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Administrative Agencies as Inherently Executive Bodies: A Return to a Constitutional Framework of American Government

There can be no doubt that the modern era of American government is dominated by the myriad agencies that have sprung up in the Twentieth Century. On both a local and especially on a Federal level, these faceless, largely unaccountable bodies created by Congress and tenuously connected to the Executive Branch or ‘headless’ control or considerably impact many, if not most, aspects of business in the nation. And yet, however beneficial and essential these agencies may be, their status and place in the American Constitutional structure has resulted in a considerable imbalance, accruing tremendous power to the legislature, with the general support and substantial aid of the judiciary. This paper, therefore, seeks to posit a return to a Constitutional framework, along the lines of Alexander Hamilton’s scheme.

“Congress is properly a deliberative corps and it forgets itself when it attempts to play the executive.”<sup>1</sup> Alexander Hamilton, the youngest of the Founding Fathers, had perhaps the most comprehensive plan for the administration of the then-newborn nation. Concerned tremendously with both the balance of powers in the new government and the unparalleled power that would be accrued to the legislative, it was his view that this was the most dangerous threat to the Federal system.<sup>2</sup>

While the anti-Federalists most feared that power would accrue in the body of a sole Executive, resulting in dictatorship or even monarchy, Hamilton and Madison recognized that

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<sup>1</sup> Letter from Alexander Hamilton to James Duane (September 3, 1780), in 2 The Papers of Alexander Hamilton: Documents and Commentary at 404 (Harold C. Syrett et al., eds. Columbia University Press, 1961-1987). Quoted in James B. Staab, The Political Thought of Justice Antonin Scalia: A Hamiltonian on the Supreme Court 39 (Rowan and Littlefield Publishers, Inc., 2006).

<sup>2</sup> See generally, The Federalist No. 71 (Alexander Hamilton).

the truest danger to any democracy lies in whoever has control over the purse. Hamilton in particular noted the “...tendency of the legislative authority to absorb every other...”<sup>3</sup> Even today, where much popular sentiment bemoans perceived power-grabbing by the President, on a fundamental, daily level, the administrative agencies have far more effect than does any action embarked upon by this President or any other.

That it is the province a duty of the legislature to enact laws is a cornerstone of any government containing the same, and can scarcely be debated on this general premise. However, that power must be tempered by the vigorous executive that Hamilton called for.<sup>4</sup> In the modern sense, it is not only in the person of the President that unity and competence of power<sup>5</sup> is essential to properly execute the laws enacted by Congress, but that the agencies created in fact to perform the embodied intent of Congress be recognized as fundamentally Executive – and therefore coequal with any other Branch.

This concept is certainly not a new one. In his passionate advocacy of the Chevron test, Justice Antonin Scalia posited that the broad delegations of power by Congress necessitated by our present society would be best accompanied by deference to the agencies to which the applicative duty was entrusted.<sup>6</sup>

Unfortunately, the real gain of Chevron, the presumption that agencies’ interpretations are due deference, was blunted almost immediately by the same Court that had created the test.<sup>7</sup> However, even Chevron did not go far enough to recognize the constitutionally proper role of agencies – certainly not according to the Hamiltonian model.

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<sup>3</sup>The Federalist No. 71 (Alexander Hamilton)

<sup>4</sup>The Federalist No.70 (Alexander Hamilton)

<sup>5</sup> Id.

<sup>6</sup> Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 518

<sup>7</sup> Chevron, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) was chipped away at in Immigration and Naturalization Service v. Cardoza Fonseca, 480 U.S. 421 (1987) and all but ignored in United States v. Mead Corporation, 533 U.S. 218 (2000)

The essential nature of agencies, as stated *supra*, is to execute statutory schemes created by Congress. And, were it merely Congressional constriction of agency duties and discretion, the Constitutional framework would not be so adversely damaged. However, the judiciary has combined with the legislative to ensure that agencies remain in a limbo state, rather than treating them as embodiments of the executive power.

In effect, agencies are presently bound at both ends of their processes. The initial authorization, scope of power and procedures are mandated by Congress in the statutes that create the agencies. So too, their actual implementation of their mandated duties is completely open to judicial construction, with deference being an occasional, inconsistently applied boon of the Court. Their procedures are termed as being quasi-legislative and/or quasi-judicial, and interpreted by the Court in that light.

In fact, there is a fundamental difference between judicial review of statutes and of agency procedures and determinations. And it is in that difference where the imbalance shows most strongly. The Constitution provides that “Each House may determine the Rules of its Proceedings...”<sup>8</sup> While Congress did pass procedural requirements bearing on the judiciary,<sup>9</sup> they are primarily guidelines and specific situational measures. More to the point, Congress expressly granted to the Supreme Court the power to prescribe the rules of conduct, evidence and procedure.<sup>10</sup>

In marked contrast to the preceding, agencies are told explicitly what procedures they must follow, at virtually every step – both by the legislature and the judiciary. The

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<sup>8</sup> U.S. Const. art. I, § 5, cl. 2.

<sup>9</sup> Judiciary and Judicial Procedure Act, 28 U.S.C. § 1651 et seq. (1948)

<sup>10</sup> 28 U.S.C. § 2071 et seq. (1948).

Administrative Procedures Act<sup>11</sup> attests to this in every respect. The A.P.A. presents a comprehensive scheme in which various agency functions are to be governed.

The effect of the dual control exercised by Congress and the judiciary on agencies has been significant, and not beneficial. Rather than being accountable to the People of the United States in any real fashion, agencies are accountable to Congress and the Court. The Constitutionality of this is certainly open to question, regardless of chains of case law or Congressional records justifying this system.

And so, the end result of this anti-democratic, fundamentally unbalanced system is that those governmental bodies most active and uniformly applicable to many aspects of daily life are not beholden to the people in any appreciable way. More expansively, the chink in the armor of the Constitutional Framework envisioned by the Framers has been widened exponentially, which will have long-term effects, as well as the immediate and current consequences inherent in massive governmental agencies with budgets equally grand in stature.

It perhaps goes without saying that there is little likelihood of a radical shift back towards recognition of agencies as fundamentally Executive, and due deference accordingly, as well as direct accountability. Nonetheless, there are potential measures that might begin the process of properly placing agencies, including the so-called 'independent agencies,' in a constitutionally defensible framework.

One avenue would manifest as a return to the Chevron test, but a bulwarked version thereof. The first prong of the test would be modified according to a Textualist theory, stating that Congressional intent must be manifested within the statutory text itself, rather than selective usage of self-serving legislative commentary preserved for prosperity and one's constituency in the Congressional Record. With that proviso, the legislative authority granted it by the

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<sup>11</sup> Federal Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1946)

Constitution is not abrogated in any way, and the combination of non-legal legislative history and judicial fishing in the waters of the same may be eliminated in this regard.

The resulting tension would create an imperative for Congress to either reach real consensus on agency purpose and an acknowledgement that its own actual power is limited to legislation – that once it enacts a more vague law, the power manifested at that point does not belong to the legislature, but is fundamentally executive in nature, and totally out of the hands of an encroaching legislature. It would further restore accountability on Congress' part for creating these agencies, and for breathing what life it desires into them. In turn, the agencies themselves would be far better equipped to determine where they stand vis a vis their responsibilities.

The second prong of Chevron becomes even more important in this scenario, seeing as how many statutes would lack the requisite clear Congressional intent within the four corners of the statutes themselves. The test as written requires that the Court consider whether the agency interpretation is a reasonable one, "...based on a permissible construction of the statute."<sup>12</sup> Determining the permissibility of any statutory construction is clearly within the province of the judiciary, and there is no reason to except a fundamentally executive act (i.e. creating and/or applying a regulatory scheme) when fundamentally legislative acts (i.e. enacting statutes as law) is free from judicial oversight.

The second Chevron prong is not free from controversy, however. Regardless of whether it is referred to as an arbitrary and capricious standard or not, the Court's acknowledgment of agencies as executive branch organs would bring it into accord with the sentiment expressed by then-Justice Rehnquist in his dissent in Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983), decided a year before Chevron. As he noted, "As long as the agency remains within the bounds established by Congress, it is entitled to

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<sup>12</sup> Chevron, 467 U.S. at 843

assess administrative records and evaluate priorities in light of the philosophy of the administration.”<sup>13</sup>

The right elucidated by Justice Rehnquist was in keeping with his earlier Opinion in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978), where he rather harshly tore apart a D.C. Circuit decision below authored by the latter Court’s Chief Justice Bazelon. Justice Rehnquist declared that the Court should never utilize judicial review to reexamine “...fundamental policy questions appropriately resolved in Congress and in the state legislatures...”<sup>14</sup> When considered in proper context as Executive in nature, there is no reason that the same sentiment expressed in Vermont Yankee should not be applied with equal force to administrative agencies.

It should be stressed that the Administrative Procedures Act would largely remain in force even after a shift towards recognition of agencies as executive. As the genie of Congressionally prescribed procedures has been out of its bottle for decades now, it is utopian to ponder complete overhaul of the procedures long-embodied in such an Act. Certainly, all sections that seek to achieve transparency in agency determinations, both in rule-making and adjudicative areas, cannot be seriously argued against in terms of utility or applicability.

In fact, that transparency would be made far more important by direct Executive oversight. Along with the nature of procedural dictates as emblematic of the guiding principles of the agencies,<sup>15</sup> there would be a more or less direct figure to hold accountable – ultimately, the President himself. It may even be readily argued that, rather than according the President tremendous additional power, anathema to Congress regardless of party affiliation, the accountability that would accompany formally bringing agencies under his control would force

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<sup>13</sup> Motor Vehicle, 463 U.S. at 59 (Rehnquist, J. concurring in part and dissenting in part).

<sup>14</sup> Vermont Yankee, 435 U.S. at 558

<sup>15</sup> See, 5 U.S.C. § 552 (a)(1) (1946)

him to proceed in the manner envisioned by the Framers – aware of and responsive to the effects of the agencies’ actions on the public.

Regardless of the particular progression that may be employed to place all administrative agencies under the rubric of the executive, the one concept that is inaccurate is the notion that Congress is delegating power thereby. It is most emphatically not a ‘delegation’ for Congress to exercise its own power, at which point the object of that power passes into another sphere of authority. Nor is in an impermissible incursion by the Executive in exercising control over administrative agencies. As Hamilton stated, it is properly a concurrent power reciprocally affecting both legislative and executive duties.<sup>16</sup> While he was speaking in that instance of treaty interpretation by the President and Congress, the same fundamental concept, that the Executive is imbued by the Constitution with concurrent and coequal powers as the Legislative, is the key factor here.

The eminent historian Richard B. Morris has said that “Hamilton was an administrative genius, perhaps the greatest America has yet produced.”<sup>17</sup> While it is arguably true that the nation has followed the lead set forth by James Madison rather than the less compromising views held by Hamilton, it would seem that in this area of Executive power versus Legislative dominance, that the latter’s vigorous promotion of an energetic and unified Executive Branch be utilized as the template for the correction of the current imbalance of power within our Federal structure.

Space constraints have prevented more than an introductory analysis into any of the interrelated concepts set forth in this paper, but it is to be hoped that it at least made a case for full accreditation of administrative agencies as Executive, that the change need not be radical,

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<sup>16</sup> 15 Papers of Alexander Hamilton, at 42, quoted in Staab, supra at 93

<sup>17</sup> Richard B. Morris, Introduction to Alexander Hamilton and the Founding of the Nation, at vii (Richard B. Morris ed., The Dial Press 1957).

but embarked upon using judicial precedent, and that the effect would be to rectify a current imbalance in the Federal structure that has held up so admirably for over two centuries. Whether Hamiltonian interpretation will hold the day when all is said and done is perhaps the least certain of the propositions set forth in this paper, for however logical and preferable it may seem to any observer, as Hamilton himself would have been the first to recognize, the political creature is such that no means and no end are certain to be utilized, no matter how internally logical they may be.