."[281] First, and most obviously, the APA did not apply to the President in sufficiently unambiguous terms. As this author has explained elsewhere, the APA's text and history show that the President should be considered an "agency" subject to both procedural constraints and judicial review.[282] Among other

[273] Pub. L. No. 79-404, § 5(a).

[274] *Id.* at §§ 5(b), 7(c), 8(b).

[275] *Id.* at § 7(a), (b).

[276] *Id.* at § 7(d).

[277] *Id.* at § 8(b).

[278] *See supra* notes 176–177.

[279] Pub. L. No. 79-404, § 3(a), (b); *see also* Grisinger, *supra* note 194, at 407.

[280] *Cf.* Lisa Lim, *How the term 20/20 evolved ï from visual acuity to general excellence*, POST MAGAZINE (Jan. 6, 2020), https://www.scmp.com/magazines/post-magazine/short-reads/article/3044330/how-term-20/20-evolved-visual-acuity-general ("The semantic leap from 20/20 meaning 'seeing well' to encompassing the quality of being superlative in other domains appears to have happened through jive talk – jazz musicians' slang, which developed from African-American vernacular English in Harlem, New York, and was adopted more widely in African-American society, peaking in the 1940s.").

[281] *See supra* note 13.

[282] Kovacs, *Constraining*, *supra* note 15, at 83–88; *see also* Kathryn E. Kovacs, *The Supersecretary in Chief*, 94 S. CAL. L. REV. P.S. 61, 75–78 (2020).

things, the APA defined "agency" to include "each authority . . . of the Government of the United States," a definition that is broad enough to encompass the President. Moreover, the definition of "agency" expressly exempted Congress and the courts, as well as some particular presidential functions, but not the President generally.[283] That omission "justif[ies] the inference that [the President was] excluded by deliberate choice, not inadvertence."[284] In addition, the APA stands in stark contrast to the Walter-Logan Bill, which expressly exempted the President.[285] More than forty-five years after its passage, however, the Supreme Court employed a version of the canon of constitutional avoidance to hold that the President is not subject to the APA.[286]

The APA's failure to expressly subject the President to its provisions has facilitated the growth of presidential power.[287] It has allowed presidents of both parties to take actions that have tremendous impacts on the American public "without following the APA's procedural mandates and without full judicial review."[288] President Trump, for example, unilaterally barred the immigration of people who do not have health insurance and redirected billions of dollars to building a wall between the United States and Mexico.[289] Such unilateral decisionmaking by a single person is the hallmark of authoritarianism.[290] Applying the APA to the President would cabin the executive's ability to impose such sweeping dictates and could forestall further democratic backsliding in the United States.[291]

Second, Congress, the ABA, and others involved in drafting the APA did not anticipate that presidents would take on the role of "Supersecretary in Chief,"[292] as they have in the decades since its passage. The President may properly oversee other executive branch officers when they make decisions pursuant to statutory delegations of authority.[293] But now, Presidents of both parties go well beyond that oversight, dictating those officers' decisions or stepping into their shoes to exercise their authority, even where the President does not otherwise have statutory or constitutional power.[294] President Obama, for example, dictated a new

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[283] Pub. L. No. 79-404, § 2(a) (1946); Kovacs, *Constraining*, *supra* note 15, at 83–84.

[284] Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (quoting United States v. Vonn, 535 U.S. 822, 836 (2001)).

[285] H.R. 6324, 76th Cong. § 1(2) (1939); Kovacs, *Constraining*, *supra* note 15, at 86.

[286] Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) (requiring "an express statement by Congress" to subject the President to judicial review for abuse of discretion).

[287] Perhaps if had Congress realized that its control of federal agencies alone would not abate the drift toward authoritarianism, it would have drafted the APA to encompass the President more clearly. Liberals and conservatives may even have agreed on this issue had they attempted to address it. *Cf.* Rosenblum, *supra* note 17, at 64 ("Roosevelt . . . explicitly endorsed limitations on his power, divisions within the executive branch, and the vesting of authority in officers he could not remove or control"); Shapiro, *supra* note 22, at 457–58 (explaining that liberal enthusiasm for a strong presidency waned among liberals and grew among conservatives during the Truman administration). Or perhaps confronting this issue head-on would have unbalanced the careful compromise that led to the APA's unanimous passage.

[288] Kovacs, *Constraining*, *supra* note 15, at 67.

[289] *See id.* at 67–68.

[290] *See id.* at 120.

[291] *See id.* at 99; *see also id.* at 98–115.

[292] *See* Kovacs, *Supersecretary*, *supra* note 282, at 72–74.

[293] *Id.* at 64; Nina Mendelson, *Disclosing Political Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1131 (2010).

[294] Kovacs, *Supersecretary*, *supra* note 282, at 65–69.

immigration enforcement policy, even though the Immigration and Nationality Act delegates enforcement discretion to the Secretary of Homeland Security.[295] Critically, because the President is not considered an "agency" under the APA, the President acting as Supersecretary in Chief assumes statutory power without satisfying the conditions on that power: APA procedure and judicial review.[296] The President as Supersecretary in Chief effectively strips congressional delegations to agencies of their procedural constraints and judicial oversight, thus approaching authoritarian governance.[297] Subjecting the Supersecretary in Chief to the APA would restore some balance between the President, Congress, and the courts.[298]

Third, the APA did not forestall the increased politicization of federal executive branch agencies.[299] Since the APA's enactment, the number of political appointees in the federal government has risen dramatically, reaching almost four thousand today.[300] Perhaps that development was inevitable with the increasing size of the federal bureaucracy. Nonetheless, the 79th Congress did not draft the APA anticipating that so much agency management would shift to the President's immediate control; indeed, the APA did not address personnel management at all. That omission left a hole in the fabric of agency control that has grown ever wider as Presidents have exerted increasing influence over agency personnel.[301]

B. The Courts

The APA also failed to prevent the courts from exacerbating democratic backsliding. As this author explored in depth elsewhere, the federal judicial rules about rulemaking have added layers of procedure to the APA's barebones provisions.[302] This increased complexity has made agency policymaking difficult and slow, inspiring Presidents to make policy unilaterally.[303] In adjudication, the courts have allowed departures from the APA's norm of adjudicator independence. In his contribution to this Symposium, Professor Christopher Walker explores the "new world" of adjudication by "less-independent administrative judges, hearing

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[295] *Id.* at 66.

[296] *Id.* at 63.

[297] *See supra* note 13.

[298] Kovacs, *Supersecretary*, *supra* note 282, at 75–78.

[299] *See generally* David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095 (2008).

[300] *See* David J. Barron, From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization, 76 Geo. Wash. L. Rev. 1095, 1122–28 (2008); Michael A. Livermore, Political Parties and Presidential Oversight, 67 Ala. L. Rev. 45, 71 (2015); Zach Plaker, *Help Wanted: 4,000 Presidential Appointees*, PARTNERSHIP FOR PUBLIC SERVICE (Mar. 16, 2016), https://web.archive.org/web/20170112205457/http://presidentialtransition.org/blog/posts/160316_help-wanted-4000-appointees.php; Editorial Board, *Donald Trump is Now Hiring*, NY TIMES (Nov. 14, 2016), https://www.nytimes.com/2016/11/14/opinion/donald-trump-is-now-hiring.html.

[301] *Cf.* Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 YALE L.J. 1002, 1036 (2017) (finding an empirical relationship between the number of presidential appointees and agency political responsiveness).

[302] Kovacs, *Rules About Rulemaking*, *supra* note 15, at 547–49, 555–59.

[303] *Id.*

officers, and other agency personnel."[304] Less independence enables more presidential tinkering with agency decisionmaking.[305]

More generally, the APA did not prevent the Supreme Court from developing an aversion to Congress's innovations in agency structure and control. In the 1930s, the Supreme Court "tolerate[d] legislative innovations that offset the New Deal's transfer of power to the President," but "as the administrative state became more firmly entrenched, the Court seemed to return to its earlier skepticism toward legislative overreaching."[306] *INS v. Chadha*, for example, in which the Court struck down the legislative veto, removed "an important if not indispensable political invention" for Congress to control agencies.[307] Similarly, when the Court struck down the Balanced Budget and Emergency Deficit Control Act in *Bowsher v. Synar*,[308] it eliminated a creative means for Congress "to oversee executive action by means other than the constitutionally prescribed lawmaking procedures."[309] More recently, the Court struck at the heart of independent adjudication when it held in *Lucia v. Securities and Exchange Commission* that the SEC's administrative law judges (ALJs) are "[I]nferior Officers" who must be appointed by the President, "Courts of Law," or "Heads of Departments."[310] After that decision, President Trump moved all federal ALJs out of the competitive civil service and subjected them to political appointment by agency heads.[311] In these ways, among others, the Court has exacerbated the growth of executive aggrandizement and democratic backsliding.

C. The Congress

Congress has played its part in the United States' drift toward authoritarianism as well. Fundamentally, the APA did not prevent Congress from abdicating much of its control of agencies and allowing the President to step into the breach.[312] Recognizing this risk, the 79th Congress attempted to strengthen its oversight of federal agencies to prevent authoritarianism. In 1945, the joint Committee on the Organization of Congress held hearings at which one witness testified that "the present trend of regulatory power toward dictatorship will continue until Congress strengthens its internal organization."[313] The following year, Congress enacted the Legislative Reorganization Act of 1946, which

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[304] Christopher J. Walker, *The Lost World of the Administrative Procedure Act*, 69 G.M.U. L. REV. __ (2021).

[305] *See generally* Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579 (2020) (presenting empirical analysis demonstrating lack of political independence in Immigration Judges' opinions); Catherine Y. Kim, *The Presidency, Immigration, and the Courts*, 68 EMORY L.J. 1 (2018) (exploring increased politicization of agency adjudications).

[306] Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1818 (2004).

[307] 462 U.S. 919, 972 (1983) (White, J., dissenting).

[308] 478 U.S. 714 (1986).

[309] Molot, *supra* note 306, at 1819–20.

[310] 138 S. Ct. 2044, 2050 (2018) (quoting U.S. Const. Art. II, § 2, cl. 2).

[311] EXEC. ORDER NO. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018).

[312] *See* Kovacs, *Rules About Rulemaking*, *supra* note 15, at 554–55.

[313] Hearings Before the Joint committee on the Organization of Congress, 79th Cong, 1st Sess. 494 (1945); *see also* Grisinger, *supra* note 80, at 411.

"promised to end administrative abuses of authority by restoring Congress to its rightful place of primacy over the administrative state."[314] Unfortunately, the Act, which shifted agency oversight from ad hoc investigatory committees to standing committees and reduced the number of committees, turned out to be "more of a political achievement than a real one."[315]

Finally, the APA could not preserve congressional productivity. Though Congress is capable of making policy "even in periods of divided government and partisan acrimony,"[316] it often fails to fulfill that primary responsibility.[317] Indeed, Congress rarely enacts the federal budget on time.[318] As Professor Walker observes, in the past seventy-five years, Congress has amended the APA significantly only five times and not in the past forty years.[319] Congress's ineffectiveness in policymaking and lack of leadership in administrative law leaves a power vacuum; the President and the courts naturally fill the void.[320] As Justice Jackson cautioned in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, Congress's power will slip through its fingers if it "is not wise and timely in meeting its problems."[321]

IV. CONCLUSION

In the 1930s and 1940s, as the Administrative State grew in the United States and fascism grew overseas, the fear that FDR might become the United States' first dictator permeated Congress's deliberation about how to control federal agencies. That fear shaped the final product of that deliberation—the APA—in significant ways. It led Congress to provide for judicial oversight of agency action; require separation of agencies' various functions; build procedural safeguards into agency rulemaking and adjudication; and require agencies to publish their rules and orders.

Yet, though Congress designed the APA to prevent the United States from becoming an authoritarian regime, the APA has failed to prevent presidential power over agencies from escalating dramatically. This Article's analysis shows that to forestall further democratic backsliding, a number of steps will be required.

First, the APA should be reinterpreted or amended to apply to the President when exercising authority delegated by statute to either the President or another federal officer.[322] Second, the APA and related statutes should be reinterpreted or amended to further protect career

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[314] Grisinger, *supra* note 226, at 111 *see also* PUB. L. NO. 79-601, 60 Stat. 812 (1946).

[315] Grisinger, *supra* note 226, at 111; *see also id.* at 123, 124.

[316] Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1460 (2014).

[317] Kovacs, *Rules About Rulemaking*, *supra* note 15, at 554; Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2018 WISC. L. REV. 1097, 1103.

[318] Kathryn E. Kovacs, *Fomenting Authoritarianism Through Rules About Rulemaking*, *in* THE FRONTIERS OF PUBLIC LAW 432 (Jason N.E. Varuhas & Shona Wilson Stark, eds., 2019).

[319] Walker, *supra* note 304, at __.

[320] Kovacs, *Rules About Rulemaking*, *supra* note 15, at 555, 557; Teter, *supra* note 317, at 1108.

[321] 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

[322] *See generally* Kovacs, *Constraining*, *supra* note 15; Kovacs, *Supersecretary*, supra note 282. *See also generally* STEPHEN SKOWRONEK, JOHN A. DEARBORN, AND DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE (OXFORD 2021) (expressing concerns about Congress's statutory constraints on the president).

employees from political influence and to ensure adjudicator independence.[323] Third, the number of political appointees in the executive branch should be limited.[324] Fourth, the federal courts should stop supplementing the APA's text with judicially created rules about rulemaking.[325] Fifth, the Supreme Court should allow Congress to develop innovative mechanisms for controlling agencies. Finally, for its part, Congress must recover its policymaking agility and reclaim its place as the "first among equals"[326] if the United States is to remain a functional democracy.

[323] *See generally* Emily S. Bremer, *Designing the Decider*, 16 GEO. J.L. & PUB. POL'Y 67 (2018); Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, __ U.C.L.A. L. REV. __ (forthcoming), https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=3736360&dgcid=ejournal_htmlemail_u.s.:administrative:law:ejournal_abstractlink; Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2328–35 (2006); Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141 (2019).

[324] *See generally* PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 164–69 (2007).

[325] *See generally* Kovacs, *Rules About Rulemaking*, *supra* note 15.

[326] *See* Leslie B. Arffa, Separation of Prosecutors, 128 Yale L.J. 1078, 1083 (2019) (quoting AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 110–11 (2005)).