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## POLITICAL EXECUTIVE CONTROL OF THE ADMINISTRATIVE STATE: HOW MUCH IS TOO MUCH?

CONOR CASEY\*

### INTRODUCTION

The relationship between the administrative state and political executive in constitutional democracies is typically channeled through a sub-constitutional version of checks and balances. The competing roles and work of a diverse cast of actors,<sup>1</sup> including politicians, political appointees, and independent civil servants, all ensure a workable accommodation between important values and principles important to such systems, including democratic accountability, efficacious governance for the common good, technocratic expertise, and commitment to the rule of law.<sup>2</sup> But for some, this picture is under threat across many constitutional systems, in situations where political executives are said to increasingly enjoy the balance of control and power<sup>3</sup> over the capacity of the administrative state apparatus, through deploying an array of legal and political tools to centralize and politicize its work to better align it with their ideology and political objectives.

In some systems, political executives attempt to bolster their ability to *steer* a bureaucracy in an ideological direction, sometimes significantly, but without severely eroding its overall bureaucratic autonomy and independence. But in others, executive control over bureaucracy effectively amounts to its *capture*, a quasi-revolutionary transformation that seriously

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1. Gillian E. Metzger, *The Supreme Court 2016 Term Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8 (2017).

2. See Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2481 (2017).

3. Power is of course a contested concept, but in this context, I adopt a workable definition common to political and legal theory which understands power to consist of the ability to “control the outcomes of contested decisionmaking processes and secure . . . preferred policies” or “effect substantive policy outcomes by influencing what the government will or will not do.” Daryl J. Levinson, *The Supreme Court 2015 Term Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 39 (2016).

alters how public power is channeled and exercised in the state. In this form, the political executive has greater capacity to promote its ideological agenda through the bureaucratic apparatus *while* severely reducing bureaucratic autonomy and scope for civil servants to act as an internal check, capable of challenging or obstructing executive policies.

Despite its importance for how public power is allocated and exercised, this phenomenon is surprisingly underexplored from a comparative or theoretical constitutional perspective. To begin the process of offering critical and comparative analysis, this Essay draws eclectically on a range of constitutional systems, both parliamentary and presidential, to highlight the different kinds of legal and political tools available to political executives striving to exercise greater control over the administrative state. I have two objectives, one explanatory, the other critical. I first offer a descriptive account of the diverse tools political executives—presidents, prime ministers, cabinets—deploy to facilitate greater control over bureaucracies. I also probe the possible incentives which seem to be driving their use and the desire for greater control. After offering this account, I switch gears to the critical, by offering a brief suggestion about how public lawyers ought to approach normative analyses of executive attempts to leverage greater control over the administrative state.

Part I briefly discusses the place of the administrative state in contemporary constitutional democracies and the fact that it tends to have a kind of internal separation of powers between political actors and civil service personnel. Part II outlines the legal and political tools political executives use to exercise greater control and direction over the administrative state. Part III probes the different moral and political incentives which seem to drive these trends by bundling them into several conceptual ideal types. Part IV evaluates the normative issues arising from these trends and argues that characterization of executive attempts to leverage greater control as appropriate or abusive exercises of power inevitably involves deeply contextual normative evaluation and, as such, public lawyers should approach such evaluation with an analytical disposition of marked caution.

#### I. THE ADMINISTRATIVE STATE IN CONTEMPORARY CONSTITUTIONAL DEMOCRACY

The administrative state's emergence as a core engine of state policymaking and governance came with the greater professionalization of civil servants and increased bureaucratic autonomy. Civil servants began to be appointed on the basis that they were not mere tools of an incumbent political executive but had an overriding duty to serve the state and public

interest.<sup>4</sup> In turn, civil servants themselves began to work from the same premise. Concepts like merit, technocratic competence, security of tenure, and insulation from partisan politics all largely displaced political patronage and loyalty as the leading principles guiding the work of bureaucracies. As a result, values like expertise and commitment to professional norms came to dominate the basis for most appointments and removals to the bureaucracy and promotion to its senior ranks.<sup>5</sup>

An increasing emphasis on the importance of balancing executive energy and the pursuit of democratic mandates, with norms and principles like legality, technocratic competence, and professionalism, now all combine to give contemporary administrators a robust level of autonomy from the political executive. This balancing act has been described as a sub-constitutional form of “internal separation of powers” between the political executive and civil service, which fragments, channels, constrains, and limits the use of administrative and regulatory power.<sup>6</sup> As a critical component of this internal system of checks and balances, bureaucratic autonomy has several important consequences. First, it is said to make the bureaucracy well-positioned to offer frank advice on executive proposals based on their professional judgment, which can offer obstacles or improvements to arbitrary, hyper-partisan, or poorly conceived policy initiatives “lacking a scientific, legal, or commonsense foundation.”<sup>7</sup> Second, bureaucratic autonomy gives civil servants a wider scope to sustain opposition or “resistance” to executive proposals that they consider dangerously transcending norms of good governance and which risk veering into the realm of the capricious, irrational, or hyper-partisan.<sup>8</sup>

## II. TOOLS FACILITATING GREATER CONTROL

The administrative bodies and departments constituting the administrative state in contemporary constitutional democracies are generally subject to a measure of control from each of the three traditional branches of government—but not the plenary control of any one of them—and enjoy a measure of internal bureaucratic autonomy from the political

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4. PETER CANE, *CONTROLLING ADMINISTRATIVE POWER: AN HISTORICAL COMPARISON* 276 (2016); Lorne Sossin, *From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion*, 55 U. TORONTO L.J. 427, 430 (2005).

5. See Sossin, *supra* note 4, at 431.

6. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 536, 544 (2015).

7. Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1656 (2018).

8. Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627, 634 (2019); Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 163–71 (2018); Jennifer Nou, *Civil Service Disobedience*, 94 CHI.-KENT L. REV. 349, 352 (2019).

executive.<sup>9</sup> However, it has also been documented across many systems that apex executive actors increasingly enjoy the *balance* of control over the administrative state. This happens when presidents, prime ministers, and cabinets deploy legal and political tools to leverage more centralized and politicized control and direction over bureaucracies and civil servants, tools not typically open to the legislature or judiciary.<sup>10</sup>

#### *A. Politicization of Appointment and Removal*

A core concept in Max Weber's influential discussion of modern bureaucracies is that appointment to their ranks is based on "merit" as measured through metrics like competitive exams and academic credentials, not personal loyalty. This Weberian account of the bureaucratic appointment process continues to ring true in contemporary constitutional democracies, given that appointment to most civil service and agency posts *is* significantly based on apolitical, merit-based criteria. While largely accurate, Weber's theoretical understanding of bureaucracy, and how its appointment process works, is not an *entirely* complete one when matched against how many contemporary systems function in practice. An accurate contemporary account of bureaucratic appointment must also grapple with the endurance of, and in some cases, thriving politicization of bureaucratic appointments and removals.<sup>11</sup>

Appointment powers have long been used by executive actors in a politicized manner to better ensure the executive's policy goals are respected and loyally implemented, and to embed the political morality of the executive into the bureaucracy.<sup>12</sup> Below I offer several constitutional democracies as examples which show how the executive can use its appointment powers to very potent political effect. I draw a distinction between executive appointments and removal which *steer* a bureaucracy in an ideological direction—but without severely eroding its overall bureaucratic autonomy

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9. See Michaels, *supra* note 6, at 532–34.

10. Benedict Sheehy & Donald Feaver, *Re-Thinking Executive Control of and Accountability for the Agency*, 54 OSGOODE HALL L.J. 175, 177–78 (2016). By "control" in this context, I am referring simply to the ability of political executives to get administrative bodies and civil servants to act to suit the former's agenda in a manner which can encompass diluting the autonomous bureaucratic capacity enjoyed by administrators, a dilution which can occur both amongst civil servants working in core departments of the executive branch, as well as in administrative bodies deliberately designed to be highly independent in discharging their functions.

11. Politicization in this context being understood as "the substitution of political criteria for merit-based criteria in the selection, retention, promotion, rewards, and disciplining of members of the public service." B. GUY PETERS & JON PIERRE, *POLITICIZATION OF THE CIVIL SERVICE IN COMPARATIVE PERSPECTIVE: THE QUEST FOR CONTROL 2* (2004) (emphasis omitted).

12. Christopher A. Cooper, *Bureaucratic Identity and the Resistance of Politicization*, 50 ADMIN. & SOC'Y 30, 31 (2018).

and independence—and appointments which can functionally effect *capture* of the bureaucratic apparatus by the political executive.

*B. Steering the Bureaucracy*

In the United States, one of the most important means presidents have at their disposal to assert control over the administrative state is their ability to appoint and remove leadership personnel from cabinet departments and independent agencies<sup>13</sup> using Article II of the U.S. Constitution. Article II and its Appointments Clause give the President authority to appoint, with the consent of the Senate, the thousands of “[o]fficers of the United States” who staff the upper ranks of the federal bureaucracy.<sup>14</sup>

Notwithstanding heated debate<sup>15</sup> over the precise scope of the removal power aspect of the Appointments Clause, judicial precedent and political practice nonetheless combine to provide ample room for presidents to appoint personnel to administrative bodies who share their ideological viewpoint and remove officials who frustrate their policy objectives.<sup>16</sup> Together, these powers constitute one of the principal gateways through which presidents influence the policy direction of the administrative state.<sup>17</sup> Such powers have been used to extensively politicize the appointment and removal process, and presidential appointees can generally be expected to loyally implement the chief executive’s political objectives within often vague statutory bounds set by Congress. Even with political appointees inside so-called independent agencies, presidents can be confident they will generally choose to align their policymaking with the ideological preferences of the presidency.<sup>18</sup>

This is why, for example, administrators tend to implement the exact same congressional statutes very differently depending on the presidential incumbent, shifts facilitated by the fact congressional statutes are often capacious and provide ample room for executive (re)interpretation.<sup>19</sup> For example, the same agencies spanning the Obama and Trump Administrations took radically divergent stances on contentious matters like LGBT issues, policing of speech and sexual assault investigations on college campuses,

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13. JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 260–61 (2000).

14. U.S. CONST. art. II, § 2.

15. See Seth Barrett Tillman, *The Puzzle of Hamilton’s Federalist No. 77*, 33 HARV. J. L. & Pub. Pol. 149, 149–67 (2010).

16. See *Myers v. United States*, 272 U.S. 52 (1926); *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

17. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1180 (2013).

18. Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 277 (2019).

19. Michaels, *supra* note 6, at 556.

immigration enforcement, and environmental regulation. On each occasion, heads of the relevant administrative bodies in charge of these policies unsurprisingly abandoned policy positions adopted by their predecessors and rapidly aligned themselves and their agency's stance foursquare with the ideological position of the new president.<sup>20</sup> Presidential appointments can thus significantly shift the ideological direction of the administrative state and the nature of its regulatory output.<sup>21</sup>

In Japan, bureaucrats have traditionally been a highly autonomous and powerful group, typically hired through a merit system that requires a very competitive standardized qualification exam and impeccable credentials.<sup>22</sup> Traditionally, the Japanese bureaucracy has combined a reputation for technocratic competence and professionalism with the "political neutrality of staff, particularly with regard to the relationship between bureaucracy and political authority."<sup>23</sup> A good demonstration of its traditional autonomy is the fact that the civil service has long self-regulated promotion to its upper echelons. While the political executive has formal legal authority over appointments, it has long acquiesced in the internal choices made by bureaucrats themselves.<sup>24</sup>

This high level of autonomy has recently come under strain as the political executive has sought to increasingly politicize the appointment process. The political executive's authority over bureaucratic appointments has been bolstered significantly post-2014 legislative reforms spearheaded by then-Prime Minister Shinzo Abe.<sup>25</sup> This shift in appointment practice has led some to fear bureaucratic officials will be less likely to serve as an independent source of advice for the political executive or a check on partisan excess, on the basis officials seeking promotion to the upper echelons of the bureaucracy will have to be more attuned to discerning and following the Prime Minister's "expressed or implicit directives" when carrying out their statutory mandates.<sup>26</sup>

A remarkable demonstration of the impact of the appointment power when deployed in a politicized way can be seen with the Cabinet Legislation

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20. CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* 77–78 (2020).

21. *Id.*

22. Ko Mishima, *A Big Bang for Japanese Mandarins? The Civil Service Reform of 2014*, 40 INT'L J. PUB. ADMIN. 1101, 1106 (2017).

23. Mayu Terada, *The Changing Nature of Bureaucracy and Governing Structure in Japan*, 28 WASH. INT'L L.J. 431, 433 (2019); see also T.J. Pempel, *Bureaucracy in Japan*, 25 PS: POL. SCI. & POL. 19, 19 (1992).

24. Mishima, *supra* note 22, at 1104.

25. Terada, *supra* note 23, at 456.

26. Cheng-Yi Huang, *Unenumerated Power and the Rise of Executive Primacy*, 28 WASH. J. INT'L L.J. 395, 407 (2019).

Bureau's ("CLB") revision of its decades-long interpretation of Article 9 of the Japanese constitution—the war renunciation clause. The CLB<sup>27</sup> is the key advisory organ to the government over legal and constitutional affairs and is regarded as highly independent<sup>28</sup> and technocratic<sup>29</sup> in its functions. While the CLB's role has no basis in constitutional text, some argue that it has an even more influential role over issues of legal and constitutional interpretation than the Supreme Court.<sup>30</sup> Decades-long CLB interpretation of Article 9 stipulated that Japan had a very limited right to maintain security forces for self-defense.<sup>31</sup> This interpretation was a thorn in the side of Prime Minister Abe and his vision for Japanese foreign policy. Aware that it would be politically difficult to pursue a constitutional amendment of Article 9 through the formal amendment procedure, Prime Minister Abe and his Cabinet shifted their efforts to find informal ways of modifying the decades-long CLB constitutional interpretation.<sup>32</sup>

To this end, in 2014, the government established an ad hoc advisory committee to advise on the possibility of a new interpretation, the Advisory Panel on Reconstruction of the Legal Basis for Security, which then advised in favor of reinterpretation of Article 9.<sup>33</sup> Around the same time, the Prime Minister demanded the resignation of the director of the CLB and used his appointment authority to appoint a new head, who was widely regarded as very sympathetic to the government's stance on departing from established CLB precedent.<sup>34</sup> In a distinct departure from tradition, the Prime Minister did not appoint a head from within the senior ranks of the CLB but "intentionally appointed" a loyalist from outside the organization to the position to allegedly "meddle in the bureaucratic culture"<sup>35</sup> and secure support for the reinterpretation.

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27. Hajime Yamamoto, *Interpretation of the Pacifist Article of the Constitution by the Bureau of Cabinet Legislation: A New Source of Constitutional Law?*, 26 WASH. L. REV. 99, 109 (2017).

28. Navraj Singh Ghaleigh, *Neither Legal Nor Political? Bureaucratic Constitutionalism in Japanese Law*, 26 KING'S L.J., 193, 205 (2015).

29. Mamoru Seki, *The Drafting Process for Cabinet Bills*, 19 L. JAPAN 168, 183 (1986).

30. David Kenny & Conor Casey, *Shadow Constitutional Review: The Dark Side of Pre-Enactment Review in Ireland and Japan*, 18 INT'L J. CONST. L. 51, 59 (2020); David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425, 1454 (2011).

31. Kenny & Casey, *supra* note 30, at 60.

32. Yamamoto, *supra* note 27, at 112.

33. The Committee comprised "a group of experts in fields from international relations and diplomacy to international law, but nonetheless contained few lawyers, and only one constitutional scholar. It was argued in the media that members of the panel were primarily selected for their hawkish views on national security." Craig Martin, *The Legitimacy of Informal Constitutional Amendment and the "Reinterpretation" of Japan's War Powers*, 40 FORDHAM INT'L L.J. 427, 475 (2017) (footnotes omitted).

34. Yasuo Hasebe, *The End of Constitutional Pacifism?* 26 WASH. INT'L L.J. 125, 128 (2017).

35. Huang, *supra* note 26, at 406.

What is important for this Essay is not the cogency of the reinterpretation, but how the episode highlights the potential impact of executive appointment powers. The authority and respect afforded to this bureaucratic institution, combined with the executive's appointment powers, allowed the political executive to shape CLB's policy in a manner that gave a shield of legitimacy to executive action, which some regarded as a constitutionally questionable circumvention of the formal constitutional amendment process.<sup>36</sup> The same outcome—a seismic shift in the CLB's interpretation of a key constitutional provision—may not have been possible had the appointment to the CLB been an entirely technocratic process.

In India, appointments to senior bureaucratic posts have similarly been long determined by a combination of merit-based exams and seniority. But like his Japanese counterpart, Prime Minister Modi has recently spearheaded significant changes to the basis for apex bureaucratic appointments. The executive has made inroads to sidestep the traditional process of exams and seniority by adopting a parallel system of appointments characterized by political discretion, allowing the executive to parachute political appointees into senior positions where it thinks expedient.<sup>37</sup> Professor Khaitan also highlights how the executive has made concerted use of its dominance over the appointment process to embed political loyalists into watchdog and so-called integrity branch institutions, which he argues is a part of a “project of ideological capture of these institutions.”<sup>38</sup>

Aggressive political use of appointments has, Khaitan argues, allowed the executive to aggrandize its authority by “incrementally but systemically” undermining the independence of nearly all the statutory bodies put in place to hold it to account, or temper its policymaking in light of core constitutional values, by ensuring they “became subservient to the political executive or were captured by party loyalists.”<sup>39</sup> With some powerful accountability institutions, like the anti-corruption ombudsman, the Prime Minister simply neglected to nominate the head official for several years, effectively disabling their ability to discharge their statutory functions.<sup>40</sup> Again, as with the Japanese example, these results would not be feasible in a highly technocratic system of appointment insulated from political executive control.

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36. Martin, *supra* note 33, at 475–78.

37. Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, 14 L. & ETHICS OF HUM. RTS., 49, 77–78 (2020).

38. *Id.* at 77.

39. *Id.* at 92.

40. *Id.* at 77–78.

### C. *Capturing the Bureaucracy*

In Hungary, part of the “spectacular change” to the political system brought about by the political party Fidesz’s extended period in power has been its “quest to further enhance political control over administrative apparatuses.”<sup>41</sup> In the past decade, Prime Minister Orbán and his government have made muscular use of appointment and removal powers to “fill all ranks in the . . . government apparatuses with politically loyal . . . civil servants”<sup>42</sup> sympathetic to the party’s goals. This has happened concurrently with the removal of many civil servants not deemed suitably sympathetic to its political aims, facilitated by legislation undermining bureaucratic security of tenure.<sup>43</sup>

Even nominally independent administrative bodies like the State Audit Office, the Chief Prosecutor’s Office, the Media Council, the Fundamental Rights Ombudsman, the Monetary Council, the National Election Commission, and the National Tax and Customs Administration experienced replacements of opposition figures and ostensibly neutral technocrats, with personnel better ideologically aligned to the Prime Minister and his party.<sup>44</sup> Whether one is sympathetic or not, there is no doubting that Prime Minister Orbán has used his authority to effect appointments and removals, which have resulted in a “substantive and comprehensive transformation of the [bureaucracy].”<sup>45</sup> These appointments and removals have consequently become a core mechanism to further his aim of building an illiberal and unapologetically Christian-Nationalist polity.<sup>46</sup>

Similar trends have been recently documented in Poland, where extensive civil service reforms have been undertaken since the Law and Justice Party (PiS) took office in 2015. Core planks of these reforms have included making senior bureaucratic appointments a matter of prime ministerial discretion and no longer subject to a competitive public application process; allowing the contracts of some senior appointments to expire without renewal; and demoting senior officials to lower positions or

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41. György Hajnal & Sándor Csengödi, *When Crisis Hits Superman: Change and Stability of Political Control and Politicization in Hungary*, 15 ADMIN. CULTURE 39, 42 (2014).

42. Michael W. Bauer & Stefan Becker, *Democratic Backsliding, Populism, and Public Administration*, PERSP. PUB. MGMT. & GOVERNANCE, Mar. 2020, at 24–25.

43. Hajnal & Csengödi, *supra* note 41, at 49.

44. *Id.*

45. *Id.* at 50.

46. Csaba Tóth, *Full Text of Viktor Orbán’s Speech at Bäile Tuşnad (Tusnádfürdő) of 26 July 2014*, BUDAPEST BEACON (July 29, 2014), [budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/](http://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/).

dismissing them outright.<sup>47</sup> In introducing these systemic reforms, the governing PiS party openly argued it was important for the executive to have greater authority to appoint civil servants who identify and sympathize with its policies. The government argued that failure to keep the civil service under close control may frustrate its political principal's goals in favor of the ideological goals of their own, or those derived from external actors hostile to the executive's.<sup>48</sup>

Following these reforms, the executive has exercised appointment and removal powers with considerable enthusiasm, lacing the bureaucracy with those loyal to its agenda while removing those considered potentially hostile or obstructive. This ongoing process of bureaucratic transformation has involved replacing thousands of civil servants across all ranks of the bureaucracy,<sup>49</sup> and restructuring the leadership of administrative bodies concerned with everything from agriculture, broadcasting, health, education, electoral competition, as well as nearly every state-owned company.<sup>50</sup> As Professor Sadurski puts it, “[n]o public or state-controlled institution” has been “left untouched where nominees of the *ancien régime* could have been found and PiS loyalists placed.”<sup>51</sup> Aggressive use of appointment and removal powers by the executive arguably represents the “most thorough, and at the same time least publicly and internationally visible, aspect of the state capture by PiS.”<sup>52</sup>

#### *D. Greater Centralization of Administrative State Policymaking*

##### *1. Executive Synoptic Mechanism to Review Administrative Policymaking*

One method of centralization is for the political executive to create synoptic mechanisms that monitor the work of administrative actors, either by reviewing their agendas or preclearing their work before promulgation. For example, U.S. Presidents of all political stripes have attempted to coordinate regulatory activity and leverage more centralized control over administrative bodies wielding delegated power to obtain significant policy

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47. Stanisław Mazur, Michał Możdżeń, & Marek Oramus, *The Instrumental and Ideological Politicisation of Senior Positions in Poland's Civil Service and its Selected Consequences*, NISPACEE J. PUB. ADMIN. & POL., Summer 2018, at 79.

48. *Id.* at 80.

49. David M. Driesen, *The Unitary Executive Theory in Comparative Context*, 72 HASTINGS L.J. 1, 34 (2020).

50. WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN 136 (2019).

51. *Id.* at 137.

52. *Id.* at 138.

aims outside the legislative process.<sup>53</sup> This control intensified considerably following the creation of the Office of Management and Budget (OMB) and the Office of Information and Regulatory Affairs (OIRA), which made the regulatory activity of the administrative state “more and more an extension of the President’s own policy and political agenda.”<sup>54</sup>

Executive Order No. 12,291—amended and expanded by several presidents—determined that tailored regulatory impact assessments would be applied to all major rules and regulations proposed by administrative bodies, a review infused with the ideological principles of presidential incumbents. For example, President Barack Obama added a requirement that proposed regulations be consistent with non-quantitative criteria such as equity, human dignity, and distributive impact.<sup>55</sup> In contrast, Republican Presidents have used these mechanisms for aggressive deregulatory purposes.<sup>56</sup> President Trump issued a supplementary executive order requiring administrative bodies to repeal two regulations for every newly proposed regulation, in addition to carrying out a cost-benefit analysis.<sup>57</sup> President Trump’s order was repealed by President Biden in January 2021, who, in turn, issued a new order instructing the OMB to come up with recommendations about how to reform the regulatory process to better ensure proposed regulations “appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities.”<sup>58</sup>

OIRA, in turn, subjects the consistency of proposed agency regulations with these executive orders to review, amend, and comment before they are promulgated. By acting as synoptic mechanisms to scrutinize the most important activity of administrative bodies,<sup>59</sup> these bodies increase presidential influence as proposed agendas and regulatory activity are subject to centralized review by their core staff before promulgation.<sup>60</sup>

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53. Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 717–18 (2007).

54. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001).

55. Exec. Order No. 13,563, *Improving Regulation and Regulatory Review*, 3 C.F.R. § 13563 (2011).

56. Kagan, *supra* note 54, at 2349.

57. Exec. Order No. 13,771, *Reducing Regulation and Controlling Regulatory Costs*, 82 Fed. Reg. 9339 (Feb. 3, 2017).

58. Memorandum for the Heads of Executive Departments and Agencies, *Modernizing Regulatory Review*, 86 Fed. Reg. 7223 (Jan. 26, 2021).

59. ADRIAN VERMEULE, *Local and Global Knowledge in the Administrative State*, in *LAW, LIBERTY AND STATE: OAKESHOTT, HAYEK AND SCHMITT ON THE RULE OF LAW* 295 (David Dyzenhaus & Thomas Poole eds., 2015).

60. Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 ANN. REV. POL. SCI. 37, 41–42 (2019); Robert F. Durant & William G. Resh, “*Presidentializing*” *the Bureaucracy*, in *THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY* 555 (Robert F. Durant ed., 2010).

Presidents have also leaned on Article II to claim authority to issue executive orders which guide and infuse the work of administrative bodies with the moral and political goals of the incumbent president. As noted, Executive Order No. 12,291 has been amended by successive presidential incumbents in a manner allowing them to subject the work of administrative bodies to a version of regulatory impact analysis defined by their political philosophy. For example, President Barack Obama added a requirement that proposed regulations be consistent with non-quantitative criteria such as equity, human dignity, and distributive impact,<sup>61</sup> whereas Republican Presidents have used the same mechanisms for aggressive deregulatory purposes.<sup>62</sup>

Presidents have also increasingly claimed authority to prompt subordinates wielding statutory power to exercise discretion in a specified way consistent with the former's goals.<sup>63</sup> Recent high-profile examples of this directive authority in action include President Obama's order to the Agency head of the Department of Homeland Security (DHS) to halt deportation investigations and proceedings of several million undocumented immigrants who met the presidentially defined criteria, and direction to the Environmental Protection Agency (EPA) to formulate and issue an ambitious new regulation intended to significantly reduce United States carbon emissions and contribution to global warming.<sup>64</sup> Swiftly following inauguration, President Trump took steps to quash these policies by ordering the newly appointed heads of the DHS and EPA to rescind them both, an order duly complied with.<sup>65</sup> This directive authority, when combined with the centralization of rulemaking in its hands, has turned the Executive Office of the President into a regulatory clearinghouse with enhanced ability to monitor, direct, and respond to the work of the entire administrative apparatus.<sup>66</sup>

Drive for greater oversight of bureaucratic policymaking is not reserved to presidential systems. In the United Kingdom, attempts to maintain the functional autonomy of a diverse array of administrative bodies while counteracting excessive fragmentation have been colored by cultivation of greater political control over the administrative state by Prime Ministers. In recent decades, the Prime Minister has been able to rely on institutional mechanisms like the Cabinet Office, which has emerged as a synoptic

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61. Exec. Order No. 13,563, *supra* note 55.

62. Kagan, *supra* note 54, at 2349.

63. *Id.*

64. Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 580 (2018).

65. *Id.*

66. Strauss, *supra* note 53.

mechanism to scrutinize the firmament of administrative bodies outside core government departments.<sup>67</sup> The executive has directed that these kinds of bodies be subjected to a rigorous review by the Cabinet Office in the lifetime of every Parliament to determine whether their functions are (1) still needed; (2) are still being delivered effectively by the organization; and (3) still contribute to the goals of the executive.<sup>68</sup>

This synoptic mechanism for a time worked in tandem with the Public Bodies Act 2011, enacted by the Conservative-Liberal Democrat Coalition Government in office from 2010 to 2015. The Act was designed to assist the government's broader aim of reducing public spending by providing Cabinet Ministers broad statutory power to abolish, merge, or restructure administrative bodies by executive order and without further parliamentary legislation.<sup>69</sup> These kinds of mechanisms, more readily accessible to an executive in a system where the executive has easier access to the levers of legislative power, ensure administrative bodies who become overtly obstructive to an incumbent executive's political program become more easily subject to political retribution in the form of the dismantling, or restructuring, of their policy functions.<sup>70</sup>

### *2. Use of the Budgetary Process to Bolster or Curb Administrative Action*

The political executive's position as lead policymaker in constitutional democracies typically encompasses a central role over preparation of the budget. This close control over budgetary powers gives political executives a potent tool to shape the policy direction of administrative bodies and their capacity to discharge their mandate.<sup>71</sup>

In the United States, for example, presidents have consistently used this strong control over the budget process to direct more funds to regulatory agendas they favor and to dent those they are opposed to.<sup>72</sup> In the Reagan era, for example, significant budget cuts were directed at bodies like the EPA and the Food and Drug Administration to promote the presidency's

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67. HAZEL ARMSTRONG & CHLOE SMITH, PUBLIC BODIES 12 (2021), <https://researchbriefings.files.parliament.uk/documents/CBP-8376/CBP-8376.pdf>.

68. See Katharine Dommett, Muiris MacCarthaigh & Niamh Hardiman, *Reforming the Westminster Model of Agency Governance: Britain and Ireland After the Crisis*, 29 GOVERNANCE: INT'L J. POL., ADMIN., & INSTS. 535 (2016).

69. Public Bodies Act 2011, c. 24 (UK).

70. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 698–702 (2000).

71. See Julia Black, *Calling Regulators to Account: Challenges, Capacities and Prospects*, in ACCOUNTABILITY IN THE CONTEMPORARY CONSTITUTION 367–69 (Nicholas Bamforth & Peter Leyland eds., 2013).

72. See generally Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016).

aggressive deregulatory agenda.<sup>73</sup> More recently, the Trump Administration sought to curtail the resources of agencies considered hostile to its objectives, manifested through repeated (but largely unsuccessful) advocacy for very sizeable cuts to the EPA and the State Department in the annual presidential budget.<sup>74</sup> Similarly, in Brazil, the President's extensive influence over the budgetary process<sup>75</sup> is said to "deeply affect" the financial autonomy of agencies designed to be independent in discharging their regulatory functions, and Professor Prado notes that such powers have been "used to the detriment" of such agencies in the recent past.<sup>76</sup> Critics of Presidents Temer and Bolsonaro, for example, have argued their antipathy toward climate change activism and environmental regulation clearly received concrete expression in the very sizeable cuts their successive budget proposals recommended for leading environmental protection agencies.<sup>77</sup> These cuts, according to critics, have had a significant impact on agency morale and their capacity to engage in patrolling and enforcing against unlawful activity harmful to the environment. The very existence of these unilateral powers, and a president's willingness to use them, ensure presidential control over agencies' financial resources undoubtedly remains a potent incentive for agencies to adopt their preferences under the threat of budget reductions.<sup>78</sup>

### III. INCENTIVES FOR CONTROL

This Part gives an account of the several different incentives which plausibly appear to be driving the use of these tools. I do so by bundling them into several conceptual heuristics. These are not mutually exclusive incentives, and it is likely one or more may be present or absent, as a dominant or minor influence, at any given time in a polity where the political

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73. Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1756–59 (2008).

74. Rebecca Beitsch & Rachel Frazin, *Trump Budget Slashes EPA Funding, Environmental Programs*, HILL (Feb. 10, 2020, 2:18 PM), <https://thehill.com/policy/energy-environment/482352-trump-budget-slashes-funding-for-epa-environmental-programs>.

75. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 84, § XXIV (Braz.).

76. See Mariana Mota Prado, *Assessing the Theory of Presidential Dominance from a Comparative Perspective: The Relationship Between the Executive Branch and Regulatory Agencies in Brazil*, in COMPARATIVE ADMINISTRATIVE LAW 225, 234 (Susan Rose-Ackerman et al., eds., 2010).

77. Jake Spring & Stephen Eisenhammer, *Exclusive: As Fires Race Through Amazon, Brazil's Bolsonaro Weakens Environment Agency*, REUTERS, <https://www.reuters.com/article/us-brazil-environment-ibama-exclusive-idUSKCN1V114I> (Aug. 28, 2019, 6:13 AM); Scott Wallace, *Brazil's New Leader Promised to Exploit the Amazon—but Can He?*, NAT'L GEOGRAPHIC (Oct. 31, 2018), <https://www.nationalgeographic.com/environment/2018/10/brazil-president-jair-bolsonaro-promises-exploit-amazon-rain-forest/>; Zoe Sullivan, *The Real Reason the Amazon Is on Fire*, TIME (Aug. 26, 2019, 6:00 AM), <https://time.com/5661162/why-the-amazon-is-on-fire/>.

78. See Prado, *supra* note 76, at 233–34.

executive takes steps to exercise more control over the bureaucracy or to erode bureaucratic autonomy.

One incentive is that executives want to *infuse the administrative state with their moral and political values*. Bureaucracies will always face inescapable political and ideological choices in choosing between different factually plausible policy positions, or when trying to translate abstract moral values like freedom, justice, and equality into concrete political choices.<sup>79</sup> In keeping with this sentiment, Vermeule has argued that the specialization and technocratic competence of the bureaucracy can be regarded as a powerful but ultimately “intrinsically neutral institutional technology” that must inevitably be entrusted, explicitly or implicitly, with a mission of “substantive content.”<sup>80</sup> There is, on this account, no persuasive way one can attempt to articulate policies in an apolitical technocratic manner, ensuring administrative states will inevitably have fundamental principles and an implicit or explicit guiding moral vision which infuses everything it does.

Filling this normative vacuum is where political executives increasingly seem to come in. Unlike diffuse and fractious legislative assemblies, or low-capacity and undemocratic judicial bodies, hierarchical bureaucracies commanded by an energetic, unified, and motivated political executive<sup>81</sup> are “uniquely positioned” to inject substantive moral content into bureaucratic action.<sup>82</sup> Political executive use of the tools discussed in Part II to coordinate, direct, and centralize review and approval of policy activity carried out the length and breadth the administrative apparatus is a potent means for it to marry “Hamiltonian and technocratic features” of governance.<sup>83</sup> That is, linking reliance on technocratic expertise and competence with executive attempts to combat interest group capture, myopic policymaking by subject-specific administrative bodies, or general bureaucratic torpor, all of which might run counter to pursuit of its vision of the common good.<sup>84</sup>

Another potential incentive is less benign and can be linked to a *desire for executive aggrandizement* more generally. Many public law

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79. See Conor Casey, ‘Common-Good Constitutionalism’ and the New Battle over Constitutional Interpretation in the United States, 4 PUB. L. 765, 781 (2021); Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1405 (1975).

80. Adrian Vermeule, *Bureaucracy and Mystery*, MIRROR OF JUST. (Mar. 22, 2019), <https://mirrorofjustice.blogspot.com/2019/03/bureaucracy-and-mystery-.html>.

81. Adrian Vermeule, *Ralliement: Two Distinctions*, JOSIAS (Mar. 16, 2018), <https://thejosias.com/2018/03/16/ralliement-two-distinctions/>.

82. Vermeule, *supra* note 2.

83. Kagan, *supra* note 54, at 2339. Hamiltonian is of course a reference to a core theme of Alexander Hamilton’s political writings; namely, his famous contention that public welfare required an efficacious government, one with leadership provided by an accountable executive dedicated to pursuing policies for the common good with “[d]ecision,” “dispatch,” and “energy.” *Id.* at 2343; see generally THE FEDERALIST NO. 70 (Alexander Hamilton).

84. Vermeule, *supra* note 2, at 2464.

commentators argue executive aggrandizement in established constitutional democracies is the key commonality of the apparently widespread trend of what has been variously dubbed “democratic backsliding” and “constitutional retrogression.”<sup>85</sup> In Professors Huq and Ginsburg’s typology of the pathways common to these various trends—including the centralization of power in the executive branch; the elimination of institutional checks on its authority; contraction of a public sphere independent from executive influence; and the erosion of political competition<sup>86</sup>—*the* unifying core is that the political executive uses its predominant position to gradually, but systematically, weaken any real institutional checks on, or competition to, its power.<sup>87</sup>

Capture of the administrative state and the erosion of bureaucratic autonomy can be important aspects of this process, and each of the forms of politicization and centralization examined in Part II can certainly be used to further this end—which can have serious consequences for how public power is channeled and exercised. Use of authority over appointment and removal to appoint partisan loyalists to the bureaucracy and independently checking institutions can be powerful means to stymie opponents and deter would-be pushback or opposition to its ideological goals.<sup>88</sup> Use of centralized and synoptic mechanisms and threats leveraged by potential budget cuts can also be potent ways for the executive to curb the ability of bureaucrats to engage in policymaking antithetical to their ideological commitments, or to offer resistance to policies.<sup>89</sup> The final part of this Essay briefly considers how public lawyers ought to normatively assess use of the tools outlined in Part II, bearing in mind the different possible incentives driving their use just canvassed.

#### IV. NORMATIVE CONSIDERATIONS

##### *A. Partisan Capture and Executive Aggrandizement*

The contention *all administrative decisions are political* is true, but it must be carefully unpacked.<sup>90</sup> As Stephenson notes, there are always two possible senses of political in this context, sometimes overlapping but sometimes very distinct. The first is that administrative decision-making

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85. See MARK A. GRABER, SANFORD LEVINSON & MARK TUSHNET, *Introduction to CONSTITUTIONAL DEMOCRACY IN CRISIS?* 1 (Mark A. Graber et al. eds., 2018).

86. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 118 (2018).

87. *Id.*

88. Tarunabh Khaitan, *Executive Aggrandizement in Established Democracies: A Crisis of Liberal Democratic Constitutionalism*, 17 INT’L J. CONST. L. 342, 351 (2019).

89. JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 45 (2016).

90. Vermeule, *supra* note 80.

involves normative determinations of the best policy to enact for the polity given the prevailing economic, social, and legal conditions and constraints. The second sense of political is narrower and linked to ensuring the partisan political success of an incumbent in maintaining power.<sup>91</sup>

Several obvious risks loom in circumstances where an executive erodes bureaucratic independence and autonomy to the extent officials are more likely to make determinations aligned with the executive's political preferences—not in the thicker normative sense, but in the crude partisan sense unconcerned with the common good. Bureaucrats mainly focused on their reputation before a partisan political audience will, it stands to reason, also be more willing to compromise commitment to professional norms, technocratic expertise, and to the statutory mission of the administrative body, at least when compared to administrators whose agenda is shaped by such values *and* due respect for elected representatives and their ideological priorities. A myopic partisan focus on loyalty neglectful of the competing concerns of competence and professionalism will invariably multiply the likelihood of policy being anchored on “false factual premises or faulty theories.”<sup>92</sup>

As bad as all this is, staffing bureaucracies with political hacks dedicated to diligently implementing executive directives, no matter how arbitrary, odious, or irrational, can carry greater risks still. Because if done with enough partisan aggression and at a large enough scale, executive control over the administrative state can be used as a potentially revolutionary pathway to hollow out well-established principles associated with constitutional government, like the rule of law, robust prosecutorial independence, freedom of speech, freedom of the press, and free and fair electoral competition with a genuine chance of party rotation of power. Such important principles will clearly suffer if bureaucrats like prosecutors and revenue officials can arbitrarily hang the threat of sanctions over the heads of political opponents of the executive, if regulators can engage in targeted harassment of media opposed to their political masters' policies, or if electoral commissions and human rights ombudsmen can turn a blind eye to, or smooth over, the distortion of electoral competition or human rights abuses.

### *B. Risks of Bureaucratic Autonomy*

On the other hand, there are several downsides we can associate with bureaucrats exercising capacious policy authority with large degrees of

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91. Matthew C. Stephenson, *The Qualities of Public Servants Determine the Quality of Public Service*, MICH. ST. L. REV. 1177, 1185 (2019).

92. Barry Sullivan & Christine Kexel Chabot, *The Science of Administrative Change*, 52 CONN. L. REV. 1, 24–25 (2020).

autonomy and insulation from political executive direction. Consider some of the most pressing challenges facing constitutional democracies today, like economic and health inequalities, ecological degradation, and inchoate feelings of political alienation and social displacement amongst citizens, all of which are toxic to a flourishing political community.<sup>93</sup> A core plank of seriously tackling these kinds of problems no doubt requires robustly using the structures of state power and the administrative state—whose work invariably touches on nearly every facet of socio-economic life—and effectuating change through them.<sup>94</sup>

Such an endeavor cannot hope to succeed unless the institutions of the executive and administrative state are led and staffed by personnel sufficiently committed to achieving similar normative ends. As such, a civil service staffed with personnel with an excessively Burkean<sup>95</sup> disposition to addressing pressing political problems, or who are trapped by old-fashioned or defunct socioeconomic paradigms,<sup>96</sup> or a deep reluctance to address them out of ideological disagreement or an alignment with vested private interests, may jeopardize their resolution. Energetic use of the tools outlined in Part II may be critical to ensuring the potent institutional technology of the administrative state is not functionally captured by powerful private interests, ossified due to excessive or misguided “small c” conservatism, or acts on its own ideological commitments in a manner which seriously frustrates the executives’ pursuit of conditions required to secure the common good.

### C. Finding the Optimal Path

Much more difficult than avoiding these dangers, however, is carving out an optimal institutional path of executive-bureaucratic relations which guards against both. Given the deeply contextual nature of the analysis, I suggest public lawyers adopt an *analytical disposition* to these questions mixed with prudence and principle. They should be prudential by refraining from offering blanket observations or cautions about the appropriate relationship between the political executive and permanent bureaucracy vis-

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93. Martin Loughlin, *The Contemporary Crisis of Constitutional Democracy*, 39 OXFORD J. LEGAL STUD. 435, 444–45 (2019).

94. Casey, *supra* note 79, at 781.

95. I use Burkean as a shorthand for the set of political and moral propositions associated with the writings and speeches of the Irish statesman and political philosopher Edmund Burke. Common themes in Burke’s thought include the need for political change to proceed cautiously, with a high premium placed on values like epistemic humility, prudence, and social stability. Burke also placed considerable weight on custom and long-standing traditional practices, seeing their very persistence as attesting to their latent wisdom and utility. Those of a Burkean disposition are more likely to value small-scale incremental or organic policy change as opposed to sudden ambitious or large-scale change. Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1487 (2007).

96. Ackerman, *supra* note 70, at 701–02.

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à-vis the legal and political tools outlined in Part II. Prudence warrants accepting that the relationship between the political executive and bureaucracy and trade-offs between values like executive energy, technocratic competence, democratic accountability, and bureaucratic autonomy, that offer the best *via media* to orient the administrative state toward the common good, will simply vary considerably depending on the polity concerned and its concrete circumstances. This is in some ways, therefore, a deflationary argument that counsels that the normative argument about this relationship must be disciplined by an appropriately contextual inquiry.

But caution in this context should not be conflated with an argument for normative relativism—far from it. Instead, it is critical public law scholars remain principled in their analysis in the sense that their criteria of evaluating abuse or appropriateness of institutional design or change in each system should always be oriented towards a compelling master commitment, one consistent with the ultimate ends and purpose of constitutional government—such as the common good or general welfare.<sup>97</sup> Ultimately, I hope this Essay encourages both comparative study and searching system-specific critical assessment of shifts in executive-bureaucratic relations by offering a preliminary comparative sketch of how different executives go about leveraging greater control over the bureaucracy, the incentives driving these trends, and the normative benefits and risks they can pose.

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97. N.W. BARBER, THE PRINCIPLES OF CONSTITUTIONALISM 2–6 (2018).