Confronting the Modern Executive: Four Perspectives

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A Theory of the Executive Branch: Tension and Legality. By Margit Cohn. Oxford: Oxford University Press, 2021. 352p. $99.00 cloth.

The President Who Would Not Be King: Executive Power under the Constitution. By Michael W. McConnell. Princeton: Princeton University Press, 2020. 440p. $35.00 cloth, $24.95 paper.

By Executive Order: Bureaucratic Management and the Limits of Presidential Power. By Andrew Rudalevige. Princeton: Princeton University Press, 2021. 328p. $95.00 cloth, $29.95 paper.

Phantoms of a Beleaguered Republic: The Deep State and the Unitary Executive. By Stephen Skowronek, John A. Dearborn, and Desmond King. New York: Oxford University Press, 2021. 304p. $27.95 cloth.

It is no secret that political power in the United States and elsewhere has, overall, shifted to "the executive" and away from legislatures. There may be debate about whether this is a product of willful "overreaching" by executives or whether, within the United States, Congress has instead willingly ceded power by engaging in what Justice Cardozo in 1935 called "delegation run riot." The concern about executive power has perhaps become heightened in the aftermath of the Trump presidency—just as Boris Johnson, with his own defiance of some of the "conventions" that are essential to the British constitutional order, is provoking debate in Great Britain.

This essay considers four recent books that speak to some of the issues raised by executive power. They are quite different from one another in method and disciplinary focus. Two are written by distinguished political scientists, one of them indeed by a trio of political scientists. One of these two, a study of executive orders, is highly empirical in its approach; the other is a more discursive essay whose topic is captured in its subtitle, *The Deep State and the Unitary Executive.* The other two books are written by equally distinguished law professors. Michael McConnell, a former federal circuit court judge who now teaches at Stanford, offers an extremely interesting and detailed history of the formation of the presidency in 1787 by way of distinguishing the president from a "king." And the fourth book, by Israeli law professor Margit Cohn, offers a more general, comparative analysis of the US and British executives, suggesting that they are far more similar than one addicted to a sharp distinction between presidentialism and parliamentarianism might imagine: one of their similarities is that both systems feature what she calls "fuzzy" law that is questionably used to enhance executive power.

One essential problem is what we mean by "the executive." Are we talking about a single individual called the president or prime minister? Or are we thinking instead of a congeries of complex institutions, with literally hundreds of thousands of members? Andrew Rudalevige's book on executive orders is especially relevant in this regard. Its topic is the increasing recourse to executive orders by US presidents who wish in effect to make policy (or law, from a realist perspective) in the absence of explicit congressional approval. One might recall that President Obama initially resisted demands that he issue executive orders to resolve the status of so-called dreamers, youngsters brought to this country in violation of US immigration law, whether directly or by their parents overstaying their limited visas. "I think it's important to remind everybody that, what I've said previously, I am not a king, I am [merely the] head of the executive branch of government," the former president told Univision. "I am required to follow the law, and that is what we've done." His hands were tied, he seemed to say, however disappointing that was to those who not only believed that American treatment of the "dreamers" was cruel but also took note of the fact that remedial legislation had in fact passed with a significant bipartisan majority in the Senate and would have almost undoubtedly passed in the House had Republican Speaker John Boehner been willing to

doi:10.1017/S1537592722000585

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https://doi.org/10.1017/S1537592722000585 Published online by Cambridge University Press

bring it to a vote. (Instead, Boehner followed the so-called Hastert rule by which he would not bring to the floor any bill that did not have the support of a majority of the Republican caucus, thereby rendering overwhelming Democratic support irrelevant.) However, Obama, with the help of his lawyers in the Executive Branch, apparently decided that he had spoken too soon, and he did in fact choose to issue an executive order providing relief for substantial numbers of the dreamers. Had he in effect taken on the trappings of "kingship" by exploiting the opportunities inherent in the practice of issuing "executive orders"?

The days when executive orders were confined to naming federal buildings or giving exemptions from certain civil service requirements to named federal employees (including J. Edgar Hoover) are long gone, and in fact they never described executive orders in their entirety. Anyone familiar with World War II knows about Executive Order 9066, in which President Roosevelt ordered the detention of approximately 120,000 Japanese resident aliens and their native-born Japanese American children (who were, of course, citizens) in what one Supreme Court justice called "concentration camps." It has now become a common feature of outgoing presidential administrations, especially if they are being succeeded by political opponents, to issue a plethora of executive orders in the closing days in office; incoming presidents often devote their first days in office to attempting to undo their predecessor's orders.

The raw numbers may not be very high. Donald Trump issued 219 orders in his four years in office, and Joseph Biden issued 77 in his first year, 19 in the first three days of his presidency. (It took until January 25 for him to sign an executive order reversing Donald Trump's attempt to limit the ability of transgendered persons to serve in the military.) But, as with Supreme Court opinions, also running around an average of 65–70 a year in recent years, at least some of them are genuinely important even if others are of interest only to the litigants. It is certainly worthwhile to pay the kind of close attention that Rudalevige offers to their gestation over a period of more than 50 years. He has done admirable work in compiling often hidden data and then subjecting them to rigorous empirical examination.

To focus, as I have just done, on the plethora of "first-days" orders may lead one to believe that executive orders are genuinely the product of *presidential* desires as to public policy. None of these "first-week" orders was the product of anything that could be described as careful recourse to the many federal agencies that might have legitimate interests in the policies touched on by the orders. The whole image of "kingship" surrounding at least some executive orders feeds the image not simply of an "imperial" institutional presidency but, more to the point, an imperial individual using the powers of the presidency at will. But then one has to pay careful attention to Rudalevige's own subtitle, *Bureaucratic Management and the Limits of Presidential Power. Some* executive orders, to be sure, might be the product of the Executive Office of the President (EOP), but many more, he demonstrates, find their origin in the desires of one or another agency within the Executive Branch to generate given policies and to use a compliant president for those purposes. Even more to the point is the ability of these agencies to limit—one might even say "torpedo"—presidential desires that they find threatening to their own policy goals. Perhaps the most fascinating chapter —"'Dear John': The Orders That Never Were"—details a number of proposals, some of them emanating from the White House itself, that never entered the Federal Register because they were successfully resisted—in effect vetoed—by ostensible subordinates to the EOP, though a very important actor and frequent placer of reins on a president is the Office and Management and Budget, very much a part of the EOP.

Rudalevige borrows Ken Shepsle's classic formulation, which originally referred to Congress, and emphasizes that the Executive Branch—indeed, even the EOP—is a "they" and not an "it." One must always be attentive to the multiplicity of views and interests among those contending to use the genuine power attached to an executive order. There are recurrent references to ongoing battles between the State and Defense Departments about foreign policy, or Agriculture and Interior about aspects of domestic policy. Chapter 2's main title is "Bargaining with the Bureaucracy," and the final chapter begins with the convincing title "Incorrigibly Plural." Not surprisingly, Richard Neustadt's famous argument that presidents must realize that they must "persuade" and not simply "order" their notional underlings plays a prominent role in the book. Sometimes it is valuable to think of a president, in George W. Bush's term, as "the decider"; but at least as often one must recognize that "the president" is simply a metonymy for a complex set of institutions that beat to their own drums and are often resistant to any "decisions" a president would like to impose.

Rudalevige has closely studied, through intense archival research, approximately 500 executive orders—see pp. 78–79 for some of the problems presented in identifying something as an executive order—issued between 1937 and the end of George W. Bush's first administration in 2004. Although he begins his book by reference to Donald Trump's executive orders attempting to curtail the entrance of Muslims to the United States, which establishes at the outset the importance of executive orders in modern politics, the rigorous part of the analysis, for better or worse, relies on data that some might regard as coming from another era—before our intense polarization led to what Ornstein and Mann memorably described as a national polity that is "even worse than it looks"—and

https://doi.org/10.1017/S1537592722000585 Published online by Cambridge University Press

that was in 2012! But even if we are eager to find out whether his conclusions still hold in the politics of today, we can be grateful to Rudalevige for the careful analysis of the rich lode he discovered.

His principal interest is ferreting out the circumstances of the gestation of executive orders and their policy domains. He carefully distinguishes among types of orders not only by subject matter but also by reference to whether they might be viewed as "top down"—coming from the EOP—or "bottom up"—initiated by the agencies, not to mention those that inevitably involved a mixture of both EOP and bureaucratic interest. As noted, his intensive research does not include the Obama or Trump administrations, although brief allusions are made to each. He would, no doubt, be the first to admit that this cannot be the "last word" on the subject, however valuable it is.

Phantoms of a Beleaguered Republic is by far the most self-consciously presentist of the four books. Though the authors are indeed distinguished members of the academy, it is written in a style that makes it accessible to almost any "general reader," and one suspects they would be rightly disappointed if they would find they are speaking only to fellow academics. One can imagine not only its being assigned in introductory courses in political science—whereas Rudalevige should probably be saved for advanced courses—but also being read in lay book groups devoted to studying public affairs. An undoubted explanation for the books being written is the perception that the American system of government is under systematic attack; it is truly "beleaguered." This is not merely the result of "polarization" around different views about what is or is not desirable public policy. Rather, a central aim for many is whether to dismantle—or, as former Trump adviser Steve Bannon put it, "deconstruct"—the administrative state and the entire Progressive vision of policies responsive to professional expertise.

Executive agencies are now often derided as part of the "deep state," a term originally used to analyze the political systems and, particularly, the role of the military in Turkey and Egypt. The "deep state," almost by definition, is hidden from public view but in fact exercises "real" power, often malevolently. Claims that "elections have consequences" are hollow if the "deep state" throughout remains in control. The answer, some now suggest, is to expose and discredit that basically illegitimate state and to weed it out, returning power to "the people" who are represented by, indeed under some visions instantiated in, "unitary executives" who are, as Andrew Jackson would have said, the "tribune of the people" entitled to rule on behalf of the electorate that placed them there.

Donald Trump's "I alone can fix it," however crude, is not completely removed from some of the historical visions of ambitious American presidents. The authors, for example, quote James K. Polk's too-often-ignored declaration, "I intend to be *myself* president of the United States," important in part, they note, "because it defied his unassuming rise as a ninth-ballot nominee" (p. 42). It was Polk, of course, who basically singlehandedly precipitated war with Mexico to gain his objective of conquering the American Southwest and expanding the Union (including the further entrenchment of slavery in Texas). Demagoguery was well known, at least as a concept, to those who framed the Constitution; Alexander Hamilton in *Federalist* 68 reassured his readers that the United States would be protected against a demagogic president by an electoral college system that placed ultimate selection of the president in the hands of the sober judgment of public-spirited leaders. As with the Framers' desire to escape the potential ravages of a system of partisan (and factional) political parties, this proved to be a truly "hollow hope," to apply the term used by Gerald Rosenberg to those who place exaggerated faith in the Supreme Court.

An important part of the authors' argument in *Phantoms of a Beleaguered Republic* is the role played in the contemporary debate by legalism. As is so often true of political argument in the United States, so do critics of the administrative state argue that it violates foundational presuppositions of the 1787 Constitution with its presumptive commitment to a certain vision of "separation of powers." As the authors put it, debates about the role of the "Deep State" relative to other institutions, whether Congress or the president, have "shifted the focus rather abruptly back to structure and the formal organization of authority. Those knotty issues of constitutional design," including especially "the separations, the checks, the devolution and dispersion of powers" that work in complicated ways to maintain "political accountability and democratic legitimacy" have now become "the critical points of contention" (p. 21).

These all can be studied from the perspective of the trained political scientist, but for better or worse, it is also the case that lawyers and judges are playing ever more key roles in this debate. Attacks on the administrative state are now emanating from the Supreme Court itself. One might describe this book as a vigorous counterattack by highly knowledgeable political scientists on a kind of arid legalism that is, the authors believe, threatening the very foundation of the modern American state by denigrating the American bureaucratic order and, concomitantly, valorizing a "unitary president" who is more and more untethered from the institutional (and legal) discipline necessary to preserve a liberal constitutional order.

For Skowronek and his colleagues, the "institutional presidency," which very much encompasses the modern administrative state, is being challenged by a "plebiscitory" conception of the office that substitutes "individual will and personal imposition" for "political leadership" characterized by "deliberation and negotiation" (p. 67). What the "deep state" provides is not a group of unscrupulous underlings seeking to sabotage the "tribune of the people"

https://doi.org/10.1017/S1537592722000585 Published online by Cambridge University Press

or the Teddy Rooseveltian "steward" of the republic. Instead, these bureaucrats, with what Louis Brownlow once labeled as their "passion for anonymity," bring to bear depths of experience, learning, and socialization into important norms of democratic governance in an increasingly complex polity that requires something more than the instincts of even well-intentioned presidents by way of guidance. Separate chapters elaborate the kinds of reassuring depth that can be found within the modern administrative state, as well as the dangers of relying on a highly personalized conception of the presidency. That way, especially in modern society and its ever-more-pervasive social media, lies demagoguery, though some students of American political development, such as Mark Graber, would locate the moment of inflection precisely with Jackson's election and his conception of himself as the people's "tribune" with suitable powers attached.

There is an obvious connection here with Rudalevige's findings on the ability of agencies to prevent enthusiastic presidents from issuing executive orders that would in fact be counterproductive to achieving the ostensible policy goals. "The executive" is indeed a "they," and we are all better off for it. But that still leaves us with what to lawyers is a central question: What *are* the "executive powers under the Constitution," and how exactly do we determine the answer to that question?

That is the focus of Michael McConnell's book. As he himself quickly admits, his volume in no serious way professes to be a successor to, say, Edward Corwin's or even Clinton Rossiter's magisterial efforts to assess the historical developments attached to presidential power. How we got to our present stage of practically allocating powers to "the executive," however defined, is of no real interest to him. Instead, he offers a careful and meticulous reconstruction of the debates in 1787 to explain what the Constitution, best understood, meant at the time of its formation. Although McConnell is a noted "originalist," he does not offer his book as an intervention designed to shape our current interpretation of presidential authority; instead, he describes it as an "intellectual history" that should serve as an essential first step in understanding the office, even if we decide both descriptively and normatively that we have moved far away from that initial set of intentions or expectations.

What does it mean to say that the president is (or is not) a king? It obviously has nothing to do with the principle of selection. Although two presidents were in fact sons of prior presidents, they got to the White House by election (even if both the 1824 and 2000 elections presented some significant problems for democratic theorists). Instead, as emphasized by Eric Nelson in his important book *The Royalist Revolution: Monarchy and the American Founding* (2014), what he describes as Hamilton's own "monarchical" tendencies had nothing to do with hereditary succession and everything to do with the degree to which presidents would retain many of the "prerogative" powers traditionally assigned to the British monarch. McConnell refers to Nelson's book only in a footnote; indeed, his book is largely confined to primary sources, without any genuine discussion of the rich scholarly literature on the history of the American presidency. That includes University of Virginia law professor Saikrishna Prakash's *The Living Presidency: An Originalist Argument against Its Ever-Expanding Powers* (2020) that, as its subtitle suggests, is an attack on those professed "originalists" who support what Prakash regards as a bloated presidency that regularly engages in constitutional overreach. (Prakash criticizes devotees of a "living Constitution" for having no genuine constitutional theory beyond a political preference for some aggressive presidents, even as they then bitterly criticize those presidents whom they do not like. Law, he argues, has nothing to do with either of these responses.) Still, this does not affect one's conclusion that McConnell's book is a genuine achievement that merits being read by anyone interested in the history of the American presidency, including the deviation between original conceptions and modern realities. Cass Sunstein is probably correct when he describes it (in a blurb of the book) as "the very best account of the founders' understanding of the presidency." Of course, the importance of that accolade may depend on how important one believes it is to be faithful to that understanding.

In any event, for McConnell, understanding of the original vision of the presidency—what he terms "the logic of Article II" (p. 198)—requires very careful attention first to the various prerogatives traditionally held by the British monarch and then, all importantly, to the way that these prerogatives were allocated by the drafters of the Constitution separately to Congress or the president (or to no one at all, exemplified by the British monarch's position as head of the Anglican Church). McConnell focuses much of his attention on the oft-discussed difference between the texts of Article I and Article II of the Constitution. Article I grants to Congress the powers "herein granted," which has served as the basis of the ongoing argument that Congress has only limited assigned powers (and that those limits should be enforced by a vigilant Supreme Court). Yet, there is no "herein granted" language at the outset of Article II; instead, it begins, "The executive Power shall be vested in a President of the United States of America." So what exactly *is* "the executive power"?

So-called presidentialists suggest that it includes vast, perhaps limitless, powers over various domains of the state. Most important would be the ability of presidents to wage war at their own discretion, whatever might be suggested by the assignment in Article I of the power of Congress "to declare" (as distinguished from "making") war. Only in the twenty-first century have British prime ministers begun to concede that they no longer enjoy the traditional

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prerogative power of the Crown to engage in wars, such as that in Iraq, without seeking any parliamentary approval. Probably the most notable recent example of the "prerogative" argument in the United States occurred in the (in)famous "torture memo" prepared under the direction of the Office of Legal Counsel (about which more later) during the Bush administration that, after first implausibly claiming that the United States was not engaging in torture, went on in effect to say that it did not matter. The president could not be prevented either by international law or laws passed by Congress from doing whatever he thought, as commander-in-chief, to be necessary to achieve our national objectives in what he defined as "the global war on terror."

The heart of McConnell's argument is that although the president *does* have some prerogative powers, by no means do they encompass what even the desiccated monarchy of George III enjoyed, let alone the Stuart kings. An important and illuminating feature of McConnell's careful reconstruction of the process by which the Constitution was drafted is that key decisions were made not by the delegates meeting together in the Pennsylvania State House, but rather by the far smaller number who were members first of the "Committee of Detail" or then the "Committee on Style." Even if one accepts McConnell's account of what was in the minds (and base of knowledge) of what might be termed the "actual drafters," there was no real debate about the theory of prerogative (and powers "vested" in the executive) either at the Philadelphia Convention or, perhaps even more importantly, at the various state conventions whose assent was in fact necessary to give juridical life to the proposals that came out of Philadelphia. To refer to *any* particular theory of the executive as the conscious decision of "we the People" is, to put it mildly, a tendentious exaggeration. The actual language of Article II, McConnell demonstrates conclusively, can only in the most formal sense even be said to have received the assent of the 39 members of the Convention who were present on September 17, 1787, and agreed, unlike three dissenters, to sign the document.

McConnell is also eager to suggest that presidents, insofar as they are "chief executives," must preside over a so-called unitary executive, which means, among other things, the right to dismiss members of the Executive Branch at will. Although he describes it as "mystifying that the drafters said nothing" (p. 163) about this power in the actual text of the document—and Alexander Hamilton famously assured his readers in *Federalist* 77 that the institutional Senate that had to confirm an appointment also would have to acquiesce in the dismissal of such an individual—McConnell nonetheless believes that the "logic" of Article II, plus knowledge of the monarchical prerogative that remained in the American chief executive, means that the "decision of 1789" that acknowledged a unilateral power of the president to remove officials—and that passed in the Senate only because Vice President John Adams, as president of the Senate, cast the tie-breaking vote—was not only prudent or simply a political win by the George Washington administration but also was in fact required by the Constitution.

This is no small matter. Andrew Johnson was impeached on the basis of his purportedly unlawful dismissal of Edwin Stanton as secretary of war in violation of the Tenure in Office Act passed by the Reconstruction Congress, and some of those who voted to acquit him (and who defend him to this day) argued that the act was unconstitutional and that Johnson was well within his powers to dismiss Stanton. And Donald Trump, who freely fired many of his Cabinet members, was apparently furious at being told that he could not fire Jerome Powell as head of the Federal Reserve Board simply because Trump disagreed with his decisions on monetary policy. (There was also, of course, the matter of Special Counsel Robert Mueller.). The Fed is the most important example of the "independent" agencies within the Executive Branch, which means they have a significant degree of legal protection against arbitrary firing. Like other proponents of the "unitary executive," McConnell prefers not to discuss the Fed, instead directing his critique at the modern "administrative state"—the subject of the final chapter—and the independence that some of the agencies have from presidential retribution.

If one is a Holmesian and believes that "experience" should triumph over "logic" when dealing with the complexities of governance, one can wonder why eighteenth-century theories of government should have any hold on us today unless, of course, we happen, on independent grounds, to believe that they are persuasive. It is when discussing the unitary executive that McConnell strays farthest from his insistence that he is doing only intellectual history and instead seems to adopt normative "originalism." Even descriptive originalism must contend with *Federalist* 77 and its endorsement of a role for the Senate regarding removals of executive branch officials, though it is also true that Hamilton changed his mind after ratification of the Constitution. But the basic question of originalism always reduces to why the dead hand of the past should control a present that must contend with markedly different realities, which helps account for, among other things, the rise of an administrative state and the need for its "depth" that Skowronek and coauthors argue for.

Nor, incidentally, does McConnell acknowledge that those purported "laboratories of experimentation" called the American states have almost uniformly rejected the "unitary executive." Fewer than 10% of the 50 states, for example, allow their governors to appoint the attorney general and, as much to the point, dismiss an attorney general for rankling the governor. In most states, attorney generals are independently elected and with some

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frequency come from the "other" political party. Tennessee's supreme court appoints that state's chief law official, whereas the New Hampshire legislature makes the choice. So even if one agrees, for the sake of argument, that the best way of understanding those who framed the Constitution is that they endorsed the idea of a "unitary executive," it is demonstrably false to say that that is in fact the "American way" of organizing an executive branch, unless one ignores the 50 states or dismisses their decisions as "un-American." The explosion of contemporary interest in comparative constitutional law and institutions is largely international. But it should be obvious that the 50 American states offer a rich lode of material for comparativists. Consider only that Virginia governor Glenn Youngkin's first acts on taking over the office in January 2022 were to issue extremely controversial executive orders regarding mask mandates by local school systems and the teaching of "critical race theory" in public schools. Needless to say, lawsuits were immediately filed arguing that he was engaged in gubernatorial overreach.

The final book in the quartet, by Margit Cohn, agrees strongly with McConnell (and Prakash) that the modern executive often overreaches and that something should be done about it. The first part of her book is descriptive; she demonstrates that the United States and United Kingdom are more alike than formalists might think. The executives in both countries, whether presidents or prime ministers, have steadily aggrandized their powers and weakened the actual role of legislatures as presumptively democratic decision makers. British ministers continue to rely on notions of "prerogative"; monarchs themselves may have become mere figureheads, but their formidable traditional powers live on, having been transferred to the "government" that governs in the monarch's name. Thus, because British monarchs could go to war or make peace on their own at least so long as they could gin up sufficient tax revenue from parliament, Tony Blair saw no need to gain parliamentary approval for his disastrous decision to join the US president, George W. Bush, in their war of choice against Iraq in 2003. And Teresa May argued vigorously, though ultimately unsuccessfully, thanks to an unprecedented revisioning of the British Constitution by the British Supreme Court, that she had the unilateral power to decide on the terms of British withdrawal from the European Union ("Brexit").

One might cavil that Professor Cohn is not really offering a "theory of the executive branch" in the sense of offering hypotheses that empirically oriented political scientists might test. But, as with the book authored by Skowronek and coauthors, there is no doubt that she offers a host of important insights that should be absorbed into modern reflections about executive power, beginning with her relative denigration of the difference between presidents and prime ministers. Her argument substantially relies on the notion of what she calls "fuzzy law," the accretion of which inevitably works to the advantage of presidents or prime ministers eager to seek legal fig leaves for their own policy (and political) objectives. By "fuzziness," she refers not only to the inevitable indeterminacy of legal language; she also emphasizes such realities as the "piling" up of statutes and past executive orders that can be used as ostensible authority for the further development of presidential power. Sharing Rudalevige's interest in executive orders (and presidential "proclamations"), she makes the important point that an increasing number of them are "justified" in boilerplate language referring only to "the Constitution and [unnamed] statutes" or, perhaps, a laundry list of multiple statutes; in any case, there is unlikely to be truly careful analysis demonstrating to an independent analyst that the president has the claimed authority. For Cohn there is often only the veneer of a legal argument that in fact masks the reality of what at worst may be a more Schmittian exercise of alegal decisionism. She offers extensive analysis of "emergency powers" and regulation of air pollution in the two countries to substantiate her concerns.

As noted earlier, one purpose of many modern executive orders is in effect to surmount congressional gridlock and to achieve policy goals that Congress, for whatever reason, has not explicitly authorized. Barack Obama's legally questionable assertion of his power unilaterally to order the bombing of Libya was justified by a dubious reading of the War Powers Act by former Yale Law School dean Harold Koh, then serving as the legal counsel to the State Department. Interestingly enough, it was unclear that the Office of Legal Counsel within the Department of Justice was willing to endorse Obama's legal authority, so he did what most people would probably do when faced with a nay-sayer: look for a second opinion that endorses the client's goals.

In fact, in considering the United States, Cohn could well have spent more time on the phenomenon of executive branch lawyers, whether in the White House itself, attached to "White House Counsel" or in the Office of Legal Counsel (OLC) within the Department of Justice. There have been some very fine lawyers in the OLC. But it would be naïve in the extreme to ignore the extent to which these decidedly non-independent lawyers, who serve at the president's discretion, end up with a perspective decidedly favorable toward justifying executive power. To be sure, now-Harvard Law professor Jack Goldsmith, when he became head of the OLC under Bush, disaffirmed the notorious "torture memo" written by John Yoo and signed by its director Jay Bybee, now a lifetime judge on the Ninth Circuit Court of Appeals, but that action is quite aberrational. Many lawyers, but I suspect few others, increasingly realize that the OLC is in fact more important with regard to issues involving executive power, however defined, than practically any federal court, including perhaps even the Supreme Court.

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Where Cohn is most "theoretical," albeit in a distinctly traditional legalistic sense, is in her final chapter. She believes that the potential cure for the excesses of "fuzziness" is to enhance the power of judicial review. She is candid enough to admit that "fuzziness"—itself not the clearest of terms!—is ultimately inescapable, but she does believe that it can be importantly reined in with sufficient judicial oversight. However, she emphasizes that she does not, in fact, want judges to make final decisions. She instead hopes that the judiciary will promote a more genuine deliberative, dialogical process of decision that gives the public greater opportunities for participation even if, at the same time, one accepts that Congress will not in fact necessarily provide clear guidance for decision making. What is most important, she concludes in her book, is to devise feasible remedies that might tame "fuzzy modes of law that [have been] relied upon by aggrandized heads of the executive branch" in both the United States and the United Kingdom (p. 322).

One suspects that both Cohn's and McConnell's books will become welcome additions to the libraries of at least six of the current members of the Supreme Court, who seem more than receptive to joining, albeit perhaps with more moderate language, Steve Bannon's war on the "administrative state." McConnell will provide an originalist veneer for a judicial attack on certain forms of executive power (even while supporting other aspects of executive power and, for some, overreach). Cohn will add a number of more presentist arguments allowing the conservative Republican majority to describe themselves as friends of democratic government waging a necessary war against executive overreach. To be fair, it was Ted Lowi who in many ways led the attack on the administrative state in his critique of what he regarded as a decadent form of liberal "interest group" pluralism that increasingly featured a detached Congress content to delegate, delegate, delegate and an executive concerned primarily to provide rents to preferred interest groups, heedless of a coherent notion of the public interest.

Regardless of one's place on the ideological spectrum, it is hard these days to be content with the operation of the current US government, including the administrative state. One might well doubt that looking back to what certain Founders were saying in 1787 is likely to prove very helpful. Similarly, one might not share Cohn's optimism about what courts can usefully provide or even the necessary virtues of enhanced "deliberation" or "dialogue" if this means that ever more time must elapse before bureaucratic agencies can effectively move against genuine threats to the public welfare. Perhaps the essential problem is the loss of public trust in what Felix Frankfurter and other Progressives used to call "disinterested" public servants. Today we are far more likely to operate under a "hermeneutics of suspicion" designed to uncover the selfish interests undergirding purportedly "disinterested" presentations of public policies. And we must certainly remember Rudalevige's point that the bureaucracy is indeed a "they" and not an "it." It is wishful thinking to believe that any entrenched group, even if sincerely dedicated to serving the public interest, will not in fact fall victim to the inevitable ideological blinders of their particular takes on the world and definitions of the "public interest." Rudalevige writes a marvelous chapter detailing why it took complex negotiations in four separate presidential administrations before it was possible to issue a truly "sticky" executive order involving what kinds of poisons might be used against predatory coyotes, in part because of quite bitter struggles among the Departments of Agriculture and Interior and the Environmental Protection Agency.

All four of these books amply repay reading and discussion. The issues at their cores should be of concern not only to professional political scientists and lawyers alike but also, and perhaps even more importantly, to an increasingly alienated citizenry riven by mistrust in America's basic institutions. Skowronek et al. write, "The clear-eyed choice is not between the Deep State and the unitary executive" (p. 195). Like Goldilocks, we are searching for the elusive "just right" balance between the two. Even if one remembers the old-fashioned slogan that "experts should be on tap and not on top," we will always have to determine at any given time the relative faith we place in an elected president (even if through the Electoral College) and those career civil servants who are in fact necessary for a functioning government. But it is good to be reminded of the "depth" that a properly constituted deep state can bring.

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