

THE ADMINISTRATIVE STATE

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Abstract: There has always been a tension, in theory, between the public accountability and the professional efficiency of the agencies of the administrative state. How has that tension been handled? What would it be like for it to be well handled?

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Here is an obvious idea. The world would be a better place if philosopher-kings, the best and the brightest, were in charge. The idea is at least as old as Plato's *Republic*—arguably the cradle of Western philosophy. What could go wrong?

Of course, when we put it that way, then the question “What could go wrong?” seems tongue in cheek. A realist's answer is a rhetorical question that likewise seems tongue in cheek, namely, “What couldn't? What *wouldn't* go wrong?” There are at least three problems.

First, we would have to know who was worthy of the title of philosopher-king. What process would identify an expert in the real world? Who sorts out true experts from pretenders?

Second, we would need a realistic understanding of what flesh-and-blood experts can know.¹ Socrates, the protagonist of Plato's *Republic*, was notorious for his professions of ignorance. An expert knows a lot and has seen a lot. Socrates, accordingly, was something of an expert, yet, to put it mildly, Socrates gave no indication that he saw himself as qualified to run the show. True experts start by knowing their limits. When it comes to governance, or to economic policy, they understand that there is only so much that they can see coming. Even when they see broad outlines, they are aware that they cannot see the details, and they are aware that, proverbially, the devil is in the details. Who among us was not at least vaguely aware of what a pandemic could look like? But no one saw it coming at any level of detail,

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¹ There are so-called experts who claim on websites to have accurately predicted the last ten recessions, and it turns out that they really did, too. Yet, it takes something away from their seemingly stellar record to learn that they predicted recession at least once every month over that same time span. Are they experts?

including those of us who wake up every morning, check the latest news, and experience it as news that we could have predicted. In sum, experts tend to understand both from theory and from hard experience that the world has become an exceedingly complex place, and information may be just around the corner that will lead them to correct or even reverse their previous expert advice. Or they may have to keep their new information to themselves, on pain of being terminated by a faux-expert supervisor who would find the new information inconvenient or embarrassing. Especially in the policy arena, every action has more than one effect. Every action has more than the intended effect. Every action has more than the foreseen effect. And the effect you don't see coming will matter (and again, this is putting it mildly).

Third, even if we knew the true experts, we would still have to wonder when to trust them. That detail is more devilish than meets the eye. People with serious expertise are also the very people whose lifetimes of work experience can create manifest conflicts of interest. For example, suppose an agency of the administrative state needs to oversee an overhaul of the banking system. Who has the expertise to know what the problem is? Who knows what would solve the problem? And who can anticipate the "solution's" hidden cost? Answer: experts on the banking system are bankers. We can set up rules to limit corruption. We can require that their personal investment be put in a blind trust, and so on. But the thing is, we will need the expertise of bankers to know what rules we should set up to limit them. They may or may not know enough to rewrite the banking system's regulatory infrastructure so as to make it incentive-compatible at that moment, but they are the only ones who even know that much. Analogously, when we need a comprehensive reform of our system for ensuring access to health care, it will be insurers who supervise our apparatus for regulating health insurance, re-writing rules to oversee the regulators along with everything else. It seems increasingly inevitable that, one way or another, the fox ends up guarding the henhouse.

This issue's guest editor, Ronald J. Pestritto, notes that Congress has become paralyzed by ideological polarization. Somewhere along the line, we stopped trusting each other's good will. The complementary point is that, even before that, Congress was already coming to be paralyzed by the sheer volume of administrative challenges. As Gary Lawson notes, elected representatives lack the relevant expertise. But aside from that, representatives lack the time even to begin to grasp the details. Lawson notes that the code of federal regulations has four times as many pages as the codification of Congressional statutes. Yet, the latter burden, smaller though it may be, is overwhelming enough all by itself. A single statute may be several thousand pages in length, and sometimes representatives get their copies of a statute with only days or hours to evaluate it before voting. Even the several hundred who authored a few pages each of the statute may end up voting on it without ever laying eyes on the entire document. When they vote yes,

they effectively delegate law-making authority to regulatory agencies that will be tasked with making sense of what just passed.

Tiffany Jones Miller discusses a conception of national purpose that emerged in the Progressive Era, and went hand in hand with a dangerous ambiguity that Joseph Postell sees as likewise emerging during that time. That is, if the best and the brightest were supposed to be insulated from politics, how was that supposed to fit with the ideal of democratic governance? Who makes key decisions? To whom are they accountable, if not voters? Did we accidentally give up on the ideal of democratic governance? Did we do something to make that ideal utterly unrealistic? Could we have done otherwise? The tension between expertise and democracy is no less puzzling in the twenty-first century.

Regulatory agencies, as David E. Bernstein notes, typically are not subject to judicial review, and it is not agencies' fault that they often need to be legally creative in interpreting both statute and Constitution in order to put a statute into practice at all. Even leaving aside ideological gridlock, the almost unimaginably vast proliferation of regulations puts us in a position where ordinary citizens, and even the legislators who pass the law, hardly have a fighting chance of knowing what the law is. What are we to make of the rule of law? Again, as Bernstein also asks, what is it supposed to mean for us to be a democracy, progressive or otherwise? Or as Eric MacGilvray asks, what are we to make of the idea of the separation of legislative, judicial, and executive powers, when real decisions almost unavoidably are delegated to agencies within the executive branch that are opaque even to the executive branch itself? What would it even be like to live in a country simple enough that we could clearly identify the separate jobs of the legislative, executive, and judicial branches, and branches could trust each other (and themselves!) to consist of experts who know what they are doing, and whose work is transparent enough to leave them properly accountable to their fellow citizens? Would Montesquieu and the American Founders have been disappointed by the imperfections in our system of separated powers, or would they be pleasantly surprised that the system continues to work as well as it does?

We can reasonably suppose that before anything else, true experts, like Socrates, know themselves. But that is easier said than done. It seems like a gaping hole in the Weberian vision of the administrative state, but we can hardly imagine a process by which the administrative state could end up consisting of teams of experienced and self-aware experts dedicated to serving the common good. At the core of the administrative state, as Sandra J. Peart reminds us, lies a problematic mismatch of incentives; the danger is that hubristic philosopher-kings reinterpret the nature and scope of their own mandate so as to surmount bureaucratic obstacles to their pursuit of the common good as they personally conceive it. Every now and then, someone who fancies himself a philosopher-king, someone like Jack

Abramoff, gets caught and sent to prison for a few years.² When the foxes are the only people who have opportunity and incentive to learn what it takes to guard the henhouse, we will have the problem that Abramoff warns us that we do indeed have, with a vengeance.

Peart and Vlad Tarko each elaborate further problems of incentive and information. When there are too many rules, compliance becomes increasingly difficult. Indeed, there sometimes seem to be so many rules that it is hard to have any idea whether one is complying. Past a certain point, all the patches applied to the holes in previous regulations become paralyzing. Vlad Tarko analyzes administrative laws using the framework of the calculus of consent to assess the efficient level of regulation for private and public goods, and, in effect, the diminishing returns of complexity. Samuel DeCanio suggests that the very singularity of administrative decisions, and our inability to do controlled experiments to see what would have happened had those decisions been made differently, or not been made at all, would be a drastic limit on the boundaries of practical social scientific expertise even if, per impossible, there were nothing else to worry about. At the same time, this is not to suggest a straightforward case for a decentralized administrative apparatus. As Samuel Bagg notes, it is a trade-off. Problems of knowledge and incentive will arise either way, albeit in different guises, and Bagg finds it reasonable to hope that the right kind of balance between centralized and decentralized administration would represent its own kind of separated power. Emily C. Skarbek offers a penetrating analysis of the promise and pitfalls of local administration locally financed. It is a classic case of a way of internalizing responsibility that “is great in theory but ...” For applications of Skarbek’s point, we can read the essay by Brian Hutler and Anne Barnhill on regulating the sale of sugary soft drinks, and Paul Moreno’s essay on affirmative action, as case studies of what we might reasonably hope for, and for better or worse reasonably anticipate, when it comes to specific applications of entrusting the need for regulation to the apparatus of the administrative state.

None of this is meant to add up to a counsel of despair, challenging though current circumstances may be. The Founders did not give up, and neither should we. Even if we cannot rival the wisdom of Socrates and Plato, we certainly know more. Our administrative states may also be more powerful than anything Socrates and Plato ever imagined. Expert knowledge, applying powerful contemporary tools of the administrative state, may yet create better societies. Admittedly, our administrative responses to the

² If we are to believe Abramoff, he ultimately came to view himself as a disgrace, and as a criminal who deserved to be in jail, yet he did not always see himself that way. Indeed, at one time Abramoff believed he was one of the good guys. Part of the price of hubris and of corruption is that people can lose touch with what honesty and decency would even be like. They get caught when they no longer remember what they are supposed to be faking. See the CBS *60 Minutes* segment on Jack Abramoff, entitled “The Lobbyist’s Playbook.” <https://www.indianz.com/News/2011/11/07/60-minutes-transcript-of-jack.asp>

COVID-19 pandemic may be disorganized and conflicting at the moment. Administrative responses likewise fall short regarding the pervasively felt need to mount a better response to racism and to almost daily reports that our police are out of control. It seems more important than ever to protect ourselves against the abuse of power. Yet, it also seems more important than ever for those with expert knowledge to lead, and point us toward the horizon of a more peaceful, more prosperous, more responsible world. An uncomfortable situation indeed. When was the last time humanity's prospects seemed so poorly understood, and when we seemed to have such a dire need for realistic social philosophy?

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