1990

Success and the Judicial Power

Frank H. Easterbrook

"Success" and the Judicial Power

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Ten generations of Justices have failed to accommodate the felt need for administrative adjudication to the commands of article III—and one might add article II, for accommodation often entails creating agencies more independent of the President than of judges. Paul Bator's Harris Lectures do a wonderful bit of demolition work on the rationales different Justices (and on the rare occasions when it has been able to assemble a majority, the Court) have offered to explain the enduring toleration of institutions seemingly so at odds with the Simple Model of article III. Metaphysics, categories, balancing, and others all give way to the power of his inquiring mind. No wrecking ball is put to use; the Big Bad Wolf demolishes this edifice with a light breath. He takes us to a place in which many (including me) will be uncomfortable: a world in which the "judicial power of the United States" draws meaning from historical developments rather than *a priori* claims, in which the "judicial power" is one of review rather than origination, just as *Crowell v. Benson*[1] had it.

Why have so many great Justices felt the need to chip away at the foundations of the Simple Model? Why are the felt necessities of the time felt? Paul Bator cannot speak for Marshall I, Holmes, Hughes, Brandeis, Frankfurter, Jackson II, and Harlan II, but he offers us his own view. It flows from a comparison between the demands of efficient public administration and the abyss. To adopt the Simple Model is to doom "a large array of highly successful and useful institutions." (233)[2] Congress has responded to "the practical necessities," (256) "circumstances [that] insistently . . . demand" (236) new approaches, by devising institutions that are "eminently useful and successful." (260) "[I]t would have been quite impossible, psychologically and politically, to create" (239) agencies with tenured decisionmakers. Since independent agencies we must have, the need

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* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. These spare thoughts on Paul Bator's *The Constitution as Architecture: Legislative and Administrative Courts Under Article III,* in this volume, derive from comments I wrote to him while his essay was in draft form. Charles Fried, put in charge of revisions in the essay, thought it unwise to tamper with Paul's work to take account of these thoughts, even though Paul might have done so had he more time. At Professor Fried's request I have revised my comments for publication with Paul's essay but have left them in the provocative form they were offered to Paul, in the hope that they will stimulate thought rather than furnish answers.

1. 285 U.S. 22 (1932).

2. Parenthetical references in the text are to the pages of Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III,* 65 IND. L.J. 233 (1990).

for flexibility is apparent. Given the "inexorable presence of the administrative state," (261) it is "quite unthinkable" (261) to take the Simple Model seriously. That could only produce a "grotesque mismatch of ends and means" (261) that would be "deeply inconsistent with our institutional traditions." (261) Add Robert Jackson's observation that "[t]here is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the [C]onstitution[] . . . into a suicide pact,"[3] and the conclusion is at hand.

Although this understanding of the relation between the administrative state and tenured deciders surely motivates many thoughtful persons in addition to Paul Bator, I doubt that it is the whole story—even the most important part of the story. The administrative state is not the only defense against the Visigoths, tenured administrative judges are not so frightening once we recognize that we already have them in superabundance, and the spectral terror that comes from equating the Simple Model with the downfall of administrative decisionmaking is as insubstantial as other things that go bump in the night.

The Constitution as Architecture asserts repeatedly that the administrative state is a great success. Although many believe so, many more are doubters. Are agencies successful? Compared to what? Often agencies are the chosen instruments of private pressure groups, which find a few deciders on short leashes[4] ideal for their purposes. Specialists may be selected because their views coincide with interest groups. One may describe them as "committed," (238) but to what? Madison's famous 10th Federalist Paper worried about the influence of faction. "Capture" was a term in use well before George Stigler and other economists suggested that the agencies needn't be captured because they were designed from the start to serve the ends of the regulated groups.[5] Administrative agencies come from the same body that enacted the Smoot-Hawley Tariff and funds tobacco subsidies. Many scholars and practical statesmen believe that numerous agencies are rollicking calamities from the perspective of the public weal, and almost everyone believes that about at least one agency—the one he knows best.

Putting to one side the question whether agencies maximize public welfare or that of their patrons, there remain more conventional doubts: agencies

3. Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

4. Members of independent agencies have terms from five to seven years, with most commissioners serving less—in part because they are appointed to unfinished terms, in part because they see their future as employees of the industries they regulate, from which they come and to which they return. The Federal Reserve, with 14-year terms, is the only substantial exception.

5. *See* G.J. STIGLER, THE CITIZEN AND THE STATE (1975); Posner, *Theories of Economic Regulation,* 5 BELL J. ECON. & MGMT. SCI. 335 (1974); Peltzman, *Toward a More General Theory of Regulation,* 19 J.L. & ECON. 211 (1976); Becker, *A Theory of Competition Among Pressure Groups for Political Influence,* 98 Q.J. ECON. 371 (1983); M. OLSON, THE RISE AND FALL OF NATIONS (1984).

running years behind their workload, changing course dramatically as each new President obtains working control, exhibiting neither expertise nor efficient throughput. When agencies succeed (as some surely do), is their success measurably different from that of line officers of the Executive Branch? Are we sure that the Nuclear Regulatory Commission, Interstate Commerce Commission, and Federal Communication Commission do better (whatever that means) than the Environmental Protection Agency, Food and Drug Administration, and Occupational Safety and Health Administration? That the Federal Trade Commission beats the Antitrust Division of the Department of Justice? That the Tax Court's opinions are more searching than those of the Chief Counsel of the Internal Revenue Service? Other liberal democracies flourish without agencies anything like ours, yet it is hard to identify significant differences in administration—except perhaps to admire the practical accommodations of other nations that have endured longer than ours. Think of France, with top-to-bottom control by a unified executive, yet a check imposed by the Conseil d'État, a group of civil servants with (effective) life tenure and adjudicative powers, its members appointed by no one other than themselves.

If the success of the administrative agencies is not as great as *The Constitution as Architecture* implies, neither is the alternative as terrible. What's so "impossible, psychologically and politically" (239) about life tenure for administrative judges? Far from "impossible," it is the norm—not only in Europe, in which specialized courts perform many of the tasks that we assign to agencies, but also in the United States. Thousands upon thousands of administrative law judges decide worker's compensation disputes and dole out disability benefits. They are not elected, as many state judges are. They are not appointed by the President and confirmed by the Senate, as all military officers of flag rank are. They are chosen by civil service methods—*and they serve for life!* Tenure is not formally "life," but then neither is that of article III judges. We serve during "good behavior." So do administrative law judges. Article III scotches mandatory retirement ages for judges; the Age Discrimination in Employment Act does the same for administrative law judges. Although our tradition has been that the "good behavior" of article III judges is tested by impeachment in the House of Representatives and trial in the Senate, while the behavior of administrative law judges is reviewed by the Merit Systems Protection Board, there is an unsettled debate of long standing about whether impeachment and trial are the only ways to remove federal judges. No point in pursuing that one, however; for current purposes the question is whether there is a *practical* difference between the tenure of article III judges and the tenure of administrative law judges. There isn't. Perhaps one could reply that the tenure of administrative law judges doesn't matter much, because their decisions are reviewed by untenured superiors ("administrative appeals judges" at some agencies, members and commissioners at others), but in

France the decisions of the untenured political officials are reviewed in turn by the tenured Conseil d'État, just as in this country they are reviewed by judges with tenure under article III. None of these different models is too terrifying to contemplate.

Why work so hard to derive judicial-power-as-review-power from the contrast between the essential and the unthinkable? Neither aspect is quite so black or white as this Manichaean approach implies. The conclusion comes more naturally from another proposition that appears in *The Constitution as Architecture*: that functional arguments about the scope of "judicial" power are doomed to failure because there is no difference between the tasks that judges and (other) bureaucrats perform. (264-65) The President's duty is faithfully to execute the law. To do this, the President must both interpret the law (to know what to do when confronted with a given situation) and find facts (to know what situation is at hand). Faithful execution *is* the application of law to facts. So the core executive task is little different in principle from the core judicial task.

Procedures spell the difference in the Over-Simple Model. If the official hears testimony and listens to argument, then the "judicial power" is nigh; if the official shoots from the hip, that's the executive power. Of course this would be balderdash. From the beginning, the Executive Branch has employed procedures we think of as "judicial," precisely because they are useful in finding facts. Officials charged with handing out payments to those who fall victim to a fickle government's disdain for its contracts must learn whether the applicant had a contract, and, if the government broke its promise, whether there was an excuse (and if not, what the injury was). Such a task, thought (for a long time) utterly incompatible with the judicial power because the money would come from the Treasury, was neither more nor less judicial in nature as factfinding procedures became elaborate. Thomas Jefferson, who as Secretary of State was charged with the duty of awarding patents to useful inventions, may have entertained argument from applicants (and rivals opposed to monopoly) about what they had accomplished, without creating any greater danger that he was exercising judicial power than would the President's decision to entertain argument and receive evidence before deciding whether to issue a pardon.

Much of what we now think of as "administrative adjudication" evolved within the Executive Branch as law became more pervasive and complex, creating greater need for factfinding procedures to show what "faithful execution" entailed. Administration might be fiat. That would be unwise (and "unfaithful") execution—the more so as the administrator needed to delegate to subordinates. To ensure that the administrator's (rather than the subordinates') approach prevailed, the delegation would include statements of legal criteria; to cut down on arbitrariness, the administrator would insist on factfinding procedures too. And so on and on, as the apparatus of marshalling, presenting, and arguing about facts and rules grows up

within the Executive Branch. As the bureaucracy grows, the cabinet officer will be unable to review all of the subordinates' acts, so comes a second delegation, this time to employees who will review the work of those who make the initial decision. All of this is part of the process of carrying out article II. But in the end it is almost impossible to distinguish from "judicial" power.

Agencies and courts are doing the same thing—unless we conceive the difference to be that between making the decision and ensuring its conformity to law, between execution and (ultimate) review. So *Crowell* conceived the difference. So most Justices have conceived the difference from the beginning. The prime objection to Congress' first effort to lodge the power to award veterans' benefits in the circuit courts was that the subject-matter was incompatible with the "judicial power."[6] When an agency decides, the procedural accouterments do not make the outcome an exercise of the "judicial power" unless it is the end of the line. All of this is consistent with the Simple Model, without posing the slightest threat to administrative agencies, bankruptcy judges, and other officers who decide cases but lack tenure. The *real* threat to administrative agencies came from article II, not article III, and did not survive the special prosecutor case.[7]

The difficult case turns out to be military courts (no review by tenured judges until a few years ago). Veterans' benefits decisions were unreviewable[8] until the creation of an article I Court of Veterans' Appeals this year, with limited review in the article III Federal Circuit. This was not problematic because private parties appeared in veterans' cases only to seek awards from the Treasury, and handing out public money is a classically executive function. Territorial courts do not pose much problem if their decisions are reviewable; anyway, it would not bring down the administrative state to give tenure to judges of the D.C. Superior Court and a magistrate or two in American Samoa. (Judges in Puerto Rico already have tenure.) Perhaps even the military courts may be brought within this framework by denying that they are "courts" at all. (Apologies for the metaphysics; at least I have John Marshall for company.) Military decisions may be reviewed by commanding officers, and they stem from a tradition of summary punishment within the chain of command. Still, if the Simple Model calls for tenure in the military courts, why shrink? We offer persons charged with littering in Yellowstone National Park a right to trial in a U.S. District Court; can it be so repugnant to the national psyche to offer those in the armed forces charged with murder a like opportunity?

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6. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

7. Morrison v. Olson, 108 S. Ct. 2597 (1988).

8. So I thought, anyway. *See* Marozsan v. United States, 852 F.2d 1469, 1485-1502 (7th Cir. 1988) (Easterbrook, J., dissenting).

In the end, then, the Simple Model is neither so hard to swallow as much discussion implies, nor so at odds (once ingested) with the current structure of government. Perhaps it has a future as well as a past.