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See Also

Response

The Challenges of Fiduciary Administration

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My usual impetus for responding to an article would be vigorous disagreement.¹ In this case, however, I thoroughly agree with Evan Criddle that the presidential-control model of legitimacy in administrative law is misguided.² In my view, he persuasively explains both that “the electorate’s relative disengagement from the federal regulatory process prevents voters from developing coherent preferences about most questions of regulatory policy” and “even if discrete preferences could be attributed to the people as a whole, the American presidency does not in practice serve as a reliable proxy for majoritarian preferences in the administrative state.”³ Moreover, I agree that his proposed theory of “fiduciary representation” is both more realistic and more normatively attractive than the presidential-control model that dominates administrative law scholarship today. Finally, I agree that his proposals—(1) to limit the APA’s exemptions from notice-and-comment rulemaking procedures;⁴ (2) to expand the scope of judicial review of agency inaction;⁵ and (3) to require the disclosure of *ex parte* communications between the White House and agencies during the rulemaking process—would significantly improve the status quo.⁶ Indeed, I believe that there is a

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1. See, e.g., Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001 (2006) (responding to Professor John Manning’s argument that it is illegitimate for federal courts to interpret statutes contrary to their plain meaning to avoid absurd results, and articulating a different understanding of the legislative process and constitutional structure that justifies the absurdity doctrine).

2. See Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEXAS L. REV. 441 (2010).

3. *Id.* at 441.

4. *Id.* at 479.

5. *Id.*

6. *Id.*

strong need for an advocate of the presidential-control model or another theory of public law that relies on “political accountability” to respond to the points raised by Professor Criddle and other scholars who have recently questioned the extent to which public officials are politically accountable to the voters for their specific policy choices.⁷ This is not, however, a role that I am willing or able to play. Rather, the more modest, and perhaps achievable, goal of this brief response is to identify a few of the trickiest challenges that have arisen for scholars, like Professor Criddle and myself, who are skeptical of the presidential-control model and interested in developing alternative theories to justify and constrain the discretionary authority of administrative agencies in the modern regulatory state. First, I will describe a few of the vital roles that elections play in the modern regulatory state, even if they cannot accurately express the majority’s preferences on most political issues or hold elected officials politically accountable for their specific policy decisions. Second, I will discuss the complexities associated with ascertaining an appropriate role for “political preferences” within either a fiduciary theory of administration or one that is based on deliberative democratic theory. Third, I will point out that the most viable alternatives to “political-control models” of administrative legitimacy tend to be fairly expensive and difficult to implement, and I will suggest that it may be worthwhile in some contexts to consider adopting oversight mechanisms besides judicial review. Finally, I will suggest that one of the biggest challenges faced by advocates of fiduciary administration and other theories that emphasize the importance of reasoned deliberation is to assuage the fears of “uncertainty” that could arise from rejecting political-control models. Although this brief Response cannot hope to resolve these challenges, it can provide a focus for future research by Professor Criddle and other scholars, like myself, who share his basic vision.

I. The Value of Elections

Under the presidential-control model, administrative agencies should make policy decisions that “reflect the preferences of the one person who speaks for the entire nation.”⁸ Because the President is the only nationally elected official in the American government, his decisions will presumably reflect the preferences of a majority of the electorate. If the President

7. See Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073 (2005) (critiquing the presumption that elections hold public officials accountable); Jane S. Schacter, *Political Accountability, Proxy Accountability, and the Democratic Legitimacy of Legislatures*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 45 (Richard W. Bauman & Tsvi Kahana eds., 2006) (same); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253 (2009) (same).

8. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 490 (2003) (describing the presidential-control model); see also Staszewski, *supra* note 7, at 1260 (same).

nonetheless strays from the will of the people, he (or at least his political party) can be held accountable at the next election.

The value of elections is more or less self-evident under the presidential-control model. As Professor Criddle persuasively explains, however, elections cannot accurately capture the majority's preferences on most political issues or hold the President accountable for the specific policy choices of administrative agencies. Accordingly, the presidential-control model is built upon severely flawed and unrealistic premises. This is particularly problematic from the perspective of a theory of fiduciary administration, because the myth that elected officials are politically accountable for their specific policy choices (and those of their agents) may operate to eliminate the perceived need for public officials to satisfy their fiduciary duties. In other words, if voters will hold public officials accountable for their policy decisions at the next election, elected officials (and the administrators under their control) should arguably be free to do whatever they want in the meantime. It is, therefore, no coincidence that advocates of the presidential-control model tend to favor limitations on judicial review of agency decision making. In any event, proxy theories of representation are not only problematic because they are empirically implausible, but they are also problematic because they may serve to relieve public officials of the fiduciary responsibilities that are actually entrusted to them by the voters.

On the other hand, it is not immediately clear whether elections are required under a theory of fiduciary administration. If the proverbial "benevolent dictator" could comply with the theory's requirements, this could pose a problem in a republican democracy. One way to resolve this dilemma, however, would be to recognize that democracy requires freedom from the prospect of arbitrary domination.⁹ An unelected government (or an administration that could not be replaced as a result of a popular election) would violate this precept because it would have the capacity to dominate the people even if it was not currently inclined to do so. Professor Criddle recognizes and endorses this aspect of democracy when he explains that *the law* provides an essential check on the ability of fiduciaries to abuse their authority over the interests of beneficiaries.¹⁰ Meanwhile, Rebecca Brown has persuasively claimed that *elections* provide voters with an opportunity to protect themselves from abuses of power by their own representative

9. See HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* 27 (2002) (premising the basic case for democracy on freedom from arbitrary government action); PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 31–35 (1997) (arguing that the republican conception of liberty is non-domination—that is, freedom from the arbitrary power of another).

10. See Criddle, *supra* note 2, at 470 (“Absent the law intervening to mediate fiduciary relations, beneficiaries would be subject to intolerable domination—the fiduciary’s capacity to exercise administrative power arbitrarily.”).

government.¹¹ Moreover, elections typically provide a means for achieving a peaceful and orderly succession from one governing regime to another.¹² Elections therefore do perform vital functions in a republican democracy, even if they cannot accurately capture the majority's preferences on most political issues or hold elected officials accountable for their specific policy choices. From a more forward-looking perspective,¹³ elections may simply give voters a chance to identify the candidates whom they like and trust *to serve as their fiduciaries* for the next term of office. Because this seems to accord with how most voters really make decisions,¹⁴ a realistic conception of the value of elections would only strengthen the descriptive accuracy and normative appeal of Professor Criddle's theory of fiduciary representation.

II. The Role of Political Preferences

Under the presidential-control model, the Chief Executive will presumably direct agencies to make decisions that accord with the preferences of a majority of voters. Thus, if an administrative agency justified a policy decision by relying on the political preferences of the President (or a majority of voters), it would be difficult to imagine a more legitimate decision. Prominent scholars have therefore recently relied upon the presidential-control model to argue that agencies should receive "credit" for giving "political reasons" for their decisions when the judiciary reviews the validity of legislative rules under the arbitrary and capricious standard.¹⁵ Meanwhile, the Supreme Court has recently sent mixed signals on the

11. Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 565–71 (1998).

12. Rubin, *supra* note 7, at 2077.

13. There is an ongoing debate in political science over whether voters use elections as opportunities to sanction incumbents for their prior decisions or to select the best available representative for an upcoming term, but voters likely take into account both types of considerations. Staszewski, *supra* note 7, at 1269.

14. See Criddle, *supra* note 2, at 458–59 ("Political scientists have found that most voters cast their votes based primarily upon 'candidate-centered' factors such as experience and temperament, rather than 'issue-centered' factors such as a candidate's specific views on Social Security reform, tax cuts, or foreign policy.").

15. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 2 (2009) (arguing "for expanding current conceptions of arbitrary and capricious review beyond a singular technocratic focus so that credit would also be awarded to certain political influences that an agency transparently discloses and relies upon in its rulemaking record"); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. (forthcoming 2010) (manuscript at 6, available at <http://ssrn.com/abstract=1470850>) ("[I]n applying an arbitrary and capricious review standard to an agency decision, judges could be deferential regarding political reasons for that decision."). See also Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67 (2009) (arguing that as a doctrinal matter, administrative agencies should be allowed to rely on any logically relevant factor that is not precluded from consideration by statute in making their decisions).

appropriate role of political preferences in judicial review of agency decision making.¹⁶

The precise role of ascertainable political preferences in agency decision making under a theory of fiduciary administration is unclear. On one hand, the “naked preferences” of elected officials or a majority of citizens would not ordinarily provide an adequate justification for agency policy choices under any theory that values reasoned deliberation.¹⁷ The adherents of “deliberative theories” would ordinarily want to know *why* elected officials and citizens held those preferences, and they would likely support a requirement that those substantive reasons be disclosed on the public record so that they could be considered on the merits (along with other interests and perspectives) during the decision-making process.¹⁸ Most advocates of deliberative theories of administration would therefore support efforts to increase the transparency of agency decision making, but they would presumably be very skeptical of proposals to give agencies “more credit” for justifying their decisions based on political reasons during judicial review.

On the other hand, the ascertainable political preferences of elected officials and citizens are not *irrelevant* under most deliberative democratic theories. Consistent with this perspective, Professor Criddle explains that a fiduciary representative must make an independent assessment of what course of action will best promote the welfare of her beneficiaries: “While beneficiaries’ actual preferences are germane to this assessment and must not be dismissed arbitrarily, they are not always dispositive for the fiduciary as they would be for a proxy.”¹⁹ Professor Criddle does not extensively elaborate, however, on the proper role of political preferences in agency decision making under his theory, or on what role the “political reasons” that are offered by agencies should play during judicial review of rulemaking.²⁰ He is not alone, of course, in failing to provide definitive answers to these

16. Watts, *supra* note 15, at 10–11 (discussing the Supreme Court’s opinions in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), and *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

17. *Cf.* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984) (defining “naked preference” as “the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want” and noting the prohibition of naked preferences as a common theme within the Constitution).

18. Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN. REV. POL. SCI. 497, 498 (2008).

19. Criddle, *supra* note 2, at 471.

20. *But see id.* at 486 (explaining that “if agencies were to rely on White House information or policy guidance, courts conducting hard look review could consider these communications alongside other material in the administrative record such as the agency’s own expert reports and comments from private parties,” and claiming that courts could invalidate rules as arbitrary and capricious “[w]here agencies unreasonably disregard warnings about potential interagency policy conflicts” or “where agencies rely on White House directives unreasonably to the neglect of important scientific facts or expert judgments”).

questions. Deliberative democratic theorists have generally failed to provide a clear account of the proper role of political preferences in agency decision making and judicial review of rulemaking. This is an important project for critics of the presidential-control model to undertake, particularly in light of the recent scholarly proposals and judicial disagreement identified above.

III. The Problem of Resource Limitations

To the extent that the presidential-control model tells agencies to follow the President's preferences and limits judicial review of agency discretion, it is relatively cheap and easy to implement. On the other hand, the best alternatives, including the theory of fiduciary administration, have a tendency to impose more ambitious responsibilities on public officials and provide greater procedural safeguards against arbitrary decision making. For example, Professor Criddle advocates limiting the APA's exemptions from notice-and-comment rulemaking, expanding the availability of judicial review of agency inaction, and requiring the disclosure of ex parte communications between the White House and agencies during the rule-making process.²¹ Such theories are routinely criticized for being unduly expensive and burdensome to implement, in addition to being challenged based on separation-of-powers principles.²²

One response to concerns about the costs associated with these proposals is that the benefits of legitimizing the administrative state and avoiding arbitrary governmental action are worth it.²³ Elections are expensive and burdensome to conduct, but their necessity is rarely questioned because they are widely understood to be central to democracy. The same could be said of the principles of fiduciary administration and the safeguards needed to enforce them. Nonetheless, it would still be worthwhile to consider whether the principles of fiduciary administration could be enforced through more cost-effective methods. In this regard, I have recently proposed the establishment of a new, independent agency that would be charged with investigating and reviewing the inaction of Executive Branch agencies and reporting its findings and recommendations to elected officials and the public.²⁴ I claim that this agency would provide many of the same benefits that would result from increasing the availability of judicial review of non-enforcement decisions and other regulatory inaction.²⁵ Meanwhile, I contend that this agency would be in a position to minimize the practical

21. *Id.* at 479–87.

22. *See, e.g.*, Bressman, *supra* note 8, at 484 n.109 (citing scholars who have criticized intensive judicial review for being “too burdensome”).

23. *Cf. id.* at 555 (claiming that some requirements “are worth the price if the return is agency legitimacy”).

24. *See* Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369 (2009).

25. *Id.*

disadvantages that have been identified with judicial review of agency inaction because this form of external review would be more comprehensive, well-informed, and cost-effective.²⁶

The broader point, however, is that critics of the presidential-control model may find it worthwhile in some contexts to consider proposing oversight mechanisms besides judicial review.²⁷ The key, however, is that such oversight mechanisms must be designed and implemented in a manner that promotes principles of fiduciary administration. This has not been true of presidential review of rulemaking by OIRA in the past, but it is conceivable that the presidential-review process could be reformulated to promote principles of fiduciary administration, and Professor Criddle's proposal to require the disclosure of ex parte communications between the White House and agencies would be a good start.

IV. The Fear of Uncertainty

The presidential-control model posits that agencies should exercise their discretion by implementing the preferences of the President because this will promote the will of the people.²⁸ The theory therefore tells agencies precisely what to do, and it provides a simple mechanism for resolving any uncertainty. In contrast, Professor Criddle's theory of fiduciary administration requires administrators to exercise independent judgment for the benefit of those subject to the administrators' power and to comply with duties of purposefulness, fairness, integrity, solicitude, reasonableness, and transparency.²⁹ Other deliberative democratic theories require agencies to engage in reasoned deliberation about which courses of action will promote the public good and to provide reasoned explanations for their policy decisions that could reasonably be accepted by free and equal citizens with fundamentally competing perspectives.³⁰ Accordingly, these alternatives to the presidential-control model plainly tolerate substantially more uncertainty regarding what agencies should do and when they have failed to do it. Indeed, these theories will not ordinarily provide definitive answers to questions regarding how agency discretion should be exercised; they are

26. *Id.*

27. See, e.g., Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227 (2006) (developing a framework to audit samples of discretionary decisions by the Executive Branch as an alternative to judicial review). See also Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 122–23 (2007) (claiming that reason giving can perform its fundamental legitimizing functions even when it is not mandated or reviewed by the courts).

28. See Bressman, *supra* note 8, at 490 (“The presidential control model seeks to ensure that administrative policy decisions reflect the preferences of the one person who speaks for the entire nation.”).

29. Criddle, *supra* note 2, at 465–72.

30. Staszewski, *supra* note 7, at 1279–84.

probably better understood as establishing outer limits on the legitimate exercise of governmental authority.

It is therefore not surprising that citizens, scholars, and judges who prize certainty in the law would be drawn to the presidential-control model. One could also predict that more deliberative theories would be more attractive to those who view the law as an ongoing, dialogic process.³¹ Nonetheless, critics of the presidential-control model need to understand and confront the fear of uncertainty that leads people to want to believe that the President embodies the will of the people on the broad range of issues that are confronted by the regulatory state. One place to start is to draw attention to the fact that the presidential-control model is premised on a series of unrealistic myths. Another important step is to explain that we should expect more from the public officials who exercise authority on our behalf, set forth principles of fiduciary administration, and propose institutional reforms that would ensure that public officials comply with their responsibilities. Professor Criddle's article has admirably performed each of these tasks, and he has therefore made a substantial contribution to the literature. As we move forward with his broader project, however, we will need to think more about the values that are really served by elections, the precise role of political preferences in administrative law, and the problems raised by resource limitations. The answers to these questions should inform the actual role that ordinary citizens play in regulatory governance as well as the nature of the fiduciary responsibilities that are entrusted to public officials, and they could therefore potentially ease the angst that may be associated with the knowledge that there are no simple answers to our regulatory problems.

31. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010).