

Carlsbad 1819

Like another Chouannerie

The imperial presidency that never comes

March 24, 2018 by Nulle Terre Sans Seigneur

There never was a great republic on earth which did not immediately change into a monarchy. It is to evade the usurpations of the victorious army generals, and the tyranny of the military government, that the great people voluntarily give to their constitution the weight of the diadem. If Marius, Sulla or Caesar, on their return from their conquests, had founded at Rome a hereditary kingship, they could not have been crowned by their soldiers. Democracy, in a state like France, enclosed among rival and warlike nations, and forced to constantly represent the great theater of Europe, is therefore an absurdity. But, say the demagogues, that's exactly why we kept the king; and I answer them that they have left too much or too little.

It was necessary, therefore, to establish forever the French constitution on its true foundations, to preserve the monarchy, to establish the communes, and to create the aristocracy in a senate essentially irremovable, that is to say, hereditary and few in number. It would be the result of these three forces, each of which is despotic by its nature, a government without despotism, but so energetic and so full, that France would soon have risen to the point of greatness in which its nature calls it; such as a tree, whose sap is no longer diverted, soon filled the earth with its roots, and the sky with its foliage.

Every force in nature is despotic, like every will in man. A single gram would populate the earth in a short time; a single herring, by multiplying, would fill the seas, if the other plants and other fish allowed them to do so. But as each plant and animal tends equally with the same energy to occupy all the earth, it happens that these different equally despotic forces repress each other; a compensation is made between them whose laws escape us, but from which it follows that, without ever destroying each other, they retain each species within its own limits.

— Antoine de Rivarol, "Philosophie politique" XIX. (published in *Oeuvres de Rivarol*, 1853)

By most orthodox analyses of historical dynamics, the United States by now ought to be some form of Bonapartist or caudilloist imperial state with a strong and unbounded chief executive ruling by decree. Certainly, many people of the Noam Chomsky/Naomi Klein/Howard Zinn persuasion probably think it is. But to anyone else, it should be obvious that America is still waiting for its Augustus.

All tongue-in-cheek insinuations by rightists and hysteria by leftists aside, Trump is nothing close to that. Not even close to an Old Hickory, in fact — another popular comparison.

Trump is more like Warren Harding than anyone else. By that, I don't mean "corrupt." Harding's name is permanently associated with the Teapot Dome scandal in the eyes of mainstream historiography. His significance, however, was in his approach to economic policy that might be termed "business nationalism" (thoroughly capitalistic, not laissez-fairist, but also not exactly developmentalist in the Listian sense), along with the fact that he was one of the last presidents to run his office under the pre-civil service reform assumptions of what an administration constituted. What once used to be called "facilitative payments" and a completely normal way of collecting revenue for government services was now considered to be "taking bribes," and this was the substance of the Teapot Dome scandal in a nutshell. These two characteristics are something Trump shares, but less effectually up to this point.

So, why isn't POTUS an Emperor yet?

Firstly, it's worth noting that the role of the presidency has changed significantly since the early 20th century from what it was before. There's a famous thesis by Jeffrey K. Tulis (1987) called "the rhetorical presidency," which posits that 19th-century presidents were expected to be congressional brokers and only seldom address the public directly. This did not mean populism and demagoguery weren't important aspects of the presidency — partisan newspapers were absolutely vicious in those days, for one thing. However, it is true and an important observation that 19th-century presidents for the most part eschewed giving public speeches about matters of policy. A notable exception that proves the rule was Andrew Johnson and his ill-fated Swing Around the Circle (https://en.wikipedia.org/wiki/Swing_Around_the_Circle), which eventually became an article of his impeachment.

This was beginning to change by McKinley's time, but would be definitively solidified and established by Theodore Roosevelt and Woodrow Wilson. From then on, the idea caught on that the president has to be this motivational speaker type of figure who pitches his startup ideas directly to the American people for fixing the world through legislation. More specifically, that a key instrument of the presidency now includes spoken discourse directed to popular audiences on matters of policy for the purpose of forcing Congress to act without due deliberation, as opposed to more traditional formal communications such as inaugural and State of the Union addresses. This notion is now an integral part of America's unwritten constitution.

Hence, a proliferation of clichés about "compassion," "good intentions," "will," etc. The muckraker brand of moral dualism — the champions of "accountability" pitted against the "lobbyists of big business" plotting in "smoke-filled rooms," is now a mundane and expected way to frame any issue. Political failures — the inability to mobilize an army to force Congress to appropriate funds for hope and change — are widely acknowledged, but policy failures — when Washington gets things done but with unintended consequences — are seldom acknowledged as something that happens in general, rather than as a phenomenon solely perpetrated by scheming "special interests." Thus the progressive men of letters' severe antipathy to any public choice style of reasoning (<https://jacobitemag.com/2017/12/22/under-theorizing-governance/>).

A related tendency is the rise in the so-called "egocentric presidency" (<https://www.cpp.edu/~class/political-science/participate/undergraduatejournal/vol1/Barrett.pdf>) — the rise in the use of singular first-person language in State of the Union addresses over the decades. Rather than give out the impression of any meaningful personal rule, it only reinforces the perspective of the president as salesman pitching to the nation. George H.W. Bush's address for January 1992 contained the following gem: "Let me level with you. I know and you know that my plan is unveiled in a political

season. I know and you know that everything I propose will be viewed by some in merely partisan terms. But I ask you to know what is in my heart. And my aim is to increase our Nation's good. I'm doing what I think is right, and I am proposing what I know will help."

Such pandering buffoonery has hardly aided to the prestige of the chief executive office.

The decline of federalism more broadly, thanks to "substantive due process," "the incorporation doctrine" and other such atrocities, is also a major factor in the suppression of an imperial presidency. The final nail in the coffin to any shred left of the old days of high federalism was probably that of Garcia v. San Antonio Metropolitan Transit Authority (https://en.wikipedia.org/wiki/Garcia_v._San_Antonio_Metropolitan_Transit_Authority) (1985) when federal minimum wage under the FLSA was imposed on all levels of U.S. government.

The paradox here is that the strengthening of the executive branch doesn't have any straightforward effect on the chief executive himself. More often than not, he is weakened. The ones who profit off the dismantling of federalism are the myriad of agencies regulated in some way by the Administrative Procedure Act. (https://en.wikipedia.org/wiki/Administrative_Procedure_Act_%28United_States%29).

At some point it is alleged that there existed a so-called "nondelegation doctrine" as a basic corollary of separation of powers, and on the old Roman law maxim of *delegata potestas non potest delegari*. The theory goes that the establishment of Congress itself constitutes a delegation of legislative power by "we the people," and hence for Congress to delegate rulemaking to agencies is an illegitimate form of double counting. Now on the state level there's evidence that this principle wasn't always taken seriously. The earliest documented instance of a state court striking down a nondelegation argument is the case of *Respublica v. Duquet* (1799) in Pennsylvania. The first independent agency is held to be the Interstate Commerce Commission in 1887, and traditional historiography regards the SCOTUS case of J.W. Hampton, Jr. & Co. v. United States (https://en.wikipedia.org/wiki/J._W._Hampton,_Jr.,_%26_Co._v._United_States) (1928) to be the landmark repudiation of the nondelegation doctrine and the birth of administrative law as a fully legitimated practice.

Against common sense, administrative rulemaking is *not* regarded as an exercise of legislative power or an usurpation thereof, with United States v. Grimaud (https://en.wikipedia.org/wiki/United_States_v._Grimaud) (1911) serving as landmark.

Separation of powers wasn't a popular idea at all with the progressive reformers. They thought it an outdated relic. One of the chief architects of the modern American administrative state, Frank Johnson Goodnow (https://en.wikipedia.org/wiki/Frank_Johnson_Goodnow) (1859-1939) had this to say in *Principles of the Administrative Laws of the United States* (1905), p.228:

The special knowledge and training possessed by professional officers, their generally long terms of office, and the fact that they are occupied exclusively in the management of public business, make it almost certain that they will act more wisely and efficiently than officers who have no special knowledge of their duties, who serve for short terms, and are expected to devote only a part of their time to the public service, and make it extremely probable that the cost of such a system will in conditions at all complex, notwithstanding the fact that salaries are paid, be less than the cost of self-government administration. If wise, efficient, and economical administration were the only or even the main end sought in the organization of an administrative system, it must be admitted that the bureaucratic system is often preferable to the self-government system.

Goodnow thought that the president should generally be legislature-independent, but otherwise supervised and controlled by courts. This is basically how things remain.

Now in s.10(e) of the Administrative Procedure Act of 1946, the scope of judicial review is enumerated to encompass the following six conditions of unlawfulness: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

With the broad-ranging content of the “living constitution,” these guarantees are quite nominal.

The Office of Information and Regulatory Affairs (OIRA), part of the Office of Management and Budget (OMB), handles review of draft regulations. Independent agencies, however, can sidestep OIRA. The OMB also reviews annual reports of agency performance submitted under the Government Performance and Results Act of 1993. Such a review looks like, for instance, [this](https://www.gao.gov/new.items/d01827.pdf) (<https://www.gao.gov/new.items/d01827.pdf>). A roadblock of any sort it ain't.

Public officials are well protected. The [Merit Systems Protection Board](https://en.wikipedia.org/wiki/United_States_Merit_Systems_Protection_Board) (https://en.wikipedia.org/wiki/United_States_Merit_Systems_Protection_Board) can issue binding decisions in response to any form of agency separation from a civil servant's position. Nearly all agencies are themselves quasi-judiciaries as they are staffed by administrative law judges to handle adjudication work. Interestingly, ALJs aren't generally regarded as part of the judicial branch, but the executive. Also the legislative branch since 1995 with the Congressional Accountability Act has backported all of the myriad of civil rights and labor laws for the benefit of congressional staffers. Federal employees have their own retirement system.

The infamous SCOTUS decision establishing the [doctrine of administrative deference](https://en.wikipedia.org/wiki/Chevron_U.S.A.,_Inc._v._Natural_Resources_Defense_Council,_Inc.) (https://en.wikipedia.org/wiki/Chevron_U.S.A.,_Inc._v._Natural_Resources_Defense_Council,_Inc.) (or Chevron deference) gives agencies significant discretion in making them authoritative interpreters of statutory law if the latter is sufficiently vague in some way.

The civil service has its own NGO in the form of the [Partnership for Public Service](https://ourpublicservice.org/) (<https://ourpublicservice.org/>), who boast of “successfully champion[ing] 34 laws and resolutions that strengthen government management and operations.” Their corporate partners include IBM, Microsoft, TimeWarner, AT&T and JP Morgan. Given that the PPS openly fights “budget constraints” and “hiring freezes” as obstacles to “employee engagement,” we can conjecture that the corporate involvement points to some form of regulatory capture.

Thanks to Newt Gingrich (and you thought cuckservatives were useless — think again!), the [Congressional Review Act of 1996](https://en.wikipedia.org/wiki/Congressional_Review_Act) (https://en.wikipedia.org/wiki/Congressional_Review_Act) allows for striking down of federal regulations by joint resolution in a 60-day window. Up until the Trump administration, it was used only a grand total of once. Since then, it has been employed 15 more times. Most of these have been various Department of Labor decisions. The CRA however, is slow and piecemeal, as well as not empowering the chief executive per se unless he is backed by a partisan house. There is also the real possibility of it being repealed in the future.

Returning to Goodnow, he was keen to the need of insulating administration from democracy: “Further, the elective method of filling offices is, in all instances, unfitted for offices, the efficient performance of whose duties requires the possession by the incumbents of large professional or technical knowledge ... Public inclination is too apt to be swayed by other than scientific reasons.” (p.235)

Long incumbencies for heads of departments are to be desired: “If, on the other hand, these bureaus are all subjected to the control and direction of some head of department, as is the case in the national administrative system, the tendency to frequent change in the incumbency is very much diminished, and it becomes possible to develop the idea that the head of a bureau who has satisfactorily performed his administrative duties should occupy a more or less permanent position. We can hardly expect to develop **an administrative system in our state governments free from the control of politics**, so long as it remains in the unconcentrated condition in which we find it at present.” (p.128)

Unsurprisingly, the current instinct to dealing with the whole quagmire of administrative law and its consequences, namely — delegation of legislative power; the combination of legislative, executive, and judicial powers in the same institution; adjudication without full judicial process; and the circumvention of both grand and petit juries — is to embark on a populist revolt against THE DEEP STATE TAKING ARE DEMOCRACY. Such an approach misses the point entirely. Democracy was “taken” for a reason, and proposing greater rotation of offices to build “accountability” is something any prog, then and now, can rebut with ease. Certainly we don’t have any reformers as smart as Chuck Reemelin (<https://carlsbad1819.wordpress.com/2017/10/31/charles-reemelins-critical-review-of-american-politics-1881/>), anymore, but neither is such a level of erudition necessary.

Nor does the problem reduce to “divided power” as such. The bottom line is that civil servants should not be salaried officials, and their labor rights should be minuscule if any. Just slightly above the level of a railroad worker having his face smashed in by a Pinkerton guard. Or maybe slightly lower. They’re not holders of earldoms, they’re supposed to be mere servants of the popular will for the common good. The popular will is a bitch, and public officials ought to feel the whiplash. Contrary to popular belief, a little bit of graft is not devastating. A system of tips and commissions that have an upper boundary set but allow bargaining between officials and members of the public at the margins is a fine and personal arrangement. Read George Washington Plunkitt (<https://www.marxists.org/reference/archive/plunkett-george/tammany-hall/index.htm>) of Tammany Hall and marvel at the flexibility of machine politics. The choices boil down either to the administrative state, machine politics, or a hypothetical feudalization of the administrative state that I’m not yet sure what would truly look like. But I’ll think about it.

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2 thoughts on “The imperial presidency that never comes”

1. Imperial Energy says:

March 25, 2018 at 12:21 am

“By most orthodox analyses of historical dynamics, the United States by now ought to be some form of Bonapartist or caudilloist imperial state with a strong and unbounded chief executive ruling by decree. Certainly, many people of the Noam Chomsky/Naomi Klein/Howard Zinn persuasion probably think it is. But to anyone else, it should be obvious that America is still waiting for its Augustus.”

Give it time. The Republic was 460 odd years before it Caesar. USG is only half that age.

“The choices boil down either to the administrative state, machine politics, or a hypothetical feudalization”

Or “Soldier”, “Merchant/Gangster” and “Sage” in reverse order.

How would modern China fit into your categories?

Reply.

2. Pingback: [The imperial presidency that never comes | Reaction Times](#)

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