# AMERICAN DISPUTES OVER THE «ADMINISTRATIVE STATE»(*)

José Carlos Laguna de Paz

## I. MISPLACED SENTIMENTS TOWARDS THE ADMINISTRATIVE STATE

Americans have been long resistant to strong executive authority. It is understandable that the United States would favor a system of strict separation of powers because the country began through a liberal revolution. It is well known that Madison declared the separation of powers between the branches of government «essential to the preservation of liberty» (1). However, the resistance to a strong executive has evolved into misplaced sentiments opposed to the so called «administrative state».

To begin with, the 19th Century British legal theorist Dicey chose the wrong word to refer to *the rule of law as opposite to the administrative law*. There is no doubt that countries ruled by administrative law have been effectively ruled by the law, at least to the same extent as common law countries.

Moreover, most scholars recognise that *the common law system is also a regulatory system*. In fact, as was even evident to Frank Goodnow in 1893, the United States grew into an administrative state (2). It remains one today, with the nation's modern legal system based on statutes. President Biden does not appear to have any intention of dismantling the administrative state.

Notwithstanding this, in the first two decades of this century there has been a vivid debate on the administrative state. The supporters defend the role of agencies. On the contrary, opponents to the administrative state claim that it departs from the original meaning of the Constitution, which was inspired by common law («lost Constitution», «Constitution-in-exile» are expressions

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(1) Adler, J. H. and Walker, C. J., «Reviving Congress's Ambition», *The Regulatory Review*, 2th Mar 2020 [https://www.theregreview.org/2020/03/02/adler-walker-reviving-ambition/].

(2) Goodnow, F. J., *Comparative Administrative Law, 2 Vol., G. P. Putnam's Sons, New York, 1893 and The Principles of the Administrative Law of the United States,* G. P. Putnam's Sons, New York, 1905.

which can be read) (3). They argue that the administrative state would not be in accordance with the principle of separation of powers. Thus, they support the «nondelegation doctrine», which would prevent Congress from delegating regulatory powers (secondary legislation) to agencies.

The debate is not without political overtones («the administrative state can turn into a form of absolutism») (4). Some understand that the primary objective of public law remains the fight against abuses of power («resistance to executive prerogative — the lawless despotism of the Stuart kings»), not the pursuit of ends in the general interest.

The point is that the administrative state —governed by administrative law— is the best way to make the rule of law effective, as Cass R. Sunstein and Adrian Vermeule brilliantly argue in their recent book *Law and Leviathan: Redeeming the Administrative State.*

*In this paper, we briefly comment on some of the main points of the American debate.*

## II. EMPOWERING AGENCIES WHILE PROTECTING CITIZENS' RIGHTS

Administrative law is certainly intended *to empower public authorities to promote the public good in an effective way. Ordinary civil law, such as contracts or torts, does not provide the basis for regulatory actions to provide public utilities, to supervise regulated sectors or to urban planning and environmental protection, just to give some examples.* It is hardly deniable that all this is not for a pret-a-porter (common law), but require a tailor made legal system.

The point is that such tailor made legal system is also intended *to protect citizens' rights by limiting the power of public bodies.* Significantly, in 1946, recognizing the need for greater structure in the administrative state, the U.S. Congress passed the Administrative Procedure Act (APA), a hallmark in modern administrative law.

A few years later in 1958, Spain adopted its Administrative Procedure Law, which in turn has had a great influence in many Latin American countries. Spain's 1958 Act took advantage of the 1889 Administrative Procedure Act, which was the first administrative procedure regulation in the world.

A legal framework composed of statutes governing administrative procedures and the essential elements of public bodies contributes to the preservation of the rule of law in the administrative state.

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(3) Sunstein, C. R. and Vermeule, A., *Law and Leviathan: Redeeming the Administrative State*, The Belknap Press of Harvard University Press, Cambridge, 2020, 18 and ff.

(4) Sunstein and Vermeule 2020, 63.

Four questions illuminate how the rule of law underlies and supports the administrative state.

## III. TO WHAT EXTENT SHOULD AGENCIES ENJOY DISCRETION TO DEFINE POLICY?

In the last two years, five U.S. Supreme Court justices have stated their intention to reinvigorate the so called *nondelegation doctrine* by announcing a test that is more demanding than the intelligible principle test that the Court has applied for nearly a century (5).

There is no doubt that the U.S. separation of powers vests Congress with the power to establish the law. Under Article I of the U.S. Constitution, Congress possesses «all legislative powers (...) granted» in the Constitution. Any regulation need delegation of powers and must comply with the substance of the authorizing statute. Consequently, agencies should have limited abilities to define policy choices. The role of agencies is to implement and enforce the law, which also includes rule-making. However, rule-making power that gives agencies the ability to create secondary legislation should not allow them to make primary policy choices. So, when Congress writes statutes in very broad terms, it may not be properly fulfilling its constitutional role.

But within these limits, at the same time it is difficult to deny that agencies have a role to play in the implementation of the statutes. It has been argued that «while regulation implemented through reliance on broad delegations of power can have bad results, regulation implemented through application of clear congressional mandates is likely to be even worse» (6). If we accept that agencies have a role to play, we can squarely concentrate in discussing what should be their powers, due process, transparency requirements, the obligation to give reasons, citizens' rights and the scope of judicial review.

## IV. WHY DO WE NEED INDEPENDENT REGULATORY AGENCIES?

As a general rule, agencies should be subject to the direction of the President. This is the basic principle of administrative organization or administrative

(5) Pierce, R. J. (Jr.), «Delegation's Critics Should Be Careful What They Wish For», *The Regulatory Review*, 15th Jun 2020 [https://www.theregreview.org/2020/06/15/pierce-delegation-critics-careful-what-they-wish/].

(6) Pierce, R. J. (Jr.), «Delegation's Critics Should Be Careful What They Wish For», *The Regulatory Review*, 15th Jun 2020 [https://www.theregreview.org/2020/06/15/pierce-delegation-critics-careful-what-they-wish/].

hierarchy and what gives democratic legitimacy to their decisions. Given this structure, why have «independent» agencies?

It should be noted that the model of independent agencies was first established in the United States and then exported to the world. However, I am not quite sure whether it has been rightly understood outside the United States. The only relative independence of these agencies tend to be understood in Europe as a flaw implementation of the model. Overlooked is the fact that in the U.S. most scholars accept that these agencies are not completely immune to presidential influence.

In this vein, it is said that «there is considerable evidence that independent agencies share the President's policy preferences (...) the appointeess of a newly-elected President usually are in a position to control decision making by an independent agency within a matter of months of taking office» (7). «Regardless of what the statute says, the president can often determine who will run an 'independent' agency. Unfilled vacancies, resignations, and 'throwing the towel' often allow a president to gain control of an administrative body. In general, a new president's first appointment will create a majority for his party (if one does not already exist). Importantly, the president determines which commissioner serves as chair, a position that gives its holder significant control over the agenda and priorities of the agency. While some independent agencies are more 'independent' than others, most generally come into line, sooner or later, with the president's views» (8). The fact is that «independent agencies are not all that independent. Their chairs are appointed by the president, after all, and most of the time, their policy preferences are broadly in line with the White House. Even if the president cannot order these appointees to make particular decisions, the power of appointment, together with other authorities, ensures that are anything but a 'headless fourth branch' of government» (9).

At the end of the day, one might think that there are good reasons for things to be this way, as policy choices have to be made by those who are democratically accountable. This is why it can be argued that regulatory choices in as much permitted by statutes are to be made by the government, at least in parliamentary systems. In this context, agencies should be entitled to approve regulations defining policy choices to a very limited extent. Their role is much more to supervise and to enforce the law by the way of adjudications, which involves a lesser extent of discretion.

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(7) Davis, K. C. and Pierce, R. J., *Administrative Law Treatise*, I, 3rd edition, Little, Brown and Company, 1994, 47.

(8) Breyer, S. G., Stewart, R. B., Sunstein, C. R., Vermeule, A. and Herz, M. E., *Administrative Law and Regulatory Policy. Problems, Text, and Cases*, 7th edition, Wolters Kluwer, New York, 2011, 129.

(9) Sunstein and Vermeule 2020, 4.

However, despite being only relatively independent—or «semi-autonomous» (10)—the advantage of these agencies is that *presumably they are not subject to day-to-day political pressure. They are expected to take more neutral actions than cabinet agencies, which are closer to the political arena.*

## V. WHAT DOES DEFERENCE REALLY MEAN?

If judicial review is essential for the rule of law, what purpose does judicial deference or Chevron deference serve?

When courts review agency action, judges may be *deferential on questions of fact because in many cases there is more than one way to interpret the facts. It is not unusual for experts in a field to have differences of opinion on the meaning of the facts. That is why European Union case law refers to such facts as complex technical and economic issues* (11). Judges can only void an administrative decision when it is not motivated by facts or it appears to be clearly unreasonable.

Courts may also give agencies *deference on questions of law. Congress is responsible for the substantive legislation of a matter but may delegate authority to an agency to create secondary regulations. So, judges are only entitled to consider whether the agency has exercised its discretion within the limits of a delegation. A judge can strike down a regulation if it does not align with the purpose of the statute——one could argue this might have really been the case in Chevron v. Natural Resources Defense Council (12). Within the boundary of delegated statutory authority, however, agencies may exercise limited discretion——but discretion, nevertheless. Judges are not decision-makers, so they cannot substitute their own judgment for that of the agency.*

## VI. IS A CIVIL SERVICE SYSTEM ESSENTIAL TO AN ADMINISTRATIVE STATE?

Certainly, a civil service system has its weaknesses. But it is arguably better than a spoils system, which allows political appointees to fill administrative

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(10) Coglianese, C., «The Semi-Autonomous Administrative State», *The Regulatory Review, 7*th Oct 2019 [https://www.theregreview.org/2019/10/07/coglianese-semi-autonomous-administrative-state/].

(11) Laguna de Paz, J. C., «Administrative and judicial review of EU supervisory decisions in the banking sector», *Journal of Banking Regulation* 20, 2019, 159 and ff. and «Understanding the limits of judicial review in European competition law», *Journal of Antitrust Enforcement* 2-1, 2014, 203-224.

(12) Laguna de Paz, J. C., *Derecho Administrativo Económico,* 3ª edic., Civitas-Thomson-Reuters, Madrid, 2020, 412-415.

agency positions when new administrations rise to power («Presidents appear to believe that they need White House loyalists to protect them from the civil service») (13).

Civil servants have to apply the policy made by those who are politically accountable, but they are not «yes men». They do their work with expertise, but also with objectivity that results from the fact that they do not owe his job to those who made the decisions. «If policy officials become essentially at-will employees, as they have in many states, how can the government be counted on to ensure independent judgment by those who adjudicate, make, and oversee rules?» (14). In this sense, civil service can be seen as an essential element of the rule of law.

## VII. TO SUMMARIZE

The basic foundation of the administrative state is a system of agencies, served by civil servants——all governed by administrative law and operating within well-defined statutory constraints, subject to a comprehensive judicial review. These elements all provide the backbone of the rule of law.

(13) Steinzor, R., «Regulatory Review, Biden Style», *The Regulatory Review,* 15th Feb 2021 [https://www.theregreview.org/2021/02/15/steinzor-regulatory-review-biden-style/].

(14) Verkuil, P. R., «Putting the Fizz Back Into Bureaucratic Justice», *The Regulatory Review, 8*th Feb 2021 [https://www.theregreview.org/2021/02/08/verkuil-putting-fizz-bureaucratic-justice/].