JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: REFLECTIONS ON BALANCING POLITICAL, MANAGERIAL AND LEGAL ACCOUNTABILITY

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The Puzzle of Judicial Review of Administrative Action.

Most modern democracies have at least one thing in common: judicial review of administrative action is simultaneously ubiquitous and contestable. The ubiquity of judicial review of administrative actions has two foundations. Normatively, democratic governance presumes that officials are the servants of the people. For that normative proposition to be true of any particular society "the people" must be able to hold officials accountable for their actions. But, judicial review is not the only accountability mechanism available. Its ubiquity requires a further factual predicate - the incapacity of other accountability mechanisms to ensure that officials serve rather than rule. No functioning democracy worthy of the name has found the primary alternative accountability mechanisms, political or managerial control, adequate to the task of sustaining democratic accountability. For this reason "democracy" and the "rule of law" have become inextricably linked, with judicial review as the keystone of the legal accountability system.

Notwithstanding its centrality in modern democratic governance, judicial review of administrative action remains continuously contestable. Complaints of the incompetence, impertinence and irrelevance of judicial review are at least as common as praise of judicial review's efficacy. Responding to these pervasive critiques, the specific practices and procedures of judicial review of administrative action are subject to constant amendment, revision, and, occasionally, major reform.

The reasons for judicial review's contestability, I will argue, are the mirror image of the reasons for it's ubiquity. Judicial review of administrative action simultaneously

supports other accountability mechanisms that bolster democratic governance and undermines them. The institution of judicial review of administrative action is rife with paradox. It supports *democratic* governance by making officials accountable to *unelected* judges. It protects *individual rights* while simultaneously ensuring *state control*. It legitimizes expert administrative judgment by subjecting that judgment to review by bodies who often have limited knowledge of either the technical data upon which administrative action is premised or the concrete situations within which administration must function.

The puzzle of judicial review of administrative action, therefore, is just this: how can such a necessary feature of modern democratic governance be accommodated to the demands of both effective administration and democracy itself? My approach to this puzzle is to view judicial review of administrative action as part of a broader question of governmental design in modern democracies, that is, how to make administration simultaneously managerially effective and politically responsive. The answer, in part, has been to make administration legally accountable through judicial review. But, this is a design problem that can only be managed, not solved. For, it entails maintaining an appropriate balance among competing forms of accountability in states committed to democracy, but constrained by the demands of efficacy and by the brute facts of social, political and economic complexity.

Forms of Official Accountability.

In virtually all modern democracies administrative officials are held accountable through three different, but connected, accountability regimes - the political, the managerial, and the legal. Indeed, in some sense, the emergence of the latter two forms of accountability are responses to the inefficacy of electoral control in the modern administrative state.

Virtually all western democracies labor in the shadow of the (quasi-mystical) model of Athenian democracy.[1] This was supposedly one of the few times in recorded history that government was in Lincoln's ringing phrase "of the people, by the people, and for the people". Citizens met as a committee of the whole, official positions were allocated by vote or by lot, and officials reported back to the assembly of the citizens. Ten times a year officials charged with carrying out various administrative tasks reported on the conduct of their offices. Their reports were subject to a vote of confidence; and, if confidence was lacking, officials faced a trial by a jury of their fellow citizens. In addition, an official might be impeached by the assembly at any time.

Officialdom was hazardous in Athens, precisely because electoral accountability was efficacious. Any unsuccessful battle or unproductive foreign negotiation might subject the hapless general or ambassador to trial, and, if convicted, to death or

exile. According to Demosthenes, Athenian generals were tried for their lives two or three times in an average career, and the danger of death by trial was greater than the risk of dying in battle.

That this direct and immediate approach to holding officials politically accountable no longer describes modern governance is obvious. What is perhaps less obvious is that the conditions of modern complex societies make most versions of political control of official action incompetent.

This is not to say that periodic elections under conditions of open access to office and majority rule, and the political accountability of administrators to duly elected public officials, are unimportant details of modern democratic governance. They are crucial to the political definition of democratic citizenship. They maintain a limited capacity to hold officials accountable for results based on the presumed political preferences of the electorate.

The problem, of course, is that the electorate is no longer reasonably homogenous, and the relationship between citizens' votes and the output of legislative processes is notoriously weak.[2] Moreover, for electoral accountability to function effectively presumes that elected officials can control administrative officials. In modern welfare and regulatory states the linkage between elected officials and administrators is not a myth, but it is tenuous. Administrators often possess wide discretion and the quality of their performance is difficult for elected officials to evaluate.

Wide discretion and loose oversight are not difficult to explain. The heterogeneous preferences of a diverse electorate and the uncertainties of appropriate action in a complex world are reflected in the vagueness of the mandates that legislators can provide for administrators.[3] Vagueness begets discretion. And when evaluating performance social outcomes are often complexly and only indirectly related to administrative behavior. To make matters worse much administrative action is non-observable by elected officials who can at best exercise episodic oversight over some administrative decisions. And, administrators have quasi-monopolies on the information necessary to evaluate the effects of their actions.[4] In the modern administrative state the belief that the citizen-elector exercises democratic control over administrative behavior, even mediately through elected officials, is stretched very thin.

One solution to the deficiencies of political accountability is an attempt to assert managerial control. We live in what has been called an "audit society".[5] And the "audit", broadly understood, is the managerial accountability mechanism of choice in both public and private organizations for ensuring that those who "have the doing in charge", act both competently and honestly.

Managerialism as a mode of accountability is, of course, not unique to democracies. The monarchical model of accountability involved a simple hierarchical relationship. Officials were accountable to the monarch and the monarch to God. We know little about how God kept his accounts, but monarchs rapidly developed

rudimentary systems of auditing.[6] Modern governments are rife with inspectorates of one or another type. In some cases the inspectorate is designed to reinforce political control by providing the expertise and continuous observation that politicians lack. In other cases the inspectorate is inside the bureaucracy itself. Indeed, modern managerial techniques emphasize the role of *external* audits in the creation of *internal* accountability systems that will produce appropriate controls over official (or private) behavior.

This technocratic regime reinforces accountability, but at a cost. First, it must focus on efficiency and effectiveness and on processes or systems. These are important matters, but they are complexly and sometimes mysteriously related to bureaucratic outputs or social outcomes. More importantly, they have virtually nothing to say about policy choice. They, therefore, strengthen elected officials' capacity to guard against corruption and inefficiency, but do little to strengthen political control over what modern bureaucracies do. Put slightly differently, managerial controls tend to assume that administrative implementation can be measured against clear, predetermined policy goals and that processes are tightly linked to outcome. Neither of these assumptions is realistic.[7]

Second, the language and dialogue of administrative oversight is internal to the administrative system. The expertise of administrators not only defeats direct political supervision, it defines the terms of evaluation from a managerialist perspective. Managerialism has its virtues, but strong reinforcement of democratic accountability is not one of them.

Moreover, there is the continuing problem of who audits the auditors. Here, somewhat ironically is an entryway for judicial review of administrative action. Although we moderns mostly think of judicial review as a means of protecting individual rights against administrative tyranny, judicial review has historically played another role as well. Hauling the king's officers before the king's courts to answer for their conduct promotes central administrative control by the sovereign at the same time that it protects private rights. Judicial review consolidates state power, and with the shift of power to the people in constitutional democracy, judicial review becomes a device for reinforcing the democratic accountability of administrative officials.[8]

Viewed from this perspective, judicial review of administrative action - the demand for "legal" accountability of officials - is the carrying out of a democratic political project: the reinforcement of democratic control of official behavior. But, like managerial accountability regimes, it is not obvious that the techniques of accountability available through judicial review are a good fit with the project of democratic political control. Accountability through judicial review is accountability to law. And so it must be. For, to premise accountability in courts on anything other than the law would be to undermine the democratic political accountability that judicial

review is struggling to reinforce. Judicial review can, therefore, only obliquely reinforce political accountability. And, as we shall see, translation of the political or the managerial into the legal can undermine those sources of accountability as well.

We find ourselves in the modern era, therefore, with a mixed set of accountability regimes: political accountability through electoral processes; managerial accountability through processes of audit and systems design; and legal accountability through judicial review. The project for institutional designers is to make these differing accountability regimes work together to produce accountable governance. And it is in this attempt that we uncover some of the paradoxes and puzzles of judicial review.

For, alas, we do not live in a world in which we can happily assign issues to boxes labeled Apolitical", "managerial", or "legal". Much administrative action can be characterized in all three ways, that is, it makes policy, it is based in part on administrative considerations of efficacy, and it affects citizens' interests in ways that raise potential legal issues. Much of the doctrine and argument in any legal system utilizing judicial review of administrative action is precisely about the separation of the "legal" from the "political" or "managerial". Or, perhaps better put, it is about the accommodation of these three separate means of providing official accountability. For it is the job of judicial review both to support political and administrative accountability and to assure accountability to law. The stresses involved in balancing accountability regimes show up anywhere and everywhere in administrative law doctrine.

Legal Accountability in Action

One way to see this delicate balancing act in action is to look at three paradigmatic types of administrative action that might be subjected to judicial review for legality: administrative adjudications, administrative rulemaking (or the adoption of what is sometimes called "delegated legislation"), and "informal" administrative action that neither decides a case nor promulgates a general norm. In a simpler world one might confidently assert that reviewing administrative adjudication was the principal function for judicial review. As in reviewing the decisions of lower courts, the question for judicial resolution would be straightforward, that is, "was this case decided according to law?". Rulemaking or delegated legislation would, by contrast, be just that: policy choice subject only to available regimes of political accountability (and, perhaps, judicial review for constitutionality). And informal managerial action by administrators would be subject to whatever processes of audit and accountability the relevant bureaucracy and its political overseers had devised. To some substantial degree this simple picture describes the presuppositions of judicial review of administrative action. But using some American examples, let me illustrate both how these presuppositions operate and the limits of their resolving power.

Adjudicating Cases.
Administrative adjudicators in the U.S. make millions of decisions annually and across a wide range of administrative functions. Often these adjudications involve claims of right which must be determined on a record after opportunity for hearing and argument. Opportunity for appeal of these adjudicatory decisions, either to a specialized tribunal or to general court seems, to the modern legal mind, non-problematic. Reviewing lower tribunals is the work that appellate courts normally do within the general civil or criminal law.

Yet review of administrative adjudication raises immediate concerns: What scope of review should reviewing in courts exercise, and what remedies should they apply in the case of legal error? To what extent should courts be involved in restructuring the processes of administrative adjudication as against merely ruling on the legality of their outputs. To what extent should the courts rely on standardized administrative routines as guarantors of regularity in high-volume, fact-based adjudications? And, what deference should be paid to the judgments of administrative adjudicators in cases that "make law" as well as apply it. In answering many, if not most, of these questions courts confront tradeoffs between or among legal, political, and managerial accountability.

It seems clear, for example, that much judicial "deference" to administrative adjudicators is based upon the perception that administrative adjudication makes policy as well as applying law. As part of its accommodation to the American administrative state in the New Deal era, the United States Supreme Court famously deferred to the judgment of the National Labor Relations Board concerning whether employees needed the protections afforded by the National Labor Relations Act. It did so through the lawyer's device of finding that the determination of "employee" status was a question of "fact" within the ordinary experience and expertise of the Board.[9] The Court has also made clear that the Board has the choice of making policy through either adjudication or rulemaking and that the Board's choice in this matter will be reviewed only for the most extreme cases of abuse of discretion, that is, effectively never.[10]. In short, these decisions suggest that policy is for the Board subject to accountability to the political branches for the shape of labor relations law. And, because the Board makes policy almost exclusively through adjudication, respect for the proper role of political accountability limits the reach of legal accountability for adjudications through judicial review.

If this were the whole story, it would be nicely counterintuitive, that is, political accountability trumps legal accountability even where one would expect the latter to be most robust. Yet, the story is not so simple. The political branches have responded to the judiciary's self-limitation by suggesting that they expect courts to engage in more searching review of Labor Board determinations.[11] And, as Labor Board policies accrete and are judicially approved, what is their status? Are they

precedents that now bind the Board in future adjudications? Or, does the Board remain free to alter policy as it perceives shifts in social and economic context? The answer seems to be the former.[12]

These developments almost turn the story on its head. Well-informed commentators have argued that judicial review has seriously impaired political accountability for Labor Board policymaking both by granting the Board discretion and by restricting it.[13] By giving the Board *carte blanche* to use adjudication as its principal policymaking device the courts have allowed the Board to bury policy in the factual complexities of individual cases and to, thereby, render political oversight virtually impossible. And, by demanding Board adherence to "precedent", the courts have deprived the Board of the flexibility to be politically responsive. In short, where judicial review should be expected to be most sure-footed and non-controversial, in reviewing administrative adjudication, the judiciary is accused simultaneously of abandoning serious legal oversight while limiting the Board's political accountability.

To take another prominent example, the Supreme Court has deferred extensively to the judgments of the Social Security Administration concerning the structure of its adjudicatory processes.[14] Here deference is not so much to administrative policy choice, subject to political accountability, but to managerial judgments about the necessities of administration. The Court has relied explicitly on the circumstantial reliability of internal administrative routines that make individual adjudicators accountable and administrative processes "fair" to claimants.

Yet, the Court has found itself intervening in other public benefits processes that it found less reliable and regularized.[15] In doing so the Court substituted its own judgment for the administrators' concerning the types of adjudicatory process necessary to produce accurate and reliable decisions. Courts have also suggested a willingness to intervene in the managerial efforts of the Social Security Administration where those efforts might impair the "independence" of administrative adjudicators.[16]

In many ways the Supreme Court's attempt to find an accommodation between citizen demands for individualized hearings concerning their rights and the necessities of mass administrative justice are laudable. In a liberal democratic regime of the 21st century, the citizen's rights are often held in the fragile currency of some form of state-based concession: professional licenses, access to education, pension rights, and so on. If the citizen is to be treated as an independent end, not merely a means of effectuating state policy, then surely these rights must be attended with forms of legal security that make them defensible in the face of bureaucratic error or corruption. Individualized hearings with demands for proof and a judgment on the record are a major bulwark against state oppression.

Yet, individualized hearings are wonderfully anti-bureaucratic. They interrupt regular routines, require the expenditure of disproportionate resources on particular decisions, and risk defeating the goals of programs designed to promote the general

welfare. Hence the delicate balancing act between defending individual rights to particularized proofs and judgments and deference to administrative judgment concerning how hearings might best be structured to maintain administrative capacity.[17]

The point here is that the necessity to balance "legality" against "administrative necessity" puts reviewing courts in an almost impossible position. To defend rights they must insert procedures into bureaucratic regimes with little or no capacity to judge what their ultimate effects might be. And, reliance on administrative necessity may easily turn out to be misplaced where the institution doing the relying - the court - has limited insight into the dynamics of administration.

Thus, for example, in a famous case in which the Court deferred to Social Security Administration's assurances of the circumstantial reliability of its data, commentators have suggested that the Court failed to appreciate both the nature of the decision that was being made at the administrative level and the degree to which the data relied upon bore on the ultimate determination.[18] Indeed, had the court been able to do a managerialist audit of the reliability of the system it was affirming, it might have been alarmed at the apparent inconsistencies across deciders and the astonishingly high rate of victory by petitioners who appealed their decisions.

On the other hand the Court's willingness to intervene to protect the independence of administrative law judges, who hold formal administrative hearings in the American system, may well have undermined managerial efforts to assure the consistency and accuracy of administrative determinations. And, where the Court forcefully inserted rights to hearings in welfare administration, this victory for the "common law ideal" of individualized days in court may have dramatically and unpredictably shifted the basic priorities of welfare administration. Assuring "rights" through adjudication may have contributed substantially to the loss of the program's capacity for client services and have shifted managerial effort from the pursuit of professionalized social services to the defensibility of income eligibility determinations.[19]

All of these critiques of both deference and intervention are, of course, contestable. But they illustrate my basic point: Even in the realm where judicial review seems most appropriate, the review of, and defense of, administrative adjudicatory processes, legal and managerial accountability, like legal and political accountability, are strongly competitive. More importantly, because managerial accountability often supports the same values of accurate adjudication that are pursued through the assertion of legal rights to hearings and review, missteps undermine not just managerialism, but the purposes of judicial review itself.

Rulemaking.

Modern administration entails the creation of a host of subsidiary norms, that is, rules, bulletins, memoranda, guidelines, manuals, and other documents that give more concrete meaning to the terms of general statutes. Techniques for generating

these norms vary enormously across legal systems. Some treat administrative rulemaking as quintessentially political and subject only to regimes of political accountability. Yet it is difficult to keep the law from creeping in, particularly in "presidential" or "separation of powers" legal systems like the American one. Because administrative jurisdiction and authority flows almost exclusively from statutes, political control of administrative discretion by presidents is always subject to the question, "Was that act authorized by law?".[20] And legislative attempts to direct administrative policy free of presidential interference may be viewed as unconstitutional in regimes that treat the President as the Chief Executive Officer.[21] Even political accountability has a legal structure that can be used to mount legal challenges in court, and this is but the tip of the legal iceberg.

Recognition that statutes do not necessarily determine policy choice and that political controls over administrative discretion may be weak have, in the U.S., lead to micro-political controls on administrative policy making. Harking back perhaps to Athenian democratic ideals, American administrative law gives any person a right to participate in agency rulemaking processes. Moreover, Congress has often insisted that judicial review be available to determine whether any administrative action, including general rules, is "arbitrary". These process guarantees and provisions for judicial oversight have produced substantial incursions into administrative policy making, even when policy is announced as a general norm or "rule".

That a Congress that finds itself unable to give administrators crisp statutory instructions might be tempted to rely on judicial review as a means of reigning in rambunctious administrators is understandable.[22] But, the American Congress' penchant for providing for immediate review of agency regulatory pronouncements has created a mini-crisis of accountability by thoroughly confusing political and legal accountability regimes.

A court faced with the question whether an agency rule is "arbitrary" is in reality faced with a political question: Has the agency's policy judgment been so bad that it should be nullified? That sort of substantive policy issue seems an issue of politics, not law. But, the statutes mandating judicial review demand a "legal" answer. And, the courts have responded by "proceduralizing" arbitrariness to make judicial review of rules legally manageable. The basic technique is to model the rulemaking process on the process of adjudication. Adjudications may be arbitrary in two senses, either substantively, because the facts of record do not justify the agency's conclusions, or procedurally, because participants have not been given a fair opportunity to participate.

American courts have taken essentially the same approach to rulemaking processes. Attempting to the extent possible to avoid the substantive, and inevitably political, judgment of whether agency policy makes sense, courts pursue related "procedural" questions of the adequacy of notice, the responsiveness of the agency to relevant comments of participating parties, the adequacy of the agency's explanation, and the exis-

tence of facts in the "record" that would justify the agency's findings. The result has been to preserve the law-like nature of judicial review, but to impose severe, sometimes insurmountable, burdens on administrative policymaking[23]. In recent years the Supreme Court has attempted to redress the balance, in part, by giving deference to agency interpretations of their own statutes. This deference is premised on the political proposition that the agencies are the delegates of the legislature who have been authorized to "make law" by their interpretive regulations.[24]

The result of making rules reviewable while asserting deference to policy choice has been a peculiar and uncertain jurisprudence. Peculiar because it seems to give judicial deference to agency interpretations of *law* while immersing courts in the often technical *facts* in the rulemaking record. Uncertain because it has given important legal armaments to obstructionist element in the agencies' regulatory space. Every rule is contestable on a host of possible legal grounds and a reviewing court's reaction to these complaints is often unpredictable. This provides strong incentives to seek review and strong disincentives for agencies to engage in rulemaking. The result is that rulemaking has languished and much administrative policy making has been driven underground. And lack of transparency tends to undermine political accountability.

One of the more important American cases on judicial review of administrative action provides some important insights into this uneasy relationship between legal and political accountability. *Motor Vehicle Manufacturers Association of the U.S., Inc. v. State Farm Mutual Automobile Insurance, Co.,*[25] involved the legality of the most important safety rule ever adopted by the National Highway Traffic Safety Administration (NHTSA) - its requirement that all vehicles be equipped with passive restraint systems (either automatic belts or airbags). The regulation had been twenty years in the making, a regulatory history that demonstrates starkly the unpredictable interactions between legal and political control of administration.[26]

The rule was first promulgated in the late 1960s, but was immediately derailed by a judicial determination that the agency's engineering specifications were inadequate. That ruling was both questionable and unnecessary, but sent the agency literally back to the drawing boards. NHTSA then produced a stop-gap measure using a different technology – ignition interlocks—to prevent the use of automobiles unless the passengers had attached their seatbelts. This second attempt ran afoul of the political process. Congress received thousands of complaints about the requirement and passed legislation to repeal it.

A change of presidents then put passive restraints on the back burner in an administration that was more interested in promoting automobile sales than regulating their safety. The rule languished until a pro-regulatory administration revived it and repromulgated it. But, the effective date for compliance outlasted that administration's mandate and a less enthusiastic administration decided to require only a "demonstration project" involving a few thousand vehicles. That administration again

passed from the scene and the rule was repromulgated, only to be rescinded by the next deregulation-minded president.

If this sketch tells us anything, it is that the issue of passive restraints was a highly political question, not a mere exercise in technocratic safety engineering. The rescission set the stage for the *State Farm* case in which various automobile insurance companies challenged the rescission of the rule as having insufficient basis in the record. On this score, they were surely correct. The agency had spent twenty years compiling a record to support the rule, and the information supporting its rescission was quite thin. The Supreme Court, therefore, invalidated the rescission as being inadequately rationalized.

This much is clear - congresses and presidents asked whether the rule was wanted. The courts asked a quite different question, whether it was adequately supported by the record either for promulgation or repeal. And, while the Supreme Court in *State Farm* recognized that the repeal of the rule was almost certainly the result of a change of administration, and therefore, a change of policy, that policy ground was insufficient to sustain the rule. Having "legalized" the review of rulemaking, by translating it into a rational process of weighing evidence compiled in a record, it was simply not possible for the defendant administrator to tell the truth and be upheld. For the truth was something like this: "I represent an administration that was elected campaigning on deregulation and regulatory relief for the automobile industry. There is some question about the safety benefits of the passive restraints rule, and given my administration's political ideology, we act by a simple motto: When in doubt don't regulate'."

When told in this way the *State Farm* story has a simple lesson: seen through the lens of judicial review, administration is apolitical. Indeed, administration must be made apolitical in order to subject it to legal accountability. And, to this degree, *State Farm* is quite consistent with the Supreme Court's constitutional jurisprudence in which the Court has been prepared to place relatively stringent limits on the powers of both Congress and the President to control administrative policy. Indeed, the Supreme Court's separation-of-powers jurisprudence so muddies the waters of the reach of presidential and congressional control over administrative policy making that the question of whether administrators are politically accountable to the President or the Congress has no straightforward answer.[27] In part, and through certain techniques, administrators are answerable to both. But whether this reinforces or destroys political accountability is hard to judge. Many would say that an agent who must satisfy two principals is in a good position to avoid satisfying either.

Judicial review has therefore, to some degree, reinforced the independence of administration from politics and political accountability. But, political institutions that are electorally accountable for government action are unlikely to give up their capacity to control governmental actors without a fight. Deprived of authority to

dictate or veto administrative policy choices, both presidents and the congress have attempted to reassert political control over administration by the creation of "managerialist" techniques.

Virtually any major federal, administrative in the United States action must now be attended by a host of analyses that describe in great detail the proposal's effects on the environment, on the structure of American federalism, on the paperwork burden on American firms and citizens, and on small entities both public and private, as well as providing an analysis of the costs, benefits and alternatives to the action proposed and the means by which all data used by the agency in its policy-making has been vetted for its scientific quality.[28] These analyses are subjected to review and audit by various "super agencies" in the executive branch and by Congress. Negotiations about the adequacy or soundness of these analyses thus becomes a pathway for reasserting political control by elected officials, particularly the President.[29] As we noted earlier, the membrane that divides "managerial" from "political" accountability may be porous.

Moreover, because all of these analyses become a part of rulemaking records, they are also a part of the factual predicate that is available to a reviewing court when determining whether the agency's behavior is or is not "arbitrary". The consequence, once again, has been to reinforce legal accountability through judicial review. Not only may outside parties use judicial review to defeat or delay administrative action that has not satisfied various analytic requirements, courts have held that the Office of Management and Budget, which oversees most of these "impact statement" regimes, may not use its oversight powers to unreasonably delay agency action.[30] Political control, in a managerial form, is thus made legally accountable.

Administration.

Government officers also carry on a huge array of managerial tasks that have little to do with either deciding cases or generating rules of conduct. They manage public lands and state-owned enterprises. They promote the exploration of space and manage the money supply. They build or subsidize infra-structure development, police the borders and attend to the national defense. They set agendas and supervise personnel.

Much of this activity is free from judicial or legal review. In the words of the American Supreme Court there is "no law to apply". These administrative judgments are often judgments of economic or engineering feasibility, political importance, and administrative capacity. Yet, strangely enough, the leading case on the presumption of judicial review of administrative action in the United States is a case involving infra-structure development – the building of highways.[31] And one finds courts routinely reviewing Corps of Engineers' water projects and Department of Interior leasing arrangements on public lands. A closer look reveals that most of these cases are the

result of cross-cutting statutes, particularly statutes concerning environmental protection, that attach non-managerial criteria to administrative routines. These requirements have been inserted in the statute books to broaden the vision of mission-oriented administrators. And Congress has relied upon the courts and private litigants as a means for ensuring attention to these broader societal values.

But, the results of "legalizing" management have not always been benign. The *Overton Park* case, the modern administrative law case that most dramatically established the principal of presumptive judicial review of administrative action in the United States, provides a cautionary tale.[32] The plaintiffs were a group of citizens unhappy about the routing of a highway through Memphis, Tennessee. Because the route chosen included the taking of some park property, the plaintiffs seized on the language in the Federal Aid Highways Act that required (1) that highway engineers avoid the use of park lands unless there were no "feasible or prudent" alternative and (2) demanded that they use "all possible planning" to minimize the damage to park lands ultimately disrupted by highway construction.

The defendant, the Federal Highway Administration, had treated the planning and building of Interstate 40 through Memphis, Tennessee, as an exercise in managerial administration. It had worked with the Tennessee Highway Department and multiple local and state planning bodies to develop a route that satisfied the need for traffic movements, subject to the constraints of local land use policies and the budget available for highway construction. The project had been ongoing for many years with multiple reanalyses and reassessments of the soundness of the plan from engineering and fiscal perspectives.

The process was also highly political. The routing of the interstate highway had been a major political issue in Memphis for nearly a decade. Local elections had been fought on the basis of that issue and the people of Memphis seemed to have spoken in favor of a city council that was committed to the project. On the basis of all this engineering, fiscal and political information, the Federal Highway authorities had determined that the chosen route through Overton Park was the only feasible and prudent one.

In the crucible of judicial review, the multiple, incremental decisions of highway construction, filtered through both technical and political processes, looked quite different. The plaintiffs urged that the Federal Highway Administration had simply misunderstood the words "feasible and prudent" in the statute. They urged, and the Supreme Court agreed, that the Congress had meant to provide strong protections for park land against the encroachments of road building. In the Court's view the administrator needed to find, in order to justify his decision, that any other route than the route taking park land would be "uniquely difficult" because of community disruption, or engineeringly impossible. Moreover, the Court refused to accept the administrator's explanations, offered in litigation affidavits, in response to the

plaintiff's lawsuit. In the Court's view the administrator had to "make a record" that justified his decision, not simply provide "post-hoc rationalizations" in the context of litigation. The notion that the lawsuit was misplaced because highway building was not appropriately subjected to judicial review was brushed aside. In the Supreme Court's view any time there was "law to apply" a court could be called upon to determine whether it had been properly applied.

On remand to the trial court, and after 128 days of testimony, the trial court found that the history of the project as presented in court did not satisfy the Supreme Court's "uniquely difficult" standard for choosing a park land route. The question was remanded to the Federal Highway Administration which declined to continue funding for the project. The federal administrator was then promptly sued by the State of Tennessee which claimed that if there were feasible and prudent alternatives to the park land route, the administrator was obliged to specify them and fund the project in that location. This put the administrator in a quandary. Federal and state officials had spent a decade devising a plan on the basis of their judgment that there were no feasible or prudent alternatives. There was no administrative record upon which a determination of an alternative route could be premised. Once again the state and local officials went literally back to the drawing boards.

I describe this as a cautionary tale because the judiciary's intervention has obvious effects on political and managerial accountability for road building. On the political side, the Court's *Overton Park* interpretation of the Federal Highway Act shifted authority strongly away from local communities, who are most effected by such endeavors, and toward national elected officials whose priorities may be quite different. The balance of benefits and costs between park lands and highways is to be decided by federal administrators under national statutory standards that give no obvious weight to local political preferences. The inter-governmental processes of political accommodation that surround joint federal-state-local projects is subordinated to the hard edges of the law.

The decision also imagines a managerial environment that highway engineers may find quite unrealistic.[33] The Court seems to assume that highway building involves ratio-deductive thinking in which facts are gathered, decisions are made based on the application of technical methodologies, and can be rationalized in straightforward logical fashion. The informal and iterative process of professional consultation and craft judgment is not captured by this picture. Moreover, if administrators want to avoid lengthy trials about their engineering decisions, the *Overton Park* case implicitly instructs them to bureaucratize the process in ways that create records suitable for judicial review. How that effects the real processes of road building is anyone's guess.

In short, subjecting these sorts of decision to judicial review implicitly makes real choices about what sorts of accountability regimes are appropriate for ensuring

managerial responsibility. The progressive logic of judicial review, if there is law, then there is review, obscures these choices as much as it illuminates them.

One should not take away from the *Overton Park* case, however, the idea that managerial discretion has been eliminated from American administrative law. American courts clearly recognize that agenda setting is one of the most critical aspects of administrative management. As a consequence, courts have been reluctant but not entirely unwilling, to invade administrative enforcement discretion or to attempt to set agency regulatory agendas.[34]

Perhaps the most important thing to notice about these limitations on judicial review of managerial discretion has to do with the way that insulation from legal accountability may create imbalances in administrative incentives. For while it is presumptively the case that an agency adjudication or agency rulemaking will be subjected to judicial review at some point, precisely the opposite presumption applies to agency failures to act. Agency agenda setting about either policy making or enforcement is an aspect of managerial discretion that in the American vernacular is "committed to agency discretion by law". This means that where political and administrative accountability regimes fail to mobilize administrative energies, judicial review will take up very little of the accountability slack. The modern political world is planted thick with laws, but the beneficiaries of those laws can only occasionally rely on the judiciary to assure that they are enforced.[35] In the American administrative state legal accountability thus has a decidedly liberal democratic character. State action that potentially invades individual freedom or impairs individual rights or interests is presumptively subject to judicial review. Administrative inaction that fails to protect the weak from the strong, or diffuse from concentrated interests, is presumptively not reviewable.

Judicial review in the U.S. thus seems to play out a political project of accountability for official action that responds to the peculiarities of the American political culture. It is perhaps not too much to suggest that judicial review in the United States is structured to pursue Thomas Jefferson's famous aphorism that "that government governs best that governs least." Public law rights in the United States follow the political culture's preference for insuring "negative" rather than "positive" liberty.

Reflections on Institutional Design

Every democracy struggles to keep a workable division between law and politics. If the citizens' legal rights are subject to the political whims of the rulers, the fundamental presuppositions for democratic governance are erased. The citizen cannot be the pawn of the state and simultaneously the source of its authority. Judicial review of administrative action is a crucial aspect of this democratic project. If officials are not subject to the law, then democracy is a sham. We simply elect our dictators.

Democracy struggles as well to balance the demands of political responsiveness and governmental competence. In the modern world that has often meant separating governance from electoral politics. Indeed, in some significant sense, electoral politics cannot produce responsive government unless it is harnessed to technically competent administration. And incompetence is politically dangerous. As has proved so common in the past, incompetent democracy will give way to authoritarian regimes that promise in the hackneyed phrase "to make the trains run on time".

Here again judicial review has a role to play. Elected officials cannot monitor the far flung activities of the modern administrative state. But citizens affected by official action can do so in part through the processes of judicial review. For, administrators called to account in court to justify their actions according to law are also being called to account for the technical competence of their actions. Requiring factual predicates for action and reasoned explanations of decisions ensures that administrators, in Weber's famous phrase, "Exercise power on the basis of knowledge".

I do not, therefore, deny for a moment the role of judicial review of administrative action in maintaining politically responsive and technocratically competent governance. This paper has emphasized, however, the potential paradoxes and tradeoffs of making administrators accountable to law. For judicial review both supports political accountability and impairs it, demands administrative competence and undermines managerial capacities. Moreover, the way that judicial review will interact with other accountability mechanisms, the political and the managerial, are often unanticipated and unpredictable. The task of institutional designers is therefore not to get the balance right once and for all. It is instead to understand the project for what it is, a project of democratic experimentalism. Democratic governments would surely be incompletely accountable without effective judicial review. But, if "accountability" is the goal, reinforcing or extending judicial review will not always be the answer.

NOTES

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5 Michael Power, THE AUDIT SOCIETY: RITUALS OF VERIFICATION (Oxford: Oxford Univ. Press 1997).

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7 For a general discussion *see* Andrew Dunsire, CONTROL IN A BUREAUCRACY (Oxford: Martin Robertson, 1978).

8 Martin M. Shapiro, COURTS, A COMPARATIVE AND POLITICAL ANALYSIS (Chicago: Univ. of Chic. Press 1981).

9 NLRB v. Hearst Publications, 322 U.S. 111 (1944).

10 National Labor Relations Board v. Wyman-Gordon, Co., 394 U.S. 759 (1969).

11 *See* discussion in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

12 *See*, e.g., NLRB v. Bell Aerospace, Co., 416 U.S. 267 (1974).

13 *See* Ralph Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court,* 1968 Sup. Ct. Rev. 53.

14 *See*, e.g., Matthews v. Eldridge, 424 U.S. 319 (1976); and Richardson v. Perales, 402 U.S. 389 (1971).

15 *See*, e.g, Goldberg v. Kelly, 397 U.S. 254 (1970).

16 *See* Nash v. Califano, 613 F.2nd 10 (2nd Cir. 1980).

17 For an extended discussion of the competition between legal, bureaucratic and political accountability and the Social Security Administration, see Jerry L. Mashaw, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS, (New Haven: Yale Univ. Press, 1983); Jerry L. Mashaw, et. al., SOCIAL SECURITY HEARINGS AND APPEALS (Lexington: Lexington Books, 1978).

18 *See* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus For Administrative Adjudication: Three Factors in Search of a Theory of Value,* 44 Chi. L. Rev. 28 (1976).

19 William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System,* 92 Yale L. J. 1198 (1983).

20 *See generally,* Peter Strauss, *Presidential Rulemaking,* 71 Chi.-Kent L. Rev. 965 (1997), Laurence Lessig and Cass Sunstein, *The President and the Administration,* 94 Colum. L. Rev. 1 (1994), Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking,* 48 Ark. L. Rev. 161 (1995).

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Administrative State, 89 Colum. L. Rev. 452 (1989); Thomas W. Merrill and Kristin H. Hickman, *Chevron's Domain,* 89 Geo. L. J. 833 (2001).

25 463 U.S. 29 (1983).

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27 For a flavor of the extensive literature see the sources cited at Jerry L. Mashaw, et al., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, 302 (2003).

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29 These developments have been criticized, Eric D. Olson, *The Quiet Shift of Power: Office of Management and Budget Supervision of the Environmental Protection Agency Rulemaking Under Executive Order* 12,291, 4 Va. J. Nat. Res. L. 1 (1984), praised, Elena Kagan, *Presidential Administration,* 114 Harv. L. Rev. 2245 (2001), and meticulously examined. Stephen P. Croley, *White House Review of Agency Rulemaking: An Empirical Investigation,* 70 U. Chi. L. Rev. 821 (2003).

30 *See, e.g.,* Environmental Defense Fund v. Thomas, 627 F. Sup. 566 (D.C., D.C., 1986).

31 Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

32 The description that follows is based importantly on Peter L. Strauss, *Revisiting* Overton Park: *Political and Judicial Controls Over Administrative Controls Affecting the Community,* 39 U.C.L.A. L. Rev. 1251 (1992).

33 *See generally,* Jerry L. Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federal Aided Highway Construction,* 122 U. Pa. L. Rev. 1 (1973).

34 For an overview of this jurisprudence consult Jerry L. Mashaw, *et* al., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, 909-947 (2003).

35 *See generally,* Cass R. Sunstein, *What Standing After Lujan? Of Citizens' Suits," Injuries" and Article III,* 91 Mich. L. Rev. 163 (1992).

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