Bernadette Meyler
Democratizing the Executive
Maryland "Schmooze" Ticket
February 17, 2013

In discussions of executive power, the question often arises as to whether the president is a better—i.e., more democratically accountable—representative of the people than members of Congress, and whether he is therefore best situated to oversee administrative decision-making and exercise appointment and removal capacities without much oversight.[1] Arguments in favor of this notion of the "unitary executive" often appeal to the fact that the president is elected through a national process, rather than in accordance with local preferences, and to the notion that the president is capable of acting with more alacrity than the supposedly sluggish members of Congress. Opponents of the concentration of power in the executive have suggested various fixes designed to check the possibility of a tyrannical exercise of power by the president. Hence, in "Constitutional Dictatorship: Its Dangers and Its Design," Sandy Levinson and Jack Balkin have suggested, among other measures, the possibility of "a vote of no-confidence mechanism that would allow Congress and/or the public to remove an American president at any time before the next scheduled election."[2] Those who believe the threat of constitutional dictatorship is currently overestimated, like Eric Posner and Adrian Vermeule, instead claim that political checks and public opinion furnish adequate brakes on presidential overreaching even during times of emergency.[3] The focus for both sides has been on majoritarian views, whether expressed through elections or other manifestations of public opinion. Hence, the principal dilemmas of the administrative state in recent years have concerned the presumed lack of political accountability of members of the administrative agencies, mechanisms for remedying this democratic deficit through control by the president, as the sole elected representative of the executive

---

[1] Matthew Stephenson has perhaps most recently summed up this position in his January 2013 essay "Can the President Appoint Principal Executive Officers Without a Senate Confirmation?":

"The pragmatic case for allowing the president to appoint senior executive branch officials without a formal Senate confirmation vote is a straightforward application of a set of familiar arguments for strong presidential control over the administration—arguments that emphasize the president's political accountability, comprehensive vision, and capacity for energetic and decisive action. The current understanding of the Senate's role in confirming presidential nominees both creates a de facto supermajority requirement and releases senators opposed to an appointment from the disciplining effect of having to cast a formal and public "no" vote. This gives the Senate—or a minority of senators whose views would not prevail in a formal up-or-down confirmation vote—too much power, significantly and excessively weakening the president and impeding the functioning of the executive branch." 122 Yale L.J. 940, 947-48.

[2] Sanford Levinson and Jack Balkin, "Constitutional Dictatorship: Its Dangers and Its Design," 94 Minn. L. Rev. 1789, 1860 (2010).

[3] Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* 113 ff. (2010).

branch, followed by concerns about the dictatorial scope of the resulting presidential power, a dictatorial scope that should itself be cabined through appeals to popular—i.e., majority—will. Of course, recourse to law itself—principally constitutional law, although also the directives of Congress—has also been made in the effort to constrain the executive branch, but I would like to put those to the side for the moment.

Instead, I want here to emphasize the extent to which the focus of ensuring political—rather than legal—accountability has rested on a majoritarian account of democracy, one that has recently been undergoing scrutiny within both continental theories of democracy and some American reconsiderations, principally those of John McCormick. Several writers from the continental tradition have questioned the majoritarian principle underlying modern democracy. As Daniel Bensaïd summarized in "Permanent Scandal,"

> Alain Badiou's Platonizing critique of "the tyranny of number" and the majoritarian principle leads him to draw a contrast between politics and "the clash without truth of a plurality of opinions." Jacques Rancière draws the contrast differently, between democracy as a permanently expansive movement and democracy the way it is taught in political science departments as an institution or regime. . . . Both offer the same critique of elections as a reduction of the people to statistics. We live in an age of universal assessment, where everything demands to be quantified and measured, where only number has the force of law, where majority is supposed to equal truth . . . .[4]

In the effort to displace the dominance of the majoritarian model, Rancière has revived one of the principal aspects of ancient democracy, that of selection by lot.

For Rancière, the "scandal of democracy" is the scandal of a form of government that resists any order inscribed by nature, displacing the modes of dominance present in a posited pre-political moment. As he writes,

> Democratic excess . . . is simply the dissolving of any standard by which nature could give its law to communitarian artifice via the relations of authority that structure the social body. The scandal lies in the disjoining of entitlements to govern from any analogy to those that order social relations, from any analogy between human convention and the order of nature. It is the scandal of a superiority based on no other title than the very absence of superiority.[5]

One mode of the displacement of entitlements and authority central to Rancière's conception of democracy, a conception according to which democracy is not one regime among others, but rather the absence of a regime, consists in the procedure of selection by lot. To the extent that chance and the possibility that absolutely anyone could rule dominates within the lottery system, that system, for Rancière, represents a more effective actualization of democracy than the current emphasis on majority rule through voting.

Selection of those governing by lot solves a particular problem that Rancière—following Plato—views as one of the central difficulties of government, the problem that those who wish to rule are often not those who should rule. Discussing the erasure of the possibility of ruling by lot from the menu of options within modern democracy, and

---

[4] Daniel Bensaïd, "Permanent Scandal," in *Democracy in What State?* 16, 21-22 (2011).
[5] Jacques Rancière, *Hatred of Democracy* 41 (2006).

attempting to counter the claim that this erasure stems from the necessity of expertise within the modern state, Rancière explains that:

> We habitually oppose the justice of representation and the competence of governors to arbitrary justice and the mortal risks of incompetence. But the drawing of lots has never favoured the incompetent over the competent. If it has become unthinkable for us today, this is because we are used to regarding as wholly natural an idea that certainly was neither natural for Plato, nor any more natural for French and American constitutionalists two centuries ago: that the first title that calls forward those who merit occupying power is the fact of desiring to exercise it.[6]

In fact, Rancière claims, "the democratic procedure of drawing lots is compatible with the principle of the power of experts on one point, which is essential: good government is the government of those who do not desire to govern."[7] Hence, for Rancière, selection by lot not only actualizes the truth of democracy, which is the displacement of any natural order of governing, but also remedies the state of affairs according to which it is those who desire to rule who dominate the political system.

Within American political theory, John McCormick has furnished the principal recent critique of majoritarian democracy in his provocative book on *Machiavellian Democracy*, aimed at reclaiming Niccolò Machiavelli's thought from the grasp of theorists of republicanism like Philip Pettit and Quentin Skinner and attempting to bring a democratic Machiavellianism into contemporary politics. As McCormick argues, republicanism allows for the dominance of politics by elites much more than Machiavelli contemplated: "[Machiavelli's] political theory is simply more popularly empowering and anti-elitist than what generally passes under the name of republican theory today."[8] In the effort to actualize a Machiavellian vision within the present-day American system, McCormick argues in the final chapter of his book for the revival of the Roman "tribune of the plebs" that Machiavelli had championed.

Historically, the "tribunes of the plebs" exercised veto power within the Senate, an institution otherwise captured by the nobility. According to McCormick:

> Machiavelli asserts that the most important function of the tribunes was to hold back the insolence of the grandi. As bearers of veto power over most of the workings of Roman government, and as the chief agents of public indictments for political crimes, the tribunes possessed the means to block policy proposals and punish magistrates and prominent citizens for violating the liberty of the citizenry or for attempting to corrupt the republic.[9]

In the effort to update this institution into a modern-day "tribune of the people," McCormick preserves the elements of selection by lot, the capacity to exercise a veto, and the class nature of the tribunate. His proposal entails most importantly that "A group of fifty-one private citizens, selected by lottery, gather for one-year nonrenewable, nonrepeatable terms," that "[p]olitical and economic elites are excluded from eligibility," and that "[t]he tribunes are empowered, upon majority vote, to veto one piece of

---

[6] *Id.* at 42.
[7] *Id.* at 43.
[8] John McCormick, *Machiavellian Democracy* 142 (2011).
[9] *Id.* at 32.

congressional legislation, one executive order, and one Supreme Court decision in the course of their one-year term."[10] Although other details of the proposal do depend upon majority voting (particularly by the populace as a whole), it is noteworthy that the mechanism for determining who should serve in the one-year position of tribune is that of the lottery. Likewise, although McCormick focuses more explicitly on elites as opposed to non-elites, his emphasis on composing the tribunate out of ordinary citizens rather than those accustomed to rule meshes well with Rancière's insistence on democracy as the rule of those not otherwise authorized to rule.

As McCormick acknowledges, however, actually implementing his idea would require a constitutional amendment. Whether the proposal is desirable or not, this process would undoubtedly place a substantial impediment in the way of realizing the tribunate of the people in practice. What I would like to suggest here is instead rethinking the dominance of the role of majoritarian decision-making in considering executive-branch action and democratizing the executive along lines similar to those Rancière and McCormick—among others—have indicated. To the extent that the administrative state itself has arisen without the need for constitutional amendment (despite the occasional protests of Justice Thomas), democratizing that administrative state internally should be constitutionally feasible.

What follows is an exploration of what such democratizing might look like in one limited area of executive-branch decision-making, that of pardoning. My aim is to suggest through a proposal pertaining to the pardon power how other areas of the administrative state could be subjected to a similar democratizing process. The following thought experiment is, therefore, intended more to indicate a possible strategy for injecting democracy into aspects of the administrative state than aimed at solving what many have diagnosed as the significant problems besetting pardoning at all levels of government in the United States.

Although the pardon power constitutes one of the president's broadest constitutionally given capacities, as Article II, section 2 furnishes the president with "power to grant reprieves and pardons for offences against the United States, except in cases of impeachment," the use of this power has vastly declined during the past half century. No one has generated a definitive explanation for this decline, which the federal government shares to some extent with the states.

One recently proffered explanation that seems at least partly convincing, even if it cannot necessarily account for the decline in state pardons, pertains to the bureaucratization of pardoning. In his "Reflections on the Atrophying Pardon Power," Paul Rosenzweig contended that:

> A final (and to my mind more plausible) theory is that the atrophy of the pardon power arises from its institutionalization. Before the Office of the Pardon Attorney was established, presidents considered pardons individually, often on their own time. Now, the pardon attorney is resident in the Department of Justice and assists the President in reviewing requests for pardons according to settled guidelines. These recommendations from the pardon attorney are just that—recommendations and nothing more. The President is not required to follow them

[10] *Id.* at 183-84.

> and retains full pardon authority. And yet, it would be a bold—or foolhardy—president who overrode the recommendations of his pardon attorney.
>
> More importantly, the advent of a pardon attorney has institutionalized the hostility of prosecutors to the exercise of the pardon power. When the President exercised the pardon power directly or, more recently, when he reviewed recommendations made by the Attorney General, pardon applications were examined with two views in mind. . . . That has changed. In the late 1970s, Attorney General Griffin Bell delegated the recommendation role to the same officials who made prosecution policy. This has had the natural tendency of modifying the DOJ approach to pardon applications—they are now seen as a challenge to an administration's law enforcement policy rather than as an effort to individualize justice.[11]

On this account, although the Office of the Pardon Attorney has been in place since the late nineteenth century, the particular form that the bureaucratization of pardoning has recently taken generates conflicts of interest between prosecution and pardoning. Furthermore, the very fact of bureaucratization may deter the president from rendering decisions more merciful than those recommended.

Another possible occasion for presidents' recent reluctance to use the pardon power liberally stems, however, from President Bill Clinton's last-minute pardons at the end of his second term. Many of these pardons were never even reviewed by the Office of Pardon Attorney and they were widely perceived as abuses of the discretionary power of a lame-duck president. As Margaret Love has described the events leading up to these final pardons:

> The Pardon Attorney, who had been up all night as the White House continued to add names to (or subtract them from) the list of beneficiaries, told a reporter that he didn't even know who many of the people were or how to reach them to inform them of their good fortune. Some of the grants were immediately identifiable as personal gestures to friends and family, and some were evidently aimed at nailing shut the coffin of the Independent Counsel Act. The pardons granted to fugitive billionaire Marc Rich and his partner Pincus Greene produced instant outrage from all quarters, focused on the key role of former White House Counsel Jack Quinn and his manipulation of the Justice Department advisory process. But as the press parsed through the many less familiar names in the weeks that followed, it became apparent that numerous other grants had been secured outside official channels through the intervention of individuals with direct access to the President . . . .[12]

In this context, it was not primarily the administrative nature of the current federal pardon process that occasioned problems but rather President Clinton's unchecked deployment of the pardon power for personal purposes. In the wake of the resulting scandal, executive branch officials have been reluctant to fall subject to the accusations of impropriety that beset Clinton on issuance of these pardons.

---

[11] Paul Rosenzweig, "Reflections on the Atrophying Pardon Power," 102 *J. Crim. L. & Criminology* 593, 605-606 (2012).

[12] Margaret Love, "The Twilight of the Pardon Power," 100 *J. Crim. L. & Criminology* 1169, 1198-99 (2010).

Taking these critiques together suggests that both the administrative apparatus currently surrounding pardons and the democratic justification for performing pardons appear lacking within the federal context in the United States. The present state of the pardon power and its implementation thus falls prey to both the critiques of the administrative state as unaccountable and of the president as a kind of dictator usurping constitutional prerogative without democratic authorization. The solution I will conclude by proposing entails displacing the majoritarian conception of democracy that generally underlies both critiques in favor of something like what Rancière and McCormick envision as an alternative, more democratic, democracy.

What if the implementation of the pardon power involved not a bureaucracy associated with the Office of Pardon Attorney but instead a rotating set of pardon juries assembled out of a cross-section of the people? We know that, although they cannot be instructed on their power to nullify law, juries do, not infrequently, make determinations that suggest that they have deemed a law invalid—at least as applied to a particular case. Allowing juries to serve as advisors to the president in lieu of a Pardon Attorney would both let the people weigh in on the appropriateness of mercy in particular cases and permit them to check what they might perceive as the excesses of federal law under particular circumstances. To preserve the federal rather than regional quality of the pardon process, we might consider appointing a citizen from each state—chosen by lot—to serve for a (decently compensated) term of a year on rotating panels of twelve jurors, each constituted for a week at a time and given a set of cases to review during that period. If the paper record proved insufficient, the jurors could appoint delegates from among their number to travel to a particular locality and pursue further investigation into the case. Although flaws might certainly be found in such a system, it could hardly be worse than the one currently in place. In addition, it has at least the potential to democratize the pardon power and, in doing so, to begin democratizing the executive branch.

While the pardon process represents a particular, limited niche within the administrative state, imagining alternatives to its current institutional form suggests the possibility for democratizing the executive more generally. How might, for instance, citizens selected by lot assist in the conduct of activities at the Department of Defense or at Treasury? Obstacles of security and expertise might present themselves to this kind of citizen involvement, but perhaps it is time to begin thinking about what it would look like to democratize such administrative agencies not by rendering them more accountable through the electoral process but by placing private citizens without authority of rank or training in their midsts.