Preparation for the topical seminar at the Lewes Library, 3:00 pm, 11/8/23
Topic – The Administrative State
Rich Harris Seminar Leader

Instructions

To prepare for the seminar, please explore the materials and links below, and then write a response of at least 200 words. There are some discussion questions at the end that you may use as writing prompts, but feel free to respond as you wish. Email your written response to lewesseminar@gmail.com no later than Monday, November 6. You are asked to read all the responses from seminar participants prior to the meeting on Wednesday November 8 at 3 p.m.

Introduction

While the there is a lot of current discussion of the "administrative state," some of it quite hyperbolic or even conspiratorial (see references to a so-called "deep state"), this topic has a rich history in the U.S. dating back to the Progressive Era and developing episodically through the New Deal, and the Reagan Revolution. The first scholar to explicitly use the term was Dwight Waldo in his 1948 treatise, *The Administrative State: A Study of the Political Theory of American Public Administration*, in which he argued that architects of the administrative state "have been generally concerned with excluding 'democracy' from administration…and with confining democracy to what is deemed its proper sphere, decision on policy." The Progressive ideal of government by "neutral experts" who apolitically execute democratic policy decisions proved problematic from the start because the administrative state was grafted onto a constitutional framework with which it was in tension. Theodore Roosevelt's 1910 speech at Osawatomie (excerpted in an attachment) is, perhaps, the seminal statement of the rationale for the administrative state and it illuminates the constitutional tensions inherent in that endeavor.

This tension between bureaucracy and democracy reflects Americans' political schizophrenia: in our classical liberal tradition government is a threat to our rights; but in our modern liberal tradition government is the guarantor of our rights. In a sense, the administrative state pounded the square peg of modern liberalism into the round hole of the Constitution's classical liberalism. Nevertheless, the administrative state was a pragmatic American response to the economic ravages, social upheavals, and political corruption of *laissez faire* capitalism in the Gilded Age. (See the attached Power Point for a sense of the problems as they were perceived by early progressives) The Supreme Court, of course, was the main arena of friction between the administrative state and the Constitution (See key cases listed below). However, Congress addressed the tension between bureaucratic expertise and democratic accountability in 1947 with the Administrative Procedures Act (APA), the primary statute governing the administrative state. See the Ballotpedia links below for a good definition of the administrative state and an overview of the APA.

What is the administrative state?

- "The New Nationalism" [excerpted], Theodore Roosevelt's 1910 Osawatomie Speech
- Ballotpedia provides a nice summary definition of the Administrative State Five Pillars of the Administrative State
- Ballotpedia also summarizes The Administrative Procedures Act (1947), the basis of our effort to align the Administrative State with the Constitution, and backstop administrative accountability with judicial review.
- Optional – A comical British perspective: *Yes Minister*, Season 1 - Episode 1

The Contemporary Debate – Paul Verkeuil and Philip Hamburger are leading experts on the administrative state: Verkeuil[1] is a forceful defender; Hamburger[2] is a prominent critic.

- Paul Verkeuil, "The Checks and Balances of the Regulatory State" (from *Valuing Bureaucracy: The Case for Professional Government*)
- Philip Hamburger, "Policies for the Next Administration" (from *Is Administrative Law Unlawful?*)

Administrative State & the Courts: Litigating and Relitigating the New Deal

- *A.L.A. Schechter Poultry v. U.S.* (1935) – Separation of Powers & the New Deal
  - In a 5-4 decision, the Court overturns the centerpiece of the New Deal, The National Industrial Recovery Act, based on the "nondelegation doctrine" (separation of powers). FDR responds with his "court packing" scheme, but Justice Owen J. Roberts switches sides in ensuing cases, setting the federal agencies on firmer ground ("the switch in time that saved nine).
- *Chevron U.S.A. v. NRDC* (1984) – "Deference" to administrative agencies.
  - The Court directs judges to defer to administrative agencies' statutory interpretation if: (a) it is based on a reasonable argument; (b) is not arbitrary and capricious; (c) the statute is ambiguous.
- Lawrence Tribe "Comments on EPA's Clean Power Rule (2014) [Executive Summary]
  - Frustrated by congressional inaction on climate change, President Obama and EPA Administrator Gina McCarthy rely on *Chevron* deference in a novel and expansive interpretation of the 1990 Clean Air Act. Even Progressive scholars like Lawrence Tribe view this as a bridge too far in administrative discretion, as indicated in his response to the EPA's rulemaking.
- *West Virginia v. EPA* (2022) – "*Chevron* deference" constrained.
  - The Court eventually takes up the issue of the Clean Power Rule, and limits *Chevron* deference by asserting a prerogative of judicial review, even of agency action based in reason, if the rule has a significant impact on the economy and society. The so-called "major question doctrine" realigned separation of powers jurisprudence to empower judges v. executive branch administrators.
- *Sackett v. EPA* (2012) – Administrative law judges (ALJs) and due process.
  - Although substantively about wetlands protection and the Clean Water Act, this first *Sackett* case turned on the due process concerns about the authority of federal agencies to issue orders and adjudicate appeals of those orders.
- *Sackett v. EPA* (2023) – "*Chevron* deference" further constrained.
  - This second *Sackett* case dealt directly with the meaning of the Clean Water Act and the reasonableness of the EPA's definition of a wetland. The Court, consistent with its major questions precedent, did not defer to the agency's statutory interpretation.
- *Loper Bright Enterprises v. Raimondo* (2023-24)[3] – Removing a pillar of the administrative state?
  - The Court will hear a direct challenge to *Chevron* deference that could radically restrain administrators' rulemaking discretion, while further asserting judicial authority to interpret statutes. The Court could overturn *Chevron* completely, or narrowly find that the National Marine Fisheries Service cannot use the absence of specific language as a claim of ambiguity under *Chevron*.

Prompt Questions

Is the delegation of legislative (rulemaking) and judicial (administrative tribunals) power to administrative agencies a threat to the Constitutional separation of powers?

Is there an alternative to empowering administrative to write rules that carry the force of law and to adjudicate disputes around those rules?

What might be the effect of overturning *Chevron* deference?

How are federal administrative agencies and officials held accountable, in theory and in practice?

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[1] Verkeuil is a Cardozo School of Law professor and was Barack Obama's Chair of the Administrative Conference of the United States.
[2] Hamburger is a Columbia Law professor and founder of The New Civil Liberties Alliance
[3] This case is scheduled for fall 2023. I'll include the case link when it is available. In the meantime, this link summarizes what is at stake.