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IRONIES OF ADMINISTRATIVE LAW

SANFORD N. GREENBERG*

The contributions to this Symposium by Professors Nicholas S. Zeppos and Thomas W. Merrill examine administrative law through different lenses. Professor Zeppos critically examines sociological, economic, and jurisprudential theories that purport to explain why “the elite bar” opposed the rise of the administrative state, focusing on the period leading up to enactment of the Administrative Procedure Act (“APA”).¹ Professor Merrill focuses on judicial reaction to the administrative state and offers an intellectual history of those reactions in the era after the enactment of the APA.² He divides that era into three periods. The first (1946-1966) was characterized by a rather optimistic “public interest” conception of the role of agencies.³ The second (1967-1983) was marked by the belief that judicial oversight could help fight “capture” of agencies by narrow interest groups.⁴ And the third (1983-present) reflects at least a family resemblance to “public choice” theory, which is pessimistic about all public institutions, whether legislative, executive, or judicial.⁵ Reading these two intriguing pieces in tandem suggests that the “stunning ironies”⁶ with which Professor Zeppos begins his article are not the only ironies that mark the history of modern administrative law.

According to the accounts that Professor Zeppos analyzes, elite attorneys resisted the rise of the administrative state because that rise appeared to threaten the epistemological and institutional underpin-

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1. Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHI.-KENT L. REV. 1119 (1997).

2. Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039 (1997).

3. *Id.* at 1048-50.

4. *Id.* at 1050-52.

5. *Id.* at 1053-55.

6. Zeppos, *supra* note 1, at 1119.

nings of their professional influence as adjuncts to the courts.⁷ This influence presumably required both a central role for common law courts and a sharp distinction between “objective” law and politics.⁸ Although there is relatively little overlap in the chronological coverage of these two articles, Professor Merrill agrees with Professor Zeppos that the elite bar resisted the growth of the administrative state.⁹ Indeed, he contends that such resistance continued in some measure after the APA was enacted.¹⁰

One might expect even greater resistance to administrative government from the judiciary than from the elite bar. The prestige and power of judges would seem more directly threatened by the rise of quasi-political agencies that often made policy without the traditional procedures of common law courts. Yet Professor Merrill claims that in the first two decades of the APA era, judicial support for—or at least acceptance of—the administrative state actually was greater than it would be in later periods.¹¹ This rapid acceptance of the modern administrative state by federal judges is an irony that calls out for further explanation.¹²

Professor Merrill attributes the judiciary’s initially favorable attitude to the post-APA administrative state in part to the role of New Deal insiders. He notes that “[t]he Supreme Court was itself heavily populated with former New Deal lawyers, including Justices Frankfurter, Jackson, Reed, Murphy, Douglas, Goldberg, and Fortas.”¹³ However, Justices Goldberg and Fortas joined the Court only in the 1960s,¹⁴ toward the end of Professor Merrill’s first period. Their ten-

7. See *id.* at 1121-24. Although Professor Zeppos raises some important questions about “the conventional account,” he acknowledges that it offers “at least a partial explanation for how lawyers shaped the [APA] and the structure of administrative law.” *Id.* at 1121.

8. *Id.* at 1122, 1129.

9. Merrill, *supra* note 2, at 1048.

10. *Id.*

11. See *supra* notes 3-5 and accompanying text.

12. As Professor Zeppos points out, one actually could trace the origins of the administrative state to the creation of the Interstate Commerce Commission in the late nineteenth century. See Zeppos, *supra* note 1, at 1131. With that starting point in mind, it arguably is an exaggeration to describe the judiciary’s acceptance of the administrative state as “rapid.” Nonetheless, it still seems ironic that the courts adjusted more rapidly than the elite bar to the expansion of the administrative state in the twentieth century. Cf. Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 567 (1997) (contending that even the allegedly conservative members of the early New Deal Court (Justices Van Devanter, McReynolds, Sutherland, and Butler) “upheld a vast array of national regulatory incursions” and “voted to uphold more Interstate Commerce Commission . . . orders than you can shake a stick at”).

13. Merrill, *supra* note 2, at 1059.

14. Justice Arthur Goldberg served from 1962 to 1965, and Justice Abe Fortas, from 1965 to 1969. See CONGRESSIONAL QUARTERLY’S GUIDE TO THE U.S. SUPREME COURT 861-62 (1979) [hereinafter CQ GUIDE].

ure thus does not explain the initial reaction in the APA era. Of the other “New Deal lawyers” cited by Professor Merrill, only Justices Stanley Reed, William Douglas, and Robert Jackson had significant New Deal administrative agency experience outside the Justice Department.¹⁵ Justice Reed had served as general counsel to both the Federal Farm Board under President Hoover and the Reconstruction Finance Corporation under President Roosevelt before becoming FDR’s solicitor general in 1935.¹⁶ Justice Douglas first served the New Deal in 1934 as a staff member of the Securities and Exchange Commission (“SEC”) while on leave from his teaching position at Yale Law School.¹⁷ He later became an SEC commissioner in 1936 and served as chairman of the SEC from 1937 until his appointment to the Court in 1939.¹⁸ And, prior to being named to the Court, Justice Jackson held a number of administrative positions, including general counsel to the Internal Revenue Service, special counsel to the SEC, solicitor general, and attorney general.¹⁹

15. Justice Felix Frankfurter did have some administrative experience during World War I, but prior to his appointment to the Court in 1939, the Harvard Law School professor served President Roosevelt only as an informal adviser. *See id.* at 851. Justice Francis Murphy served as governor general and later United States high commissioner in the Philippines and as attorney general before his 1940 appointment. *See id.* at 852.

President Roosevelt’s other appointees to the Supreme Court were Hugo Black, James Byrnes, and Wiley Rutledge. Justice Black had served as Senator from Alabama, and his Senate career included investigations into “abuses of marine and airline subsidies and the activities of lobbying groups.” *Id.* at 849. Justice Byrnes had served in the House and Senate before his brief Court tenure, and his New Deal administrative experience came only after he resigned from the Court during World War II. *See id.* at 853. Justice Rutledge had served as a law school professor and dean and as a D.C. Circuit Judge prior to being elevated to the Supreme Court. *See id.* at 854-55.

Of the other Justices appointed to the Court between 1945 and 1965, only Chief Justice Vinson had significant New Deal administrative experience outside the Justice Department. *See id.* at 855-62.

16. *See id.* at 850. For additional background on Justice Reed’s administrative experience, see JOHN D. FASSETT, *NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY* 31-195 (1994).

17. *See WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS* 257 (1974) [hereinafter *DOUGLAS, GO EAST*].

18. *See id.* at 262, 314; *CQ GUIDE, supra* note 14, at 851-52.

19. *See CQ GUIDE, supra* note 14, at 854. Both Justice Jackson and Justice Murphy, during their tenures as attorney general, played a role in the studies that helped lead to the enactment of the APA. *See COMMITTEE ON ADMINISTRATIVE PROCEDURE: ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES*, S. DOC. NO. 77-8, at 1 (1st Sess. 1941); *see also* *Wong Yang Sung v. McGrath*, 339 U.S. 33, 39-41 (1950) (discussing the background to the APA). Commenting on the 1941 report, Justice Frankfurter observed that “[t]he time has come . . . for us to give full acceptance to Administrative Law as an honorable and indispensable member of our legal household, instead of continuing to treat it as though it were a subverter.” Felix Frankfurter, *Foreword—The Final Report of the Attorney General’s Committee on Administrative Procedure*, 41 *COLUM. L. REV.* 585, 586-87 (1941).

Justice Reed perhaps best illustrates Professor Merrill's point that judicial acceptance of the rise of the administrative state can in part be explained by the experiences of New Deal lawyers who became judges. Even before he was named to the Court, Reed was recognized as "an important legal aide in forwarding and defending the policies of the New Deal"²⁰ In his tenure as solicitor general, Reed argued before the Court a number of the early important New Deal cases.²¹ Reed—and the Roosevelt Administration—suffered embarrassing losses in some of these cases.²² Reed's experiences working for two federal agencies and arguing before a Court that was hostile to the New Deal's experiments in social welfare and economic regulation possibly contributed to his opposition to "krytocracy—government by judges."²³ Whatever the reasons for his judicial self-restraint, "Mr. Justice Reed . . . believed that substantial deference should be given to the judgment of the Executive or of federal agencies where Congress had chosen to rely on their expertise and discretion to implement statutory policy."²⁴

But perhaps other New-Deal-lawyers-turned-Justices, rather than being advocates of the administrative state because of their personal experiences, entered the Court skeptical of unchecked administrative power.²⁵ Such skepticism characterized at least Justice Douglas. While he viewed his own agency's early activities as relatively immune from improper private influences,²⁶ Justice Douglas's memoirs are filled with warnings about regulatory capture.²⁷ Some of the warnings

20. FASSETT, *supra* note 16, at 84 (quoting N.Y. TIMES, March 19, 1935, at 9).

21. See, e.g., *id.* at 88-90 (discussing Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

22. See, e.g., *id.* at 194-95, 214.

23. *Id.* at x.

24. Attorney General Benjamin R. Civiletti, *Proceedings in the Supreme Court of the United States in Memory of Justice Reed*, 449 U.S. xxxvii, lii (Dec. 15, 1980). For examples of Justice Reed's deference in the administrative law context, see *Wong Yang Sung v. McGrath*, 339 U.S. 33, 53-55 (1950) (Reed, J., dissenting) and *Gray v. Powell*, 314 U.S. 402, 411-12 (1941).

25. Professor Merrill himself notes that some New Deal insiders eventually became disillusioned with the administrative state, but he traces this disillusionment to a later period. Merrill, *supra* note 2, at 1051.

26. See, e.g., DOUGLAS, GO EAST, *supra* note 17, at 266-68, 295.

27. See, e.g., *id.* at 294 ("After experience with administrative agencies at the federal level, it seemed to me that most agencies become so closely identified with the interests they are supposed to regulate, eventually they are transformed into spokesmen for the interest groups."); WILLIAM O. DOUGLAS, THE COURT YEARS: 1939-1975, at 166-67 (1980) [hereinafter DOUGLAS, THE COURT YEARS] ("By the 1960s and 1970s the corporation dominated American life. Its lobbies ran Washington, D.C., the power behind almost all of the federal agencies. Federal agencies had been entrusted by Congress with carrying policies into practice that were consistent with the 'public interest.' In practical effect, 'public interest' became impregnated with 'corporate interest'; the agencies, not viciously and corruptly, but nonetheless effectively, became vehicles whereby the corporate lobbies dictated or influenced agency policies.")

reflected lessons that could have been learned after the New Deal, perhaps during Professor Merrill's second period.²⁸ Other comments, however, suggest that even during the New Deal, Justice Douglas was wary of the influence that regulated parties could have over federal agencies. For example, he contended in his memoirs that during the New Deal, one agency "had long been a disgrace, pretty much the tool of cattle and sheep barons."²⁹ He also reported having told President Roosevelt that the vital steel industry had to be controlled by the federal government but that "regulation" would not work because "steel would soon run the regulators."³⁰ And he apparently opposed FDR's experiment in corporate self-regulation, the National Industrial Recovery Act ("NIRA").³¹

Justice Douglas's judicial opinions during the 1940s and 1950s also sometimes reflected distrust of private power and unchecked administrative discretion. For example, in his dissent from a decision that approved the Interstate Commerce Commission's permitting a railroad subsidiary to transport freight by truck, Justice Douglas observed that "the present decision allows the Commission to construe the statute as if 'railroad convenience and necessity' rather than 'public convenience and necessity' were the standard."³² In another case, he protested the Court's approval of a rate reduction ordered by the Federal Power Commission ("FPC") because the FPC had endorsed an alleged "unholy alliance"³³ between two utilities in violation of the Sherman Act: "It is far better that one public utility win one more legal skirmish in its struggle against regulation, than that we abandon legal standards and let the regulatory agency run riot."³⁴

Justice Douglas's views on private power and administrative government are not the only reasons to question whether the appointment of New Deal lawyers as Justices does much to explain the relatively favorable reception of the administrative state by the Court during the 1946-1966 period. By the time that the APA was enacted,

28. See, e.g., DOUGLAS, *GO EAST*, *supra* note 17, at 313.

29. *Id.* at 306; see also *id.* at 264 (noting that one commissioner had been placed on the SEC because President Roosevelt had been "under great pressure to name" someone "in order to 'protect' the interests of Wall Street").

30. *Id.* at 360.

31. *Id.* at 342-43; see also *id.* at 343-44 (indicating the opposition to the NIRA by then-Senator and later-Justice Black).

32. *ICC v. Parker*, 326 U.S. 60, 74 (1945) (Douglas, J., dissenting). The majority opinion in this case was written by a fellow New Deal lawyer, Justice Reed.

33. *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 426 (1952) (Douglas, J., dissenting).

34. *Id.* at 424.

the Court was a fractured institution. It is true that as FDR's appointees began their tenure on the Court in the late 1930s and early 1940s, they often agreed with each other and the Administration on the broad contours of national power.³⁵ For example, during the 1940 Term, the five FDR appointees on the Court virtually always agreed on cases that "involved any issue of New Deal power and philosophy."³⁶ The cases that came before the Court in this period sometimes involved important administrative law issues such as the non-delegation doctrine³⁷ or judicial deference to an agency's construction of its own statute.³⁸

But the last years of the New Deal—that is, those immediately preceding enactment of the APA—exhibited sharp divisions on the Court.³⁹ These divisions became even more pronounced after President Truman succeeded FDR. During the 1946 and 1947 Terms, the Court decided forty-six cases by votes of five to four, with New Deal lawyers Douglas and Reed voting alike in only fourteen (thirty percent) of these cases.⁴⁰ Moreover, personal bickering on the Court became so severe and occasionally so public that President Truman reportedly wanted Justices Black, Jackson, Murphy, and Frankfurter to resign.⁴¹

Much of the disagreement on the Court during the early years of the APA involved non-administrative law issues such as the applicability against the States of the federal Bill of Rights.⁴² However, the Court also divided at times in deciding important administrative law

35. See FASSETT, *supra* note 16, at 263.

36. *Id.* at 290.

37. See, e.g., *United States v. Rock Royal Coop.*, 307 U.S. 533, 574-78 (1939). However, this and other cases of the period often focussed on issues such as the scope of the federal government's Commerce Clause powers and other issues not directly relevant to administrative law. See FASSETT, *supra* note 16, at 245-46.

38. See, e.g., *Gray v. Powell*, 314 U.S. 402 (1941). This very deferential decision was written by Justice Reed and joined by Justices Black, Frankfurter, Douglas, and Murphy. See *id.*

39. See FASSETT, *supra* note 16, at 318, 346, 370. Justice Douglas observed that the Court that included FDR's appointees was "not a 'team.' There were as many divisions within that group as there likely would have been had nine Presidents named the nine Justices." DOUGLAS, *THE COURT YEARS*, *supra* note 27, at 33.

40. See FASSETT, *supra* note 16, at 419.

41. See *id.* at 413. Among the reasons for the bickering on the Court in this period were a dispute over Justice Black's failure to recuse himself from a case argued by his former law partner and Justice Jackson's apparent bitterness over not being named Chief Justice. See *id.* at 380-83, 405-10; DOUGLAS, *THE COURT YEARS*, *supra* note 27, at 28-32. *But see* EUGENE C. GERRHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 287-88 (1958) (contending that Justice Jackson was not disappointed about not becoming Chief Justice).

42. See, e.g., FASSETT, *supra* note 16, at 422-24 (discussing *Adamson v. California*, 332 U.S. 46 (1947)).

cases.⁴³ As Professor Merrill himself notes,⁴⁴ Justice Jackson (joined by Justice Frankfurter) dissented from Justice Murphy's opinion for the Court in *SEC v. Chenery Corp.*⁴⁵ The dissent denounced the Court for appearing to approve of "administrative authoritarianism, this power to decide without law"⁴⁶ Although Justice Jackson recognized in another case that administrative agencies had become "indispensable" to modern government,⁴⁷ he also warned that they had "become a veritable fourth branch of the Government, which has deranged our three-branch legal theories"⁴⁸ Justice Jackson's views, and the similar misgivings sometimes expressed by Justice Douglas,⁴⁹ hardly seem to reflect unalloyed confidence in the administrative state on the part of New Deal lawyers.

If the influence of former New Deal insiders on the Court explains relatively little of the apparent acceptance of the administrative state during Professor Merrill's first period, then alternative explanations are required. One possibility is that judges acquiesced in the world that the APA created more quickly than did elite lawyers because the judiciary saw itself as a neutral institution that was obligated to carry out congressional intent. Judicial self-restraint perhaps was especially important on a Court that was only a decade removed from the trauma caused by the sharp initial resistance to the New Deal and the furor over FDR's court-packing plan.⁵⁰ While elite lawyers were free as individuals and in organized groups to fight the administrative state or to try to shape it to their (and their clients') benefit, judges did not have such freedom.

Yet this proposed explanation also raises at least one puzzling irony of its own: if an institutional ethos of fealty to congressional intent helps explain the judiciary's initial acceptance of the administrative state, why did the courts often "tip-toe[] around"⁵¹ one aspect of

43. See, e.g., *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

44. Merrill, *supra* note 2, at 1086.

45. 332 U.S. 194 (1947) (*Chenery II*). This case and its predecessor, *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) (*Chenery I*), are discussed at length in Professor Zeppos' article in this Symposium. See Zeppos, *supra* note 1.

46. *Chenery II*, 332 U.S. at 216.

47. *FTC v. Ruberoid Co.*, 343 U.S. 470, 482 (1952) (Jackson, J., dissenting).

48. *Id.* at 487.

49. See *supra* notes 32-34 and accompanying text.

50. See generally Peter L. Strauss, *Administrative Law: The Hidden Comparative Law Course*, 46 J. LEGAL EDUC. 478, 487 (1996) (noting that Congress's creation of "so many agencies was itself a signal of unhappiness with judicial activism . . . which the courts of that time doubtless understood").

51. Merrill, *supra* note 2, at 1086.

the APA, its apparent call for de novo review of questions of law?⁵² Section 706 appears to mandate that courts independently interpret statutes that are involved in administrative law disputes.⁵³ A consistent plain meaning interpretation of § 706 would have promoted the judiciary's own authority without sacrificing judicial self-restraint. However, despite the mandatory language of § 706, courts frequently have deferred to agencies' interpretations of their own statutes.

Professor Merrill contends that during his initial period, "the public interest conception of the administrative state" encouraged courts to give agencies flexibility in making policy.⁵⁴ The need for such flexibility, in turn, presumably helps explain the judicial willingness to side-step congressional intent regarding § 706, although following such intent would have enhanced the authority of the courts.⁵⁵ It seems ironic, however, that an ideology as vague and malleable as "the public interest" would trump both institutional self-interest and the ideology of judicial self-restraint in this context, where the two latter factors could have combined to justify a plain meaning interpretation of § 706. At any rate, the relationship among these factors requires further study.

There is at least one further irony suggested by comparing the Zeppos and Merrill articles. If elite lawyers fought to keep the emerging administrative state from departing far from the model of the common law courts,⁵⁶ then one might expect that judges would prefer that agencies look as much like Article III courts as possible. Indeed, many administrative law cases do reflect this preference for adjudica-

52. See *id.* at 1085-86 (discussing 5 U.S.C. § 706). This section provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions The reviewing court shall—

. . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

. . . .

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

5 U.S.C. § 706 (1994).

53. *But cf.* RONALD A. CASS ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 163 (2d ed. 1994) ("While . . . APA §706 leave[s] no doubt about who (court or agency) has the ultimate authority to interpret statutes, [it] tell[s] us virtually nothing about *how* courts . . . should interpret statutes.").

54. Merrill, *supra* note 2, at 1086.

55. *Id.*

56. See Zeppos, *supra* note 1, at 1128.

tory procedures⁵⁷ and maximized procedural due process.⁵⁸ However, Richard J. Pierce recently noted that to the extent that judges became suspicious of administrative government, they were in part reacting to their experience reviewing New Deal agencies that had relied heavily on adjudication rather than rulemaking.⁵⁹ According to Professor Pierce, this reliance on adjudication tended to facilitate regulatory capture by avoiding relatively broad public involvement.⁶⁰ And at least one of the New Deal Justices, William Douglas, shared this preference for rulemaking over adjudication.⁶¹ So, at least by Professor Merrill's second period, courts sometimes seemed to prefer that agencies act more like policy-making mini-legislatures and less like imperfect replicas of the judiciary itself.

* * * * *

Professors Zeppos and Merrill both recognize that the forces that shaped the creation and implementation of the APA cannot be fully explained by any one theory or intellectual tradition. This comment on their thought-provoking articles makes no claim to offer a comprehensive theory of its own. Rather, it recognizes that, for students of administrative law, the search for answers can be as rewarding as the answers themselves.

57. See, e.g., *Natural Resources Defense Council, Inc. v. NRC*, 547 F.2d 633 (D.C. Cir. 1976), *rev'd sub nom. Vermont Yankee Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

58. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), *superseded by statute as stated in Ardestani v. INS*, 502 U.S. 129, 133-34 (1991); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). *But cf. Zeppos*, *supra* note 1, at 1128-29 ("To the extent the agencies were fairer and 'almost' like courts, it became more palatable to shift the bulk of work from the courts to the agencies.")

59. See Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 *TULSA L.J.* 185, 189 (1996).

60. *Id.* at 187-88.

61. *Id.* at 189; see also *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 778 (1969) (Douglas, J., dissenting) (noting that "[p]ublic airing of problems through rule making makes the bureaucracy more responsive to public needs"). Even before the passage of the APA, the SEC had sometimes used a type of notice-and-comment rulemaking that Justice Douglas praised for promoting input by affected parties. *DOUGLAS, GO EAST*, *supra* note 17, at 276-77.

