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### The Trump Administration Versus the Administrative State: A Response to Professor Buzbee's Deregulatory Splintering

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THE TRUMP ADMINISTRATION VERSUS THE ADMINISTRATIVE  
STATE: A RESPONSE TO PROFESSOR BUZBEE'S  
*DEREGULATORY SPLINTERING*

REBECCA BRATSPIES\*

INTRODUCTION

In his paper *Deregulatory Splintering*, Professor Bill Buzbee uses administrative initiatives during the first two years of the Trump Administration to map a Trumpian approach to the regulatory state. He describes an administration that consistently ignores procedural constraints, undermines the relationship between science and substantive conclusions, and flaunts its general disdain for the arduous, fact-laden process of rulemaking. Although he begins by acknowledging that “[m]ost laws leave some latitude for choice, and with choice comes room for judgment and agency pursuit of new policy directions,”<sup>1</sup> Professor Buzbee makes it clear that the Trump Administration’s tactics involve far more than merely pursuing new policy directions. Instead, he describes an administration bent on “regulatory splintering”—taking a string of administrative actions that, in the aggregate, have the effect of rescinding earlier regulations, but that are deliberately structured to avoid a full and direct analysis of the underlying law and facts. By laying out a typology of how the Administration has deployed these splintering tactics to elude the constraints on Presidential power, Professor Buzbee shows just how far outside the norm the first two years of this administration have been. His paper does a masterful job of identifying the administration’s various splintering tactics, and of detailing how the administration has deployed these tactics in the context of specific regulatory decisions. Professor Buzbee documents an administration determined

\* Professor, CUNY School of Law and Director of the Center for Urban Environmental Reform. This article was initially presented at a symposium at Chicago-Kent College of Law on “The Trump Administration and Administrative Law” on November 30, 2018. I am deeply grateful to Peter Strauss for including me in the conference, and for generously sharing his expertise and advice. My colleague Sarah Lamdan, my husband Allen Schulz, and my daughter Naomi listened with various degrees of patience as I spun out the parallels described in this essay. Their feedback was invaluable.

1. William W. Buzbee, *Deregulatory Splintering*, 94 CHL-KENT L. REV. 439, 440 (2019) (citing Anne Joseph O’Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 482–83 (2011)).

to “sidestep engagement”<sup>2</sup> with the public and willing to “dodge underlying facts and science.”<sup>3</sup> That alone would be an important contribution to the literature. But Professor Buzbee does more—he also shows how and why these splintering tactics are mostly failing in court. For Professor Buzbee, the various defeats that the administration has suffered in court demonstrate that legal norms are holding, and that the courts are serving their proper role as a check on executive power.

My assignment is to comment on Professor Buzbee’s paper. However, I do not have much in the way of critique of either Professor Buzbee’s typology of the various Trumpian splintering tactics, nor of his assessment of the (il)legality of these tactics. Where I depart from Professor Buzbee is in the lesson he draws from the experience. I am far less sanguine than Professor Buzbee that the courts, and the legal norms of the administrative state, can withstand this assault. In my opinion, we are facing an existential threat to democratic governance. Professor Buzbee’s paper, though excellent in itself, shares a common feature of law review writing more generally—focusing on technocratic challenges rather than on the underlying, unspoken problem of a president who does not believe in the rule of law.<sup>4</sup> I worry that the legal academy is effectively counting angels dancing on the head of a pin<sup>5</sup> while around us the administrative state, like other democratic experiments, may end “*not with a bang but a whimper.*”<sup>6</sup>

The crisis we face is not new—it is a new iteration on an ongoing struggle within our form of government. In an era where the president’s lawyer claims that conflict of interest laws “don’t apply to the president”<sup>7</sup> and the President asserts that he “can’t have a conflict of interest”<sup>8</sup> with its

2. Buzbee, *supra* note 1, at 442.

3. *Id.*

4. In taking this position, I depart from Professor Rakoff’s approach which posits a hypothetical Trumpian jurisprudence which might characterize the deregulatory splintering Professor Buzbee documents as within the parameters of legitimate choices among laws various modalities. Todd Rakoff, *Response to William W. Buzbee, “Deregulatory Splintering”: What Might the Other Side Say?*, 94 CHI.-KENT L. REV. 699 (2019). Where Professor Rakoff posits a Trumpian legal theory, I see a flat rejection that the law constrains Presidential decision-making.

5. Most scholars agree that medieval scholars did not actually engage in this “debate.” The apocryphal story was instead a pun that riffs angels on a needle’s point with needless, pointless debate. See Peter Harrison, *Angels on Pinheads and Needles’ Point*, 63 NOTES & QUERIES 45, 47 (2016). Nevertheless, this debate has been used as an example to highlight how scholarly discourse can mistake the nature of the problem it examines. *Id.*

6. T.S. ELIOT, *THE HOLLOW MEN* (1925).

7. Interview by Jake Tapper with Rudy Giuliani, Former N.Y. Mayor (Nov. 13, 2016), <http://www.cnn.com/TRANSCRIPTS/161113/sotu.01.html> [<https://perma.cc/FDC8-LUDL>].

8. Interview by Arthur Sulzberger, Jr., with Donald Trump, President-Elect, in Manhattan, N.Y. (Nov. 23, 2016), <https://www.nytimes.com/2016/11/23/us/politics/trump-new-york-times-interview-transcript.html> [<https://perma.cc/NP9A-ENEW>].

obvious echoes of another president claiming “well, when the president does it, that means it’s not illegal”<sup>9</sup> this is a real question. Reflecting this reality, analogies between the Trump administration and the Nixon administration’s Watergate crisis are legion.<sup>10</sup> Without in any way suggesting that those analogies are inappropriate, I want to instead direct attention to some other possible, if slightly less obvious Presidential parallels. By drawing analogies to other past crises involving the scope of Presidential power, I suggest that we can more easily ‘see’<sup>11</sup> the Trump administration’s existential threat to the administrative state—a necessary first step for confronting its administrative excesses. To that end, this paper looks to two non-Nixonian administrations that also surfaced gaping holes in the existing edifice of administrative law: The Andrew Jackson Administration and the Franklin Roosevelt Administration. The message that emerges from this examination is that devising a law-based solution to plug the gaping hole that has been revealed (or created) in our legal edifice will take time, maybe a long time, and there will be many related crises along the way. You may have heard that history does not repeat but it rhymes. Today we are all poets. We just don’t know it.

## I. LESSONS FROM THE JACKSON ADMINISTRATION

The phrase ‘Jacksonian democracy’ captures a wide variety of competing and interrelating national impulses that have particular salience today. Jackson rode to power on a wave of popular resentment, with a message aimed primarily at white male voters who viewed themselves as on the losing end of the emerging national capitalist economy. Embracing a complex stew of hard monetary policy, class warfare, and white supremacy, Jackson repeatedly urged an ‘us versus them’ political framing, focusing on what he called a fundamental conflict between working people and the “nonproducing” classes of society. The parallels to the current admin-

9. ‘*I have impeached myself*’: Edited transcript of David Frost’s interview with Richard Nixon broadcast in May 1977, THE GUARDIAN (Sept. 7, 2007), <https://www.theguardian.com/theguardian/2007/sep/07/greatinterviews1> [<https://perma.cc/Y2WE-LQ98>].

10. See, e.g., Clive Irving, *Trump Follows Nixon’s Last Lines of Defense as Walls Close In*, DAILY BEAST (Jan. 19, 2019), <https://www.thedailybeast.com/trump-follows-nixons-last-lines-of-defense-as-walls-close-in> [<https://perma.cc/89NT-LNB2>]; Dahleen Glanton, *Donald Trump may just be worse than Richard Nixon. Here’s why.*, CHI. TRIB. (Dec. 3, 2018), <https://www.chicagotribune.com/news/columnists/glanton/ct-met-dahleen-glanton-trump-nixon-corruption-20181130-story.html> [<https://perma.cc/35TS-LFW6>]; Frank Rich, *Just Wait*, N.Y. MAG., Mar. 20, 2017.

11. JAMES C. SCOTT, *SEEING LIKE A STATE* (1998). Scott’s work focuses on how the process of making the social world legible to states involves simplification and homogenization. I am borrowing his language to make a slightly different point about law and legal analysis: that a concentration of analytical attention is necessary to bring into focus otherwise obscured aspects of the relationship between the complex and unwieldy social world and the legal structures that purport to govern it.

istration's divisive tactics including Trump's call for a "Muslim travel ban,"<sup>12</sup> and his repeated mischaracterization of refugees as criminals<sup>13</sup> and thugs are unmistakable.

There is no question that at the time, the campaign of 1832 had been the most bitter political campaign in American history. Jackson may not have claimed he could "shoot somebody on Fifth Avenue and not lose any voters,"<sup>14</sup> but he cultivated a similar kind of 'above the law' persona. Thomas Jefferson described Jackson as "one of the most unfit men I know of [to be president of the United States]. He has had very little respect for laws or constitutions."<sup>15</sup> Opponents accused Jackson of being a slave trader, a gambler, and a backwoods buffoon who could not spell more than one word out of four correctly. They viewed Jackson as a dangerous man, a demagogue likely to become a tyrant, and unsuited by temperament to be president.<sup>16</sup> Jackson's supporters, by contrast, viewed his election a victory for the "farmers and mechanics of the country"<sup>17</sup> over the "wealthy and well born."<sup>18</sup> The parallels to "Make America Great Again" (MAGA), and "taking back"<sup>19</sup> the country are obvious, but with the part of the Creek, Choctaw, Cherokee Nation being played by Central American refugees in the modern iteration.

After the election, Rudy Giuliani compared Trump's election to Jackson's, stating: "This is like Andrew Jackson's victory. This is the people beating the establishment. And that's how he [Donald Trump] posited right from the beginning, the people are rising up against a government they find

12. *Trump Urges 'Shutdown' on Muslims Entering US*, USA TODAY (Dec. 7, 2015), <https://www.usatoday.com/videos/news/nation/2015/12/07/76958228/> [<https://perma.cc/Q7YJ-H5RM>].

13. Donald Trump (@realDonaldTrump), TWITTER (Nov. 26, 2018, 7:19 AM), <https://twitter.com/realDonaldTrump/status/1067015026995879937> [<https://perma.cc/XW8P-Z653>].

14. CNN, *Trump: I could shoot somebody and not lose voters*, YOUTUBE (Jan. 23, 2016), <https://www.youtube.com/watch?v=iTACH1eVIAa> [<https://perma.cc/TUVM-FR XR>].

15. H.W. BRANDS ANDREW JACKSON: HIS LIFE AND TIMES 97 (2006) (quoting Daniel Webster's 1824 interview with Thomas Jefferson).

16. One widely circulated pamphlet accused Jackson of "atrocious and unnatural acts . . . including slaughtering 1,000 unarmed Native Americans, taking a nap in the midst of their corpses, and eating a dozen of them for breakfast." John Taliaferro, *Supplemental Account of Some of the Bloody Deeds of General Jackson, Being a Supplement to the "Coffin Handbill"*, Northern Neck, VA, 1828.

17. See, e.g., *The Great Contest: What the Two Parties Are Contending For*, in 6 THE EXTRA GLOBE 161 (Francis P. Blair & Amos Kendall eds., 1840) (reiterating the phrase "farmers and mechanics" as Jackson's core supporters).

18. *National Nomination: People's Ticket President, Andrew Jackson; Vice President, John C. Calhoun*, DELAWARE PATRIOT & AMERICAN WATCHMAN, Mar. 28, 1828, at 3.

19. Trump used the slogan "take back our country" on campaign posters. Jamelle Bouie, *Our George Wallace*, SLATE (Sept. 27, 2015), [http://www.slate.com/articles/news\\_and\\_politics/politics/2015/09/donald\\_trump\\_is\\_a\\_modern\\_day\\_george\\_wallace\\_the\\_republican\\_front\\_runner.html](http://www.slate.com/articles/news_and_politics/politics/2015/09/donald_trump_is_a_modern_day_george_wallace_the_republican_front_runner.html) [<https://perma.cc/J4BR-CJDL>].

to be dysfunctional.”<sup>20</sup> Shortly after his inauguration, Trump added a portrait of Andrew Jackson to the oval office.

It is not only Trump supporters drawing this parallel. Time Magazine’s June 2018 cover depicting Trump in royal regalia with the caption “King Me” and subtitle ‘visions of absolute power’<sup>21</sup> echoed nineteenth century political cartoons depicting President Jackson as King Andrew.<sup>22</sup> Professor Buzbee’s most trenchant critique of the Trump Administration, that it ignores the system of checks and balances built into the federal administrative state, echoes criticism of the Jackson administration, particularly the relationship to co-equal branches of government. While Jackson never called Chief Justice Marshall a “so-called judge,”<sup>23</sup> he openly defied the Supreme Court’s ruling in *Worcester v. Georgia*.<sup>24</sup> Jackson’s advocacy for, and ruthless implementation of the Indian Removal Act,<sup>25</sup> raises stark parallels to Trump’s racialized border separation and zero tolerance policies.

Aside from the personal and rhetorical parallels between Jackson and Trump, patterns in the two administrations also raised similar concerns about presidential abuse of power. One particular parallel was constitutional concerns raised by President Jackson’s embrace of a spoils system for doling out federal positions. A famous Thomas Nast political cartoon captured this concern. Nast drew a monument of President Jackson riding a pig that was eating out of a trough labeled plunder, while walking over fraud,

20. Brent Griffiths, *Giuliani: 2016 vote has echoes of Andrew Jackson*, POLITICO (Nov. 9, 2016), <https://www.politico.com/story/2016/11/rudy-giuliani-trump-win-andrew-jackson-2016-231035> [<https://perma.cc/8UV9-QDLJ>].

21. TIME (June 18, 2019).

22. The cartoon by an unknown artist can be viewed from the Library of Congress website. *King Andrew the First*, LIBRARY OF CONG. (1833), <https://www.loc.gov/pictures/item/2008661753/> [<https://perma.cc/4ATT-FT8C>]. It depicts Andrew Jackson holding a veto in his left hand, and a scepter in his right. He is standing on a shredded constitution. It is believed that this cartoon is in response to Jackson’s 1833 order removing government deposits from the Second Bank of the United States, a move that resulted in the only congressional censure ever issued against a president for abuse of presidential power. 10 REG. DEB. 58–1187 (1834). There is a clear parallel to Trump’s decision to declare an emergency at the southern border in order to build his wall when Congress refused to allocate funds for the project.

23. Donald Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 8:12 AM), <https://twitter.com/realdonaldtrump/status/827867311054974976?lang=en> [<https://perma.cc/7G5J-RU3K>] (“The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned.”).

24. 31 U.S. 515 (1832). Justice Marshall reputedly stated before the 1828 election “should Jackson be elected, I shall look upon the government as virtually dissolved.” BALTIMORE MARYLANDER, March 22, 1828.

25. Jackson sent 7,000 federal troops to Georgia to force the Cherokee off their land at bayonet point, thereby inaugurating the Trail of Tears.

bribery and spoils. The side of the monument was emblazoned with the statement “to the Victors belong the Spoils.”<sup>26</sup>

This phrase encapsulated the Jacksonian approach to administering the federal government. While it sounds vaguely Shakespearian, the phrase actually comes from New York Senator William L. Marcy.<sup>27</sup> Marcy uttered these words in defense of President Jackson’s 1832 decision to appoint Martin Van Buren as Minister to England. Senator Henry Clay of Kentucky had objected the appointment as emblematic of what he called an “odious system” by which “the offices, honors and dignities of the people were . . . put up to a scramble.”<sup>28</sup> The Jackson Administration had, by this time, become notorious for dismissing long-serving civil servants and replacing them with party loyalists, with roughly ten percent of all civic servants removed from their posts (919 officials).<sup>29</sup> Senator Clay cautioned that this practice “would finally end in . . . despotism.”<sup>30</sup> Marcy responded:

It may be, sir, that the politicians of the United States are not so fastidious as some gentlemen are, as to disclosing the principles on which they act. They boldly preach what they practice [sic]. When they are contending for victory, they avow their intention of enjoying the fruits of it. If they are defeated, they expect to retire from office. If they are successful, they claim, as a matter of right, the advantages of success. They see nothing wrong in the rule, that to the victor belong the spoils of the enemy.<sup>31</sup>

Marcy tied this embrace of a spoils system to the averment that President Jackson had come into office “upon a political revolution” and had “found almost all the offices, from the highest to the lowest, filled by political enemies.”<sup>32</sup> While not quite an accusation that “the deep state” was conspiring against the Jackson Administration, this language comes very close to the rhetoric deployed by apologists for the Trump Administration.<sup>33</sup>

26. Thomas Nast, *In Memoriam—Our Civil Service as it Was*, HARPER’S WEEKLY, Apr. 28, 1877, at 325.

27. Marcy had a storied career—he was governor of New York, Secretary of War to President James Polk, Secretary of State to President Franklin Pierce. *William L. Marcy is No More!*, N.Y. DAILY TRIB., July 6, 1857, at 4.

28. 8 REG. DEB. 1324 (1833) (remarks of Mr. Clay).

29. DANIEL W. HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 328–33 (2007).

30. *Id.*

31. 8 REG. DEB. 1325 (1833) (remarks of Mr. Marcy).

32. *Id.* at 1326.

33. For example, Trump officials have tried to delegitimize the 2017 National Climate Assessment issued by 13 federal agencies by characterizing it as a product of the ‘deep state’. Coral Davenport, *Trump Administration’s Strategy on Climate: Try to Bury Its Own Scientific Report*, N.Y. TIMES (Nov. 25, 2018), <https://www.nytimes.com/2018/11/25/climate/trump-climate-report.html>

We see this same dynamic in the current administration—the power to hire and fire has been used to pave the way for sycophantic supporters or relatives of this President and to rid him of perceived enemies. The most high-profile such firing was FBI Director James Comey, but this practice extends far beyond him. Career civil servants report being singled out, sidelined, or otherwise punished for work they did under the prior administration.<sup>34</sup> Trump appointees strategically used distant or unpleasant reassignments and other tactics to drive career civil servants deemed “disloyal to Trump” from their jobs.<sup>35</sup> During the longest federal government shutdown in United States history, President Trump repeatedly characterized federal workers as opponents and as partisan Democrats, rather than as civil servants.<sup>36</sup>

There are lessons for today from the Jackson Administration. The reverberations of Jackson’s Indian removal policy are still being felt today. The Supreme Court is just this term taking up the question of the scope of a

[<https://perma.cc/DC83-F54V>]. These ‘deep state’ allegations are popular in the far right media, and extent all the way to the absurd ends of conspiracy theory. *See, e.g.*, Editorial, *Deep State: did Justice, CIA and FBI Commit Crimes to Get Rid of Trump?*, INV’RS BUS. DAILY (Jan. 15, 2019), <https://www.investors.com/politics/editorials/deep-state-trump-crimes-russia/> [<https://perma.cc/Z85J-SCDM>] (alleging that ‘deep state’ holdovers from the prior administration were plotting against the president). Indeed, even the president’s son got into the act tweeting about a deep state. Donald Trump, Jr. (@DonaldJTrumpJr), TWITTER (July 7, 2017, 3:18 PM), <https://twitter.com/DonaldJTrumpJr/status/883450261057961984> [<https://perma.cc/U6LX-RCJX>].

34. Elise Labott, *Frustrated State Department employees hire attorneys, charging ‘political retribution’*, CNN (Jan. 28, 2018), <https://www.cnn.com/2018/01/26/politics/state-department-employees-hire-attorneys-political-retribution/index.html> [<https://perma.cc/L2S5-6BMM>]; David Shephardson, *U.S. Energy Department balks at Trump request for names on climate change*, REUTERS (Dec. 13, 2016), <https://www.reuters.com/article/us-usa-trump-climate-idUSKBN1421V0> [<https://perma.cc/UH3T-3KRX>] (reporting that the incoming Trump administration wanted names and professional memberships for workers who attended UN climate talks or worked on climate matters).

35. Margaret Hartmann, *Trump Loyalists Accused of Purging Veterans Affairs Ahead of New Secretary’s Arrival*, N.Y. MAG. (July 19, 2018), <http://nymag.com/intelligencer/2018/07/veterans-affairs-allegedly-purged-of-those-disloyal-to-trump.html> [<https://perma.cc/R35L-EL6E>] (discussing purges of civil servants at the Department of Veterans Affairs); Jonah Shepp, *Trump’s Efforts to Purge Disloyal Civil Servants May Already Be Underway*, N.Y. MAG. (Mar. 16, 2018), <http://nymag.com/intelligencer/2018/03/trump-push-to-purge-disloyal-civil-servants-may-be-underway.html> [<https://perma.cc/V72C-LNK3>] (describing reassignments at the State Department); Evan Halper, *Civil servants charge Trump is sidelining workers with expertise on climate change and environment*, L.A. TIMES (Oct. 4, 2017), <https://www.latimes.com/politics/la-na-pol-trump-civil-servants-201709-story.html> [<https://perma.cc/P4AW-XZPF>] (describing this tactic at Interior); *see also* Letter from Representative Elijah Cummings to Trey Gowdy, Chairman of the Comm. on Oversight & Gov’t Reform (Feb. 27, 2018), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2018-02-27.EEC%20to%20TG%20re.%20Reassignment%20of%20SES%20employees%20and%20other%20civil%20Falsepdf> [<https://perma.cc/M3L4-Y4DM>].

36. Tal Axelrod, *Trump: ‘I don’t care’ that most federal employees working without pay ‘are Democrats’*, THE HILL (Jan. 5, 2019), <https://thehill.com/homenews/administration/424004-trump-i-dont-care-that-most-federal-employees-working-without-pay-are> [<https://perma.cc/F3J6-2453>] (quoting and interpreting Trump tweets); Bess Levin, *Trump: Unpaid Shutdown Workers Are Mostly Dems, So Screw ‘Em*, VANITY FAIR (Dec. 27, 2018), <https://www.vanityfair.com/news/2018/12/trump-shutdown-mostly-democrats> [<https://perma.cc/5L52-M4K9>] (same).



Jackson-era treaty with the Creek Nation.<sup>37</sup> With regard to the spoils system, the damage of Jacksonian cronyism was long-lasting. By the end of the Civil War, the federal government employed 70,000 people, most of whom held their positions only for a short time.<sup>38</sup> Standards for appointment were largely non-existent, and nepotism and cronyism were rife.<sup>39</sup> It took the assassination of President James Garfield by as a disappointed or crazed “office seeker”<sup>40</sup> to replace the spoil system with the professional, merit-based civil service. The assassination was widely perceived as “the product of the spoil system.”<sup>41</sup> President Chester Arthur, who became president upon Garfield’s death, made ending the spoils system a centerpiece of his administration. He called for civil service reform in his first official Presidential address. Just one year later, he signed the Pendleton Civil Service Act<sup>42</sup> into law. This Act created a bipartisan Civil Service Commission to evaluate job candidates and transformed government positions from spoils—favours bestowed by powerful officials on their supporters—into positions won on the basis of merit and competitive examinations.

## II. LESSONS FROM THE FRANKLIN DELANO ROOSEVELT ADMINISTRATION

Unlike President Jackson, nobody is rushing to draw personal comparisons between Donald Trump and Franklin Delano Roosevelt. Indeed, in terms of political philosophy and personal style, it would be hard to imagine more dissimilar men. Nevertheless, Roosevelt’s presidency raised another set of profound questions about the scope of presidential power, this time in relation to the Congress and the administration of expansive authority delegated from the legislature to the executive branch. How those ques-

37. *Carpenter v. Murphy*, No. 17-1107 (U.S. May 21, 2018), raises questions about present-day salience of the Jackson era removal treaty that forced the Creek to leave the East and resettle in Oklahoma. Treaty of Cusseta art. II, Mar. 24, 1832, 7 Stat. 366. This treaty “solemnly guaranteed” the Creek a territory where “they shall be allowed to govern themselves.” *Id.* art. XIV. The pleadings and documents in this case are available on Scotusblog. See *Carpenter v. Murphy*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/royal-v-murphy> [https://perma.cc/EBG8-TSVX].

38. For example, more than eighty percent of the Treasury department positions turned over with presidential administrations. ARI ARTHUR HOOGENBOOM, *OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT 1865–1883*, at 3 (1961).

39. LEONARD D. WHITE, *THE JACKSONIANS* 394–98 (1954).

40. *A Great Nation in Grief: President Garfield Shot by an Assassin*, N.Y. TIMES, July 3, 1881, at 1. Garfield’s assassin, Charles Guiteau, typically characterized in the press as a disappointed or crazed “office seeker” was a mentally-unbalanced former supporter who did not receive a spoils/patronage post he felt to be his due.

41. *The Moral of It*, 33 THE NATION 26 (July 14, 1881) (“We do not think we have taken up a newspaper during the last ten days which has not in some manner made the crime the product of “the spoils system.”).

42. 22 Stat. 403 (1883).

tions were resolved nearly eighty years ago directly informs some of the splintering tactics Professor Buzbee describes.

President Roosevelt won office in a landslide based on his promise of “a New Deal for the American People.”<sup>43</sup> The first days of his administration saw a slew of legislation touching just about every aspect of the American economy.<sup>44</sup> These new laws greatly expanded the scope of the federal government, raising the concern that the president might wield untrammelled power. There is no question that extensive statutory delegation to the President, coupled with his use of executive orders, allowed Roosevelt to reshape the federal government and its relationship to citizenry and the states.

The first major test of New Deal legislation came in *Panama Refining Co. v. Ryan*.<sup>45</sup> The Supreme Court found by an 8–1 majority that Section 9 of the National Industrial Recovery Act was an unconstitutional delegation of legislative authority to the President. The majority characterized the discretion delegated from the legislature to the president by this act as standardless;<sup>46</sup> allowing the President to exercise unfettered discretion.<sup>47</sup> The lone dissent, Justice Brandeis, did not challenge the notion that there were constitutional limits to delegation, but argued that the particular delegation at issue had enough standards to be constitutional.<sup>48</sup> Matters concerning the scope of the Roosevelt administration’s power came to a head four months later with three unanimous Supreme Court decisions<sup>49</sup> issued

43. FDRLibrary, *1932 Democratic National Convention*, YOUTUBE (June 15, 2017), <https://youtu.be/-mqWhDwAFmk> [<https://perma.cc/SJ6S-TQ6K>] (excerpts of Franklin D. Roosevelt’s acceptance speech).

44. “This Administration came into power pledged to a very considerable legislative program. It found the condition of the country such as to require drastic and far reaching action.” Letter from Franklin D. Roosevelt, President, to Roy W. Howard, Reporter (Sept. 2, 1935), [http://webapp1.dlib.indiana.edu/findingaids/view?doc.view=entire\\_text&docId=VAD2868#mets=http%3A%2F%2Fpurl.dlib.indiana.edu%2Fuiid%2Fmediaschool%2Fmets%2FVAD2868-06016&aid=VAD2868-U-03270&page=1](http://webapp1.dlib.indiana.edu/findingaids/view?doc.view=entire_text&docId=VAD2868#mets=http%3A%2F%2Fpurl.dlib.indiana.edu%2Fuiid%2Fmediaschool%2Fmets%2FVAD2868-06016&aid=VAD2868-U-03270&page=1) [<https://perma.cc/GK8H-WYL5>].

45. 293 U.S. 388 (1935).

46. *Id.* at 418 (“Congress did not declare in what circumstances that transportation should be forbidden, or require the President to make any determination as to any facts or circumstances. Among the numerous and diverse objectives broadly stated, the President was not required to choose. The President was not required to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary.”).

47. *Id.* at 430 (complaining that “the Congress has declared no policy, has established no standard, has laid down no rule” and opining that “[i]f [section] 9(c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function”).

48. *Id.* at 440 (Brandeis, J., dissenting) (objecting that the delegation in Section 9(c) “is not unconfined and vagrant. It is canalized within banks that keep it from overflowing.”).

49. These cases struck down major components of the New Deal and restricted the President’s power to remove certain government officials. The Court drew a distinction between independent agencies, like the Federal Trade Commission, whose members can only be removed for cause and

on May 27, 1935:<sup>50</sup> *Louisville Joint Stock Land Bank v. Radford*,<sup>51</sup> *Humphrey's Executor v. United States*,<sup>52</sup> and *Schechter Poultry Corp. v. United States*.<sup>53</sup>

*Schechter Poultry* struck down the National Industrial Recovery Act on nondelegation grounds. Together with *Panama Refining*, *Schechter Poultry* interrogated the relationship between Congress, the President, and the Courts with regard to delegation of legislative powers to the executive. In asserting that there were constitutional limits to the scope of delegation, the court emphasized that Congress must declare a policy, establish a standard, or lay down a rule by which such delegated discretion is to be exercised.<sup>54</sup> While widely viewed as a judicial aberration, the Roosevelt era nondelegation cases nevertheless established an important cornerstone of the administrative state—that it is for Congress to define the scope and goals of the authority it delegates to the executive.

A divided Supreme Court subsequently found other New Deal legislation unconstitutional on Tenth Amendment grounds.<sup>55</sup> Together with the nondelegation rulings, these cases were unambiguously the Court's conservative majority throwing down a judicial gauntlet in response to the New Deal. After winning a landslide re-election, President Roosevelt responded by proposing the Judicial Procedures Reform Bill of 1937, which became known as the court packing plan. This bill would have allowed the President power to appoint up to six additional Justices to the Supreme Court. The Roosevelt administration characterized this legislative initiative as a response to “[t]he impossible situation created by the [Court's] reck-

executive agencies whose heads serve at the pleasure of the president. The importance of this distinction resurfaced during the Trump administration with the president's threats to remove the head of the Federal Reserve. See Jennifer Jacobs et al., *Trump Discusses Firing Fed's Powell After Latest Rate Hike*, *Sources Say*, BLOOMBERG (Dec. 21, 2018), <https://www.bloomberg.com/news/articles/2018-12-22/trump-said-to-discuss-firing-fed-s-powell-after-latest-rate-hike> [<https://perma.cc/W6X8-9XMR>].

50. Justice Brandeis, who had dissented in *Panama Refining Co. v. Ryan*, declared that day “the most important day in the history of the Supreme Court and the most beneficent.” ALPHEUS T. MASON, *BRANDEIS: A FREE MAN'S LIFE* 620 (1946) (describing Brandeis's subsequent conversation with reporters).

51. 295 U.S. 555 (1935) (declaring the Frazier-Lemke Farm Bankruptcy Act to be unconstitutional on takings grounds).

52. 295 U.S. 602 (1935) (overruling the President's use of removal power).

53. 295 U.S. 495, 543 (1935) (declaring Section 3 of the National Industrial Recovery Act to be an unconstitutional delegation to the executive).

54. 293 U.S. 388, 430 (finding Section 9(c) of the National Recovery Act unconstitutional because “the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which [the specific executive decision] is to be allowed or prohibited.”).

55. *United States v. Butler*, 297 U.S. 1 (1936) (Agricultural Adjustments Act); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (Bituminous Coal Conservation Act); *Ashton v. Cameron Cty. Water Improvement Dist.*, 298 U.S. 513 (1936) (Municipal Bankruptcy Act).

less use of injunctions in restraining the operation of Federal law.”<sup>56</sup> The Administration accused the judiciary of judges bringing the process of government “to a complete stop” through the issuance of injunctions.<sup>57</sup>

Contemporaneous political cartoons raised alarms about the degree of power this plan would have consolidated in the presidency. One depicted Roosevelt with a bowl labeled ‘power’ asking “more please.”<sup>58</sup> A particularly prescient cartoon showed Roosevelt in the Oval Office being visited by a ghost asking: “What about some future president with dictatorship ideas?”<sup>59</sup> The Democratically controlled senate eventually rebelled against the court packing plan—standing up to the Administration and calling the plan “a needless, futile and utterly dangerous abandonment of constitutional principle.”<sup>60</sup> It was this political courage to put “country before party” that ended the constitutional threat. And, with the adoption of the APA,<sup>61</sup> the Congress codified the terms under which the executive must exercise delegated powers. Over the ensuing seventy years, a large body of law, regulations, and practices grew up around the APA, defining how the executive must exercise delegated authority. It is this body of law, regulation, and practice that is now in jeopardy and that Professor Buzbee examines in his paper.

The first two years of the Trump Administration, federal courts have once again been busy issuing injunctions.<sup>62</sup> However, there is a key difference between these current day injunctions and those from the New Deal era. Where the New Deal cases raised facial challenges to the work of the legislature, the Trump-era injunctions address administrative disregard for legislatively-imposed constraints. Indeed, the Trump Administration seems not to understand that it exercises delegated rather than inherent authority. At the same time, this Administration has brought a spoils mentality not just federal appointments, but also to federal regulation itself. Thus we see

56. *Reorganization of the Federal Judiciary: Hearing on S. 1392 Before the Comm. on the Judiciary*, 75th Cong. 4 (1937) (statement of Hon. Homer Cummings, U.S. Attorney Gen.).

57. *Id.*

58. Joseph L. Parrish, *Oliver Twist*, CHI. TRIB., Jan. 16, 1937, at 10.

59. *The Ghost at the Banquet*, EL PASO HERALD-POST, Mar. 9, 1937, at 7.

60. S. REP. NO. 711 (1937).

61. The Administrative Procedures Act was enacted on June 11, 1946. Pub. L. No. 79-404, 60 Stat. 237. The current iteration of the Act can be found at 5 U.S.C. § 500 *et seq.*

62. Various federal courts have issued injunctions preventing the Trump administration from ending the Deferred Action for Childhood Arrivals (DACA) program, *Regents of the Univ. of Cal. v. U.S. Dept. of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018), to rewriting the Affordable Care Act’s birth control mandate, *Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019).

a lobbyist for the coal industry in charge of protecting the environment,<sup>63</sup> a committed proponent of defunding public schools running the Department of Education,<sup>64</sup> an avowed foe of the Affordable Care Act heading Health and Human Services<sup>65</sup>—the list goes on.<sup>66</sup>

These actors embody the Trump Administration's spoils mentality. They have repeatedly attempted to radically reinterpret existing laws to suit the Administration's supporters, often with little explanation,<sup>67</sup> and without legally-required processes.<sup>68</sup> Professor Buzbee's excellent paper documents many of these presidential spoils grabs in detail. He shows how Trump Administration actions conflict with the legitimizing processes that have grown up around administrative law in the years since the Supreme Court decided *Panama Refining* and *Shechter Poultry*, and the Congress unambiguously enacted the APA. In rejecting the Trump Administration's attempt to exercise unfettered delegated authority as a spoils system, the federal courts have repeatedly stated as "axiomatic" the Roosevelt-era principle that "administrative agencies may act only pursuant to authority delegated to them by Congress."<sup>69</sup> Thus, courts have been demanding that the Trump

63. Jennifer A. Dlouhy, *President Trump Nominates Acting EPA Chief Andrew Wheeler, a Former Coal Lobbyist, to Lead Agency*, TIME (Jan. 9, 2019), <http://time.com/5498307/andrew-wheeler-coal-lobbyist-epa-head/> [<https://perma.cc/L7VW-FJ43>].

64. Valerie Strauss, *Nine controversial—and highly revealing—things Betsy DeVos has said*, WASH. POST (Mar. 12, 2018), [https://www.washingtonpost.com/news/answer-sheet/wp/2018/03/12/nine-controversial-and-highly-revealing-things-betsy-devos-has-said/?utm\\_term=.c8710f86cb4f](https://www.washingtonpost.com/news/answer-sheet/wp/2018/03/12/nine-controversial-and-highly-revealing-things-betsy-devos-has-said/?utm_term=.c8710f86cb4f) [<https://perma.cc/HUZ5-CW4Q>] (quoting DeVos as saying "public education is dead").

65. Tami Luhby, *Obamacare critic is Trump's pick for health secretary*, CNN (Nov. 29, 2016), <https://money.cnn.com/2016/11/28/news/economy/tom-price-trump-health-secretary/index.html> [<https://perma.cc/EC8T-T4GE>].

66. One spoils issue emerging as this article goes to press is the FAA's refusal to ground Boeing 737 Max in the wake of two recent plane crashes. Virtually every country besides the United States has suspended flights of by the plane. News coverage of the United States' outlier decision emphasizes the close relationship that Trump has with Boeing and with the company's CEO. See, e.g., David Shepardson & Jeff Mason, *Ties between Boeing and Trump run deep*, REUTERS (Mar. 12, 2019), <https://perma.cc/NKN3-R72U> [<https://perma.cc/NKN3-R72U>]; Emily Stewart, *Boeing's cozy relationship with Trump complicates the FAA's decision to not ground Boeing planes*, VOX (Mar. 13, 2019), <https://www.vox.com/policy-and-politics/2019/3/13/18263719/boeing-ceo-dennis-muilenburg-trump-tweet-call> [<https://perma.cc/SCC9-QCH2>]; Rex Nutting, *Decision on Boeing 737 safety should be based on facts, not Trump's political calculus*, MARKETWATCH (Mar. 13, 2019), <https://www.marketwatch.com/story/with-boeings-737-still-flying-in-the-us-how-do-we-know-if-trump-is-protecting-us-2019-03-12> [<https://perma.cc/U937-PDSM>]. That Trump has created a regulatory spoils system is the clear subtext of this coverage.

67. *Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019) (granting a nationwide injunction preventing enforcement of rules expanding exemptions to the Affordable Care Act's contraceptive coverage requirement).

68. *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date*, 82 Fed. Reg. 27,133 (June 14, 2017), *overruled by* *Air All. Hous. v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018).

69. *Trump*, 351 F. Supp. 3d at 817; *Air All. Hous.*, 906 F.3d at 1060; *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 108 (2d Cir. 2018) (finding that NHTSA exceeded its statutory

Administration must ‘point to something in the statute’<sup>70</sup> as authority to take the action at issue. Time and again, the Administration has been unable to do so.

Again, there are lessons from the past for how to survive the current crisis. Roosevelt’s court packing plan failed because Senators from his own party took seriously their responsibility as a co-equal branch of government and did not merely cater to the whims of a president based on party loyalty. Today’s Senate must similarly show itself capable of this level of constitutional patriotism. The Supreme Court ultimately embraced the notion that Congress must canalize delegated discretion<sup>71</sup> by articulating intelligible principles by which courts can evaluate presidential administration.<sup>72</sup> This canalized discretion became the separation-of-powers solution that we have been living with ever since, and that Professor Buzbee implicitly relies on to save us now.

### CONCLUSION

Legitimacy in our administrative law system is a carefully crafted compromise. Safeguards like transparent processes and public participation have become a proxy for democratic legitimacy. The message from Professor Buzbee’s paper, and from this symposium more generally, is that existing processes and institutions will save us. I hope they are right. But we are grappling with profound questions of democratic survival. The Trump Administration’s spoils approach to regulation has raised a real question about whether it views itself as bound by the rule of law, or whether it is engaged in a project that could more accurately be called the law of rule.<sup>73</sup> In this fashion, the Trump Administration compels us to confront the core question of whether there is a shared belief that law is a constraint of power, and, if not, whether a defensible, democratic system of delegated administrative authority is still possible.

authority in indefinitely delaying a previously published rule increasing the civil penalties for noncompliance with fuel economy standards).

70. *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (finding that the Clean Air Act did not authorize EPA to stay a final methane rule provision).

71. This phrase comes from Cardozo’s dissent in *Panama Refining Co. v. Ryan*, asserting that Section 9(c) of the National Recovery Act was constitutional because the “[d]iscretion is not unconfined and vagrant. It is canalized within banks that keep it from overflowing.” 293 U.S. 388, 440 (1935) (Cardozo, J., dissenting).

72. *Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 430 (1928).

73. See, e.g., Barack Obama, President of the U.S., Remarks at the Democratic National Convention (July 27, 2016) (transcript prepared by Politico) (noting this tendency and asserting “[w]e don’t look to be ruled”).

Justice Marshall raised this issue more than two centuries ago when he asked: “To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained?”<sup>74</sup> This eternal question of democratic legitimacy in the administrative state could have been written about Trump’s Muslim ban, his border separation policy, or even his attempt to unilaterally bar reporters from White House press pool.<sup>75</sup>

While the discussion at the Chicago-Kent symposium frequently surfaced this core question, the papers in this symposium generally avoided raising them directly, taking refuge instead in various forms of technocratic analysis. Maybe that is inevitable. These questions create a crisis for the future of the administrative state, but that crisis is as much political as it is legal. As lawyers and law professors it feels somehow unseemly to embed our legal scholarship in overtly political discussions. Our expertise is law. Yet, there is an urgent and growing need for lawyers and scholars from across the political spectrum to grapple with these questions and to consider what they reveal about the relationship between the President and the administrative state; between a system based on law and one rooted instead in partisan politics.

And, there are answers out there for us to find. While these questions may have reached their apotheosis in the Trump Administration, they are not particularly new in themselves. We have seen similar challenges for the administrative state in past administrations, and as a nation have weathered the existential crises they generated. Democratic governance evolves—and with each new challenge the administrative state has reformed to allow democratic governance to continue in a different guise.

74. *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

75. *White House says it has ‘broad discretion’ on press access*, ASSOCIATED PRESS (Nov. 14, 2018), <https://www.ap.org/ap-in-the-news/2018/white-house-says-it-has-broad-discretion-on-press-access> [<https://perma.cc/9TN8-UKHF>]. *See also* Complaint at 10, *Cable News Network, Inc. v. Trump*, No. 1:18-cv-02610 (D.D.C. Nov. 13, 2018) (alleging in para. 37 that Trump called CNN “the enemy of the people”).