

# ESSAYS

## INTRODUCTION: THE PLACE OF AGENCIES IN POLARIZED GOVERNMENT

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Peter Strauss's *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*<sup>1</sup> reshaped contemporary thinking about the constitutionality of federal administrative government. When the article appeared in 1984, the Reagan Revolution was in full swing. Reagan's overtly antiregulatory policy stance and his Administration's advocacy of a highly formalist and originalist style of constitutional interpretation fundamentally challenged the post-New Deal administrative state. Aggressive interpretation of Article II led to controversial strategies of White House control: centralized rulemaking review, appointment of agency heads loyal to the President's (anti)regulatory agenda, and attacks on institutions of administrative independence such as the independent regulatory commissions and career civil servants.<sup>2</sup>

*The Place of Agencies* was a masterful defense of the constitutional legitimacy of American administrative government. Professor Strauss insisted on the essential constitutional distinction between the apex—Congress, the President, and the Supreme Court—and the vast apparatus of administration beneath. In this view, the Constitution prescribes strict separation of legislative, executive, and judicial powers only at the apex.<sup>3</sup> Below this level, two other structural principles dominate: a separation-of-functions requirement rooted in due process and a checks-and-balances concern with avoiding excessive accumulation of power in any single governmental entity.<sup>4</sup> Administrative agencies are constitutional so

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1. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573 (1984) [hereinafter Strauss, *Place of Agencies*].

2. See David J. Barron, *Foreword: From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 *Geo. Wash. L. Rev.* 1095, 1130–31 (2008) (noting significant increase in politicization of appointments and agency personnel under Reagan Administration); Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2277–80 (2001) (describing development of centralized regulatory review under Reagan Administration); Kevin M. Stack, *Obama's Equivocal Defense of Agency Independence*, 26 *Const. Comment.* 583, 585–94 (2010) (describing Reagan Administration's attack on independent agencies).

3. Strauss, *Place of Agencies*, supra note 1, at 577–78.

4. *Id.*

long as they have relationships of control and accountability with each of the actors at the apex: “The three must share the reins of control; means must be found of assuring that no one of them becomes dominant.”<sup>5</sup> In emphasizing the constitutional need for significant relationships between agencies and *all* of the “opposed, politically powerful actors at the apex of government,”<sup>6</sup> Professor Strauss pushed back on assertions of unitary presidential control. Rather, as he developed further in later work, the President is to be an “overseer,” not a “decider”—a supervisory role shared in important ways with Congress.<sup>7</sup>

Our own thinking about separation of powers is so deeply indebted to Professor Strauss’s work that we relished the opportunity to consider *The Place of Agencies* thirty years later. Some things have not changed much: centralized regulatory review, politicized agency appointments, and agency independence remain fiercely debated.<sup>8</sup> More fundamentally, however, the world seems a very different place. Funding the government has become an ongoing exercise in political “chicken” that debilitates agency planning<sup>9</sup> and unsettles domestic and international financial markets.<sup>10</sup> Delays have so plagued the agency appointments process that a Democrat-controlled Senate finally exercised the long-threatened “nuclear option” of limiting the filibuster.<sup>11</sup> Overall, the productivity of the 112th and 113th Congresses fell to levels historically associated with national crises.<sup>12</sup> No one would have described the Reagan or Clinton

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5. *Id.* at 579–80.

6. *Id.* at 581.

7. Peter L. Strauss, Foreword: Overseer, or “The Decider”? The President in Administrative Law, 75 *Geo. Wash. L. Rev.* 696, 704–05 (2007) [hereinafter Strauss, Overseer or Decider].

8. The literature on these issues is vast, and Professor Strauss, has not surprisingly, been a leading participant in the ongoing debate. See, e.g. *id.*, at 700–05 (describing and rejecting claims of unitary executive power by the Bush II Administration); Peter L. Strauss, Presidential Rulemaking, 72 *Chi.-Kent L. Rev.* 965, 968–75 (1997) (describing increased presidential role in and politicization of rulemaking). For a sampling of the broader debates in other scholarship on point, see Peter L. Strauss et al., Gellhorn and Byse’s Administrative Law: Cases and Comments 213–42, 685–761 (11th ed. 2011) (discussing centralized regulatory review, presidential direction of agency decisionmaking, agency independence and presidential removal power, and appointments).

9. See Gillian E. Metzger, Agencies, Polarization, and the States, 115 *Colum. L. Rev.* 1739, 1751 (2015).

10. See, e.g., Katy Burne, Andrew Ackerman & Ryan Tracy, Markets Are Anxious Over Fears of Default, *Wall St. J.* (Oct. 12, 2013, 12:22 AM), <http://www.wsj.com/articles/SB10001424052702304500404579129801171185802> (on file with the *Columbia Law Review*).

11. Paul Kane, Reid, Democrats Trigger “Nuclear” Option; Eliminate Most Filibusters on Nominees, *Wash. Post* (Nov. 21, 2013), [http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c\\_story.html](http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html) [<http://perma.cc/3N4V-GEWL>].

12. Daniel Newhauser, No, the 113th Congress Wasn’t the Least Productive Ever, *Nat’l J.* (Dec. 23, 2014), <http://www.nationaljournal.com/congress/no-the-113th-congress-wasn-t-the-least-productive-ever-20141223> [<http://perma.cc/98J7-WZS7>] (citing analyses of political scientists Sarah Binder and David Mayhew).

years as eras of good feeling between the House, Senate, and White House. Still, major social and economic legislation was enacted and government (despite some conspicuous stutters like the 1995 to 1996 shutdowns), for the most part, moved forward.<sup>13</sup> The George W. Bush years saw increasingly incandescent partisan rhetoric and unparalleled presidential adventurism, but the perceived exigencies of September 11 and four years of rare unified party control allowed government, for the most part, to continue.<sup>14</sup> By late in the Bush II Administration, however, scholars had begun to speak of “broken” institutions,<sup>15</sup> and the Obama years have seen growing pessimism about the capacity of a 200-year-old constitutional structure to produce reliable, effective governance.<sup>16</sup>

How does this altered political reality affect the complex inter-institutional roles and dependencies traced out in *The Place of Agencies*? Are gridlock and partisan “tribal warfare”<sup>17</sup> the new normal at the apex of national government? If so, the intricate system of separated, checked-and-balanced powers that Professor Strauss so adroitly described may be vanishing—an anachronism to which lip service must be given, so long as the Constitution is formally unamended, but which must be mitigated and circumvented by those seeking reliable, effective governance. If, instead, hope remains for abating polarization and hyperpartisanship, can the institutions of administrative government below the apex facilitate this shift by, for example, providing opportunities for bipartisan engagement and the emergence of new areas of common ground?

These are very large questions that obviously cannot be resolved in this setting. The pair of essays that follow do, however, make a start.

In *Congressional Polarization: Terminal Constitutional Dysfunction?*, Cynthia Farina looks at the phenomenon of polarization, focusing on the rancorous and embattled legislative branch the Constitution places at the forefront of our system of government. Divided into two chambers with very different representational bases, and saddled by the Constitution and longstanding practice with various supermajoritarian hurdles to action, Congress has always suffered significant structural challenges as a

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13. See David R. Mayhew, *Partisan Balance: Why Political Parties Don't Kill the U.S. Constitutional System* 45 tbl.2.1, 69 tbl.2.3, 73 tbl.2.4 (2011) (presenting success of Reagan and Clinton, with other modern Presidents, in getting legislative agendas through Congress).

14. See *id.* (highlighting passage of USA Patriot Act and other 9/11-driven legislation as well as Bush II Administration's overall success from 2005 to 2006 and in early 2001).

15. E.g., Thomas E. Mann & Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* 17 (2008).

16. See Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 *Colum. L. Rev.* 1689, 1689–91 (2015).

17. Congress as ‘The Broken Branch,’ *Wash. Post* (Oct. 11, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/10/AR2006101001155.html> [http://perma.cc/WB7Q-5ZHB].

political actor—especially as compared with the President.<sup>18</sup> Perhaps for this reason, dire warnings about congressional dysfunction have a venerable history in American political commentary.<sup>19</sup> In recent years, however, institutional disability seems to have degenerated into institutional incapacity. Now, Congress often manages to be only a spoiler of others' initiatives, unable to engage productively in the shared enterprise of governing contemplated by the Constitution.

Hyperpartisan legislative deadlock has already significantly affected the behavior of the other actors at the apex, as well as the operation of administrative government beneath.<sup>20</sup> If this condition is unlikely to improve, the constitutional and policy implications are profound. Balance cannot be maintained, nor can the reins of control over administration be shared, if one of the principal actors has retreated into self-absorbed obstructionism. Professor Farina's contribution reviews the rich political science literature on polarization to discover what is known about its nature, degree, and causes. She finds some core areas of agreement, much unresolved conflict about important dimensions, and little definitive evidence about causation. (This last is perhaps fortunate, for most of the proposed remedies would require changes in the Constitution, embedded electoral processes, or both.) Most important for present purposes, she discerns several areas in which the potential exists for shifts in a depolarizing direction. Things are not certain to get better—but they are also not nearly so certain as the sound-bites suggest to stay this bad.

Against this backdrop of guarded optimism, in *Agencies, Polarization, and the States*, Gillian Metzger examines how high levels of polarization have changed regulatory government and how, in turn, agencies might contribute to changing polarized politics. Partisan warfare conducted within divided government necessarily affects the relationships of control and accountability that are the subject of *The Place of Agencies*. Most centrally, as legislative deadlock undermines Congress's ability to direct agency action, the President is incentivized and empowered to use agencies as tools for unilateral policymaking. Still, these recognized effects of polarization tell only part of the story. With broad powers exercisable without the kinds of inter-institutional agreement that hyperpartisanism can stymie, agencies continue to govern even in highly polarized times. This ongoing ability to make and adapt major federal policy enables agencies to shape, as well as be shaped by, the political environment. A critical element of this dynamic is the role played by state governments in

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18. See, e.g., *The Federalist* No. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (contrasting “[d]ecision, activity, secrecy, and despatch” of energetic single executive with deliberateness of numerous legislature).

19. E. Scott Adler & John D. Wilkerson, *Congress and the Politics of Problem Solving* 3–4 (2013).

20. See Metzger, *supra* note 9, *passim*.

federal programs, which can reinforce national political divides but also motivate new crosscutting alliances.

Professor Metzger examines these complex effects using the Affordable Care Act (ACA) as a case study on administration and polarization in practice. The ACA stands as the poster child for hyperpartisanship. Repealing Obamacare remains the Republican Party's unifying mantra, while the Obama Administration has embraced significant unilateral actions in its zeal to make the Act work. The picture of implementation, however, is far more complex, with red states increasingly reaching deals with the Administration to expand Medicaid and the Department of Health and Human Services taking a flexible approach to bring as many states as possible on board. The story of the ACA thus reinforces the need for more nuanced accounts of the place of agencies in a polarized world.

