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# Legislative Atrophy

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# Legislative Atrophy

Jesse Panuccio\*

The country is sharply divided over President Obama's policies. But whether you celebrate or lament these policies, one thing is certain: Mr. Obama has been one of the most effective presidents in history at making his agenda a reality. At the end of his eight years, he'll have left almost nothing on the table. On just about every domestic and foreign-policy front he has moved the needle significantly to the left. Yet, despite this policy success, the Obama administration's legislative accomplishments are relatively few. President Obama cannot boast the legislative record of Franklin Roosevelt or Lyndon Johnson, who ushered in the New Deal and Great Society programs through hard-fought battles in Congress. And even with respect to President Obama's one major legislative accomplishment—the Affordable Care Act—the actual text of the law has, in practice, had only a loose relationship with the implementation of healthcare policy since its enactment.<sup>1</sup>

How can it be that President Obama has accomplished so much from a policy perspective while accomplishing so little in Congress? The answer, of course, is that he has done it all through various forms of executive action—from outright decrees, to rulemaking, to non-enforcement of existing laws, to litigation positions. The Obama administration has gone further than any in history in making policy through executive fiat. President Nixon may have once famously said, “when the president does it, that means that it is not illegal,”<sup>2</sup> but it is President Obama who has actually governed according to that creed.

Professors, pundits, and politicians have now spent several years debating President Obama's various uses (or misuses) of executive power—important and interesting debates, as highlighted by this symposium. But in addition to debating the legality of these actions, we must also ask another critical question: How is it that we've gotten to this point? How is it that the

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\* I am grateful to the *FIU Law Review* for the invitation to present at this symposium, and for its editors' work on this comment. I delivered a version of these remarks at the Federalist Society's Florida Chapters Conference on February 28, 2015. See *2015 Florida Chapters Conference*, FEDERALIST SOC'Y, [www.fed-soc.org/events/detail/2015-florida-chapters-conference](http://www.fed-soc.org/events/detail/2015-florida-chapters-conference) (last visited Apr. 20, 2016).

<sup>1</sup> Professor Blackman, in his presentation, laid out the many ways in which the Obama administration has ignored the plain text of the Affordable Care Act. See Josh Blackman, *Government by Blog Post*, 11 *FIU L. Rev.* 389 (2016).

<sup>2</sup> Interview by David Frost with Richard Nixon, Former President, United States of America, in Monarch Bay, Cal. (Mar.–Apr. 1977), [http://landmarkcases.org/en/Page/722/Nixons\\_Views\\_on\\_Presidential\\_Power\\_Excerpts\\_from\\_a\\_1977\\_Interview\\_with\\_David\\_Frost](http://landmarkcases.org/en/Page/722/Nixons_Views_on_Presidential_Power_Excerpts_from_a_1977_Interview_with_David_Frost).

American people and their governing institutions have largely come to accept an executive that acts unilaterally? The answer, I think, is that President Obama's assertions of executive power are merely the coup de grace on a long period of legislative atrophy.<sup>3</sup>

To appreciate just how far we've come, recall the founding generation's views on the separation of powers. James Madison, famously noting in Federalist 51 that men are not angels, explained, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."<sup>4</sup> Madison continued, "a dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."<sup>5</sup> These auxiliary precautions are found in the structural provisions of the Constitution—the vertical and horizontal separation of powers. With respect to the latter, the founders hewed to the theory first espoused by Aristotle, who said in his *Politics* that the deliberative branch of government is "the supreme element."<sup>6</sup> Echoing this in Federalist 51, Madison wrote, "In republican government, the legislative authority necessarily predominates."<sup>7</sup> Accordingly, as Madison explained in Federalist 48, "it is against the enterprising ambition of *this* department that the people ought to indulge all their jealousy and exhaust all their precautions."<sup>8</sup> Acting on this belief, the founders wrote a constitution in which the first article (establishing Congress) is much more finely wrought than, and is more than double the length of, the second article (establishing the presidency). The founders viewed the legislative branch—with the power to make policy—as first among equals, and thus much more carefully cabined that branch through structural protections.

But who could possibly think of Congress as predominant today? Our modern system is one of executive predominance—an "Imperial Presidency" as Arthur Schlesinger famously put it<sup>9</sup>—with power slowly accreted over time. From healthcare, to immigration, to drug policy, to the environment, to fiscal policy, to energy—no one really asks what Congress is doing. All that matters is what the federal agencies are doing. There are

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<sup>3</sup> Two scholars have recently published excellent, longer treatments of this topic. See Charles J. Cooper, *Confronting the Administrative State*, 25 NAT'L AFF. 96 (2015); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

<sup>4</sup> THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1961).

<sup>5</sup> *Id.*

<sup>6</sup> ARISTOTLE, *POLITICS* bk. IV, at 179 (H.W.C. Davis, ed., Benjamin Jowett trans., Oxford at the Clarendon Press 1908) (c. 385 B.C.E.).

<sup>7</sup> THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1961).

<sup>8</sup> THE FEDERALIST NO. 48 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

<sup>9</sup> ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

many explanations for this—sociological, historical, economic<sup>10</sup>—but from a legal perspective, legislative atrophy flows from several doctrines that radically depart from the founding vision.

First, the federal courts long ago gutted the non-delegation principle, which holds that Congress cannot grant legislative power to the executive branch. The abandonment of this precept means that it is acceptable for Congress to empower federal agencies with vast amounts of regulatory authority and very little guidance. For example, it is acceptable, the Supreme Court has held, for Congress to authorize an agency to pass regulations on a topic in a way that is, simply, “requisite to protect public health.”<sup>11</sup> With this leeway, Congress has over time delegated ever more policymaking work to administrative agencies, with ever broader grants of power. Why take on the politically difficult work of policymaking when it can be sloughed off on others?

Second, under the *Chevron* doctrine, if there is a “legislative delegation to an agency on a particular question,” then federal courts are to defer to the “agency’s construction of the statute which it administers.”<sup>12</sup> Indeed, the Supreme Court has recently held that courts must defer to agencies on the very question of whether Congress has, in fact, delegated power.<sup>13</sup> Thus, not only can agencies make policy with a relatively free hand, they can determine whether Congress has given them that free hand.

Third, agencies adjudicate cases that arise under the statutes they administer.<sup>14</sup> In other words, an agency can make policy, enforce that policy, and then adjudicate the claim of an affected party who might challenge that enforcement action. Indeed, the Supreme Court has even held that, in some cases, agencies can adjudicate claims that arise under the organic law of states, rather than under federal statutes committed to the agencies’ administration.<sup>15</sup>

In modern American government, then, most law is made, executed, and adjudicated by administrative agencies. What might the founders have thought of this situation? Well, in Federalist No. 47, Madison told us precisely: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very

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<sup>10</sup> See, e.g., Cooper, *supra* note 3, at 99–100 (describing Woodrow Wilson’s policy arguments in favor of unifying power in technocratic experts); *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1223 n.6 (Thomas, J., concurring in the judgment) (same).

<sup>11</sup> *Whitman v. American Trucking Ass’ns., Inc.*, 531 U.S. 457, 473 (2001).

<sup>12</sup> *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

<sup>13</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

<sup>14</sup> See *Den, ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855) (holding that “matters[] involving public rights” may be adjudicated by agencies).

<sup>15</sup> See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986).

definition of tyranny.”<sup>16</sup>

Some justices currently on the Supreme Court have raised concerns over just how far aspects of the administrative state have strayed from the founding plan. Indeed, in a concurring opinion in a 2015 case, Justice Thomas called for a wholesale reworking of the Court’s non-delegation doctrine: “[T]he test we have applied to distinguish legislative from executive power largely abdicates our duty to enforce that prohibition. . . . I would return to the original understanding of the federal legislative power and require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process.”<sup>17</sup> In other words, Justice Thomas would require Congress to get back into the game of policymaking.

As for deference to administrative agencies, cracks are starting to show. In *City of Arlington v. FCC*, a 2013 case, Chief Justice Roberts—joined by Justices Kennedy and Alito—took the position that, in allowing agencies to determine for themselves whether Congress had conferred to them interpretive authority over a particular issue, the Court’s administrative deference has gone too far. The Chief Justice quoted Madison’s caution against tyranny and bemoaned “the danger posed by the growing power of the administrative state.”<sup>18</sup> The Chief Justice lamented that “as a practical matter [administrative agencies] exercise legislative power, . . . executive power, . . . and judicial power . . . ,” and that “[t]he accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government.”<sup>19</sup> In another case, *Michigan v. EPA*, Justice Thomas went even further. He criticized not just aspects of the *Chevron* doctrine, but “raise[d] serious questions about the constitutionality” of “the broader practice of deferring to agency interpretations of federal statutes.”<sup>20</sup>

Of course, “Justice Thomas’s views do not command a majority of the Court—or anywhere close to a majority. And it is highly unlikely . . . that the Court will ever be composed of five originalists like Thomas.”<sup>21</sup> So the administrative state will march on—unchecked by the federal courts, at least.

And the vast administrative state grows vaster by the day. How much policymaking is being done by agencies? Well, in 2013 and 2014, federal

<sup>16</sup> THE FEDERALIST NO. 47 (James Madison) (Clinton Rossiter ed., 1961).

<sup>17</sup> *Dep’t of Transp. v. Ass’n of Am. RRs*, 135 S. Ct. 1225, (Thomas, J., concurring in the judgment).

<sup>18</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).

<sup>19</sup> *Id.* at 1877–78.

<sup>20</sup> *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2014) (Thomas, J., concurring).

<sup>21</sup> Cooper, *supra* note 3, at 108.

agencies promulgated 7,213 new regulations while Congress enacted only 296 new laws—twenty-four regulations for every law, and about ten new regulations per day.<sup>22</sup> In terms of cost, “[b]y the [Obama] administration’s own estimates, the rules it issued in [fiscal year] 2012 alone imposed more costs on the economy than all the rules issued during the entire first terms of Presidents Bush and Clinton, combined.”<sup>23</sup> As Chief Justice Roberts put it in his *City of Arlington* dissent, “hundreds of federal agencies [are] poking into every nook and cranny of daily life,” and “the citizen confronting thousands of pages of regulations . . . can perhaps be excused for thinking that it is the agency really doing the legislating.”<sup>24</sup>

These numbers highlight another problem with the system we’ve created: the administrative state is so vast, and the civil service laws so protective of the employees who staff it, that there are few, if any, checks on much of the work of the modern executive branch.<sup>25</sup> The one elected and accountable official in the executive branch—the President—is often unable to truly control the expansive powers that the legislative branch has ceded to federal agencies. We are governed not by the tyranny of an elected president, but by the unchecked discretion of an unelected class of permanent government officials. The courtiers, and not the king, hold much of the power in the modern federal government.

The inability of the President to control the executive branch is not just a matter of scope—it, too, is a matter of legal doctrine that perverts the founding scheme. Under *Humphrey’s Executor*, Congress may establish “independent” agencies that do not answer directly to the President. As the Court put it, “[t]he authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties

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<sup>22</sup> Competitive Enterprise Institute, *Ten Thousand Commandments 2014*, <https://cei.org/studies/ten-thousand-commandments-2014>; Competitive Enterprise Institute, *Ten Thousand Commandments 2015*, <https://cei.org/10kc2015>.

<sup>23</sup> SUSAN E. DUDLEY, REGULATORY STUD. CTR., GEO. WASH. UNIV., COSTS OF NEW REGULATIONS ISSUED IN 2012 DWARF THOSE OF PREVIOUS YEARS, ACCORDING TO OMB REPORT 1 (Apr. 22, 2013), [https://regulatorystudies.columbian.gwu.edu/files/downloads/20130422\\_OMB\\_Report.pdf](https://regulatorystudies.columbian.gwu.edu/files/downloads/20130422_OMB_Report.pdf). The economic costs of all of this regulation are of great concern. Even more concerning are the criminal penalties that attach to this continuing onslaught of federal regulation. “There are . . . hundreds of thousands of federal regulations that can be criminally enforced. . . . In fact, most Americans are criminals and don’t know it . . . .” Alex Kozinski & Misha Tseytlin, *You’re (Probably) a Federal Criminal*, in *IN THE NAME OF JUSTICE* 44 (2009).

<sup>24</sup> *City of Arlington*, 133 S. Ct. at 1879 (Roberts, C.J., dissenting).

<sup>25</sup> See *id.* at 1878 (Roberts, C.J., dissenting) (“[N]o President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity.”) (quoting Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250 (2001)); Daniel Foster, *One-Party Taxmen*, NAT’L REV. (July 1, 2013), at 18, [www.nationalreview.com/nrd/articles/350943/one-party-taxmen](http://www.nationalreview.com/nrd/articles/350943/one-party-taxmen) (“[W]e are in large part governed by a politically insulated fourth branch of government . . . in war and peace, boom and recession, no matter who controls the Congress, the Courts, or the White House.”).

independently of executive control cannot well be doubted . . . .”<sup>26</sup> Well, perhaps to the progressive eye of 1935, but to the founding eye of 1789 some doubt may have crept in.<sup>27</sup>

Combining these doctrinal developments—abandonment of non-delegation, extreme deference to agency interpretations, and establishment of independent agencies—the situation is as follows: Congress can delegate policymaking of any kind to an executive agency, the agency can interpret the scope of its own authority under that delegation without much interference from the courts, and the President can be completely walled off from that agency’s decisionmaking.

For a jarring example of what this means in practice, consider a few facts from a major policy shift that occurred during President Obama’s administration. First, in announcing his support for a policy of so-called net neutrality among Internet providers, President Obama in October 2014 said, “My appointee [at the Federal Communications Commission (FCC)], Tom Wheeler, knows my position. Now that he’s there, I can’t just call him up and tell him exactly what to do.”<sup>28</sup> Second, in advance of the FCC’s vote on Internet regulation in March 2015, Chairman Wheeler refused to testify before Congress.<sup>29</sup> Third, the FCC, in fact, voted to regulate the Internet as a public utility.

Think about how perverse this situation is, at least from the perspective of the founders. Why in the world is an executive branch agency making the economy-altering, profound policy decision of how the Internet should be defined and governed? Aren’t major policy decisions like this precisely the province of elected representatives in Congress? And even if it were appropriate for the executive branch to make this decision, how can it be that the President of the United States is reduced to lobbying his own appointees regarding what moves to make? To whom are Chairman Wheeler and his fellow commissioners accountable? Who elected them? To whom do they answer if the electorate cannot reach them, the President

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<sup>26</sup> *Humphrey’s Executor v. United States*, 295 US 602, 629 (1935).

<sup>27</sup> *See, e.g.*, THE FEDERALIST NO. 69 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[T]he executive authority, with few exceptions, is to be vested in a single magistrate.”); THE FEDERALIST NO. 70 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Energy in the executive is a leading character in the definition of good government. . . . The ingredients which constitute energy in the Executive are . . . unity . . . duration . . . an adequate provision for its support[, and] competent powers. . . . That unity is conducive to energy will not be disputed. . . . This unity may be destroyed . . . by vesting the power . . . ostensibly in one man, subject, in whole or in part, to the control and co-operation of others, in the capacity of counselors to him.”).

<sup>28</sup> Andy Kessler, *The Department of the Internet*, WALL ST. J. (Nov. 10, 2014, 7:29 PM), [www.wsj.com/articles/andy-kessler-the-department-of-the-internet-1415665771](http://www.wsj.com/articles/andy-kessler-the-department-of-the-internet-1415665771).

<sup>29</sup> Andrew Johnson, *FCC Chair Refuses to Testify Before Congress Ahead of Net Neutrality Vote*, NAT’L REV. (Feb. 25, 2015, 10:19 AM), [www.nationalreview.com/corner/414380/fcc-chair-refuses-testify-congress-ahead-net-neutrality-vote-andrew-johnson](http://www.nationalreview.com/corner/414380/fcc-chair-refuses-testify-congress-ahead-net-neutrality-vote-andrew-johnson).

cannot control them, and Congress cannot even get them to testify? Reasonable people can differ on the substance of the FCC's Internet regulations, but it is hard to see how any American who believes in representative democracy and the importance of separation of powers can believe that it is healthy or constitutional for the FCC to be able make this important policy decision without accountability to either Congress or the President.

The issue here—the question of whether certain functions are properly delegated by Congress to the executive branch—is not the same as the question of whether the Obama administration is exceeding even Congress's capacious delegations of policymaking power. The question is whether the actual delegations Congress has made to the executive in the last century are a perversion of the founding principles and an abdication of Congress's duty to make policy. The question is whether our entire administrative state is sufficiently protective of liberty and faithful to the founder's constitutional scheme. As Professor Hamburger recently put it, the current administrative state “systematically steps outside the Constitution's structures, thereby creating an entire anti-constitutional regime.”<sup>30</sup>

So, yes, as others have pointed out during this symposium, President Obama has taken to acting without statutory authority or in direct contravention of clear statutory language. In so doing, consistently and without hesitation, President Obama has pushed executive power further than any president in history. His answer to any question of executive authority has been “yes we can.” But once we have gone as far as we have in delegation and deference to the executive—once we have spent a century acclimating ourselves legislative atrophy and a government that is largely dominated by executive-branch policymaking—is it really such a far leap for the executive to simply start acting without, or in direct contravention of, statutory law?<sup>31</sup> No other institution of government is acting to stop the aggrandizement of power, the people are not revolting against it, and the media refuses to police it. Montesquieu once said, “Political liberty . . . is present only when power is not abused, but it has been eternally observed that any man who has power is led to abuse it; he continues until he finds limits. Who would think it! Even virtue has need of limits.”<sup>32</sup> In modern times, we might say that even “hope and change” have need of limits. But if

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<sup>30</sup> Hamburger, *supra* note 3, at 498.

<sup>31</sup> As Justice Thomas put it in his opinion in *Michigan v. EPA*: “Although we hold today that EPA exceeded even the extremely permissive limits on agency power set by our precedents, we should be alarmed that it felt sufficiently emboldened by those precedents to make the bid for deference that it did here.” *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2014) (Thomas, J., concurring).

<sup>32</sup> MONTESQUIEU, *THE SPIRIT OF THE LAWS* bk. XI, 155 (Anne M. Cohler, Basia C. Miller & Harold S. Stone eds. & trans., Cambridge Univ. Press 1989).

no one will set limits, we cannot expect a president to set them for himself. As Madison warned us, presidents are men, not angels, and we must “oblige [government] to control itself.”<sup>33</sup>

The question, then, is whether there are still limits we can place on the executive branch. Is it even possible in our globalized and highly technologized world to have a government that makes most decisions through the quaint, slow, and often cumbersome institution of Congress? I think the answer is yes. I think it is possible for the legislative branch to retake control, to legislate more carefully, with tighter delegations, and to more closely monitor and refine what agencies are doing. I think this is possible because it is exactly what happens here in the home state of this law review—Florida.

As a doctrinal matter, the Florida Supreme Court has been more willing than the United States Supreme Court to invalidate delegations as overly broad. The court has “expressly and repeatedly rejected whatever federal doctrine can be said to exist regarding nondelegation” and held that the “far-ranging administrative powers tolerated in the federal system are contrary to the fundamental philosophy underlying American government.”<sup>34</sup> Thus, few, if any, statutes in Florida grant agencies the broad discretion afforded federal agencies. Yet the government still manages to function.

Doctrine, however, is just words on a page. The real check on administrative power in Florida is that the legislature takes its role seriously. It crafts very detailed legislation and it revisits that legislation when it feels an agency has gone astray or a new regulatory issue has arisen. Moreover, the Florida Legislature created the Administrative Procedures Committee, which examines every agency rule for consistency with statute.<sup>35</sup> If the committee objects to a rule, and the agency fails to respond, the rule is deemed withdrawn. If the agency chooses not to amend and so notifies the committee, the full legislature is put on notice of the disagreement so that it can take corrective action if desired.

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<sup>33</sup> THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1961).

<sup>34</sup> B.H. v. State of Florida, 645 So. 2d 987, 991–92 (Fla. 1994). This is not to say the Florida Supreme Court is paragon of virtue when it comes to all aspects of the separation of powers, especially in recent years. Two extreme examples from 2011 suffice to make the point. In one case, the Court created *Humphrey’s Executor* on steroids, by holding that the governor cannot control administrative rulemaking of agencies headed by officials who serve at his pleasure. See *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011). In another case (one of many), the Florida Supreme Court has aggrandized the legislative policymaking power to itself. See, e.g., *Pino v. Bank of N.Y.*, 76 So. 2d 927 (Fla. 2011) (retaining jurisdiction over a case settled by the parties because the issue “transcend[ed] the individual parties” and was “one of great public importance and in need of resolution”).

<sup>35</sup> See FLA. STAT. § 120.545 (2016).

This is not the place for a full exposition of administrative law and practice in Florida, but the example of the country's third most populous state demonstrates that legislative work can still be done by the legislature, even in our modern and complex society. One might argue that the federal government covers too much ground for this kind of close, frequent work by the legislative branch. But that is not an argument for abandoning the horizontal separation of powers. Instead, it is a point in favor of reinvigorating the other major separation-of-powers principle that the founders put in place: federalism. If Congress cannot actively engage in all that is going on at the federal level, then too much policymaking is being done at the federal level.<sup>36</sup> More policymaking needs to be left to the states if that is the only place where legislative predominance—that is, representative democracy and its attendant liberty—can properly function.

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<sup>36</sup> *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1252 (Thomas, J., concurring in the judgment) (“I accept that this would inhibit the Government from acting with the speed and efficiency Congress has sometimes found desirable.”).