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# Symposium Executive Discretion and the Administrative State: Introduction

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EXECUTIVE DISCRETION AND THE  
ADMINISTRATIVE STATE

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## — Symposium —

EXECUTIVE DISCRETION AND THE  
ADMINISTRATIVE STATE

## INTRODUCTION

*B. Jessie Hill*

It would be no exaggeration to say that struggles over executive discretion are as old as the executive itself. Yet, it is also a favorite canard of pundits and talking heads on both sides of the political spectrum to claim that recent administrations have engaged in power-grabbing that is both unprecedented and in excess of constitutional limits.<sup>1</sup> Rarely are such claims examined in careful and studious detail, as the authors of this Symposium have done.

Controversies over the Obama Administration's actions (or, in some cases, declared inaction) on immigration, the Affordable Care Act, marijuana, and recess appointments have reminded us that executive discretion and the potential for executive overreaching extend beyond the international affairs and national security arenas. Recently, tension between Congress and the President became particularly visible when a federal district court preliminarily enjoined President Obama's "Deferred Action for Parents of Americans and Lawful Permanent Residents."<sup>2</sup> Though only a preliminary ruling, the decision charged that the administration's newly announced policy not to deport a particular category of deportable immigrants, issued in the face of congressional inaction on immigration reform, evinced "complete abdication" of executive responsibility, "thwart[ing]" the will of

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1. See, e.g., Bill O'Reilly, *Bill O'Reilly: Is President Obama Misusing His Power?* Talking Points (July 21, 2014), available at <http://www.foxnews.com/transcript/2014/07/22/bill-oreilly-president-obama-misusing-his-power/> (suggesting that President Obama has abused the power of his office in a way that is different from prior presidents' abuses); *Senator Says Bush Is Acting Like "King George,"* ABC News (Dec. 18, 2005), available at <http://www.foxnews.com/transcript/2014/07/22/bill-oreilly-president-obama-misusing-his-power/> (quoting former Sen. Russ Feingold as comparing President George W. Bush to a tyrannical monarch).
2. *Texas v. United States*, No. CIV. B-14-254, 2015 WL 648579, at \*1, \*62 (S.D. Tex. Feb. 16, 2015). Interestingly, the case was brought by twenty-six states rather than by a representative of the legislative branch. *Id.* at \*1.

Congress and “not just rewriting the laws [but] . . . creating them from scratch.”<sup>3</sup>

It is both the present salience and the enduring importance of the issue of executive discretion that inspired this Symposium, which brings together respected scholars in the fields of law and political science to consider the role and limits of executive discretion in the administrative state. Some of these scholars have taken a historical perspective, demonstrating that the problem of executive power has been, and remains, a central and perennial one in American democracy. Moreover, the Articles in this Symposium confirm that facile characterizations of one party’s or even one administration’s approach to the issue of executive power fall woefully short of providing any descriptive power. Instead, the story of executive discretion and its limits throughout American history is a nuanced one, in which raw political imperatives as well as high constitutional theory, informal norms, and long-term rule-of-law considerations have all played a role.

One theme that weaves through many of the papers in this Symposium is the importance of informal political constraints on Presidential power. For example, Dino P. Christenson, Assistant Professor of Political Science at Boston University, and Douglas L. Kriner, Associate Professor of Political Science at Boston University, flip the conventional line of questioning on its head, and instead of asking why Presidents seem to be acting unilaterally with greater and greater frequency, they ask why Presidents do not do so more often, given the relative lack of formal legal constraints on unilateral executive action.<sup>4</sup> The answer, it turns out, is that informal political constraints play an important—if not predominant—role in shaping Presidential decision-making. Using the case study of President Obama’s executive action on immigration before the 2012 presidential election and his delay in acting in advance of the 2014 midterms, Christenson and Kriner demonstrate that the President acted unilaterally only when “the electoral benefits of acting . . . outweighed the anticipated political costs of doing so.”<sup>5</sup> Similarly, they demonstrate that President Obama’s decision to seek congressional authorization before taking military action in Syria was motivated by political rather than legal concerns.

Joseph White, Luxemburg Family Professor of Public Policy and Chair of the Department of Political Science at Case Western Reserve University, examines a more unusual occurrence: Congress handing

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3. *Id.* at \*50.

4. Dino P. Christenson & Douglas L. Kriner, *Political Constraints on Unilateral Executive Action*, 65 CASE W. RES. L. REV. 897 (2015).

5. *Id.* at 920.

power back to the President to exercise according to his own prerogatives—specifically, by eliminating earmarks.<sup>6</sup> The elimination of congressional earmarks may profitably be viewed as an instance of shifting power more than of streamlining the legislative process, because, as Professor White explains, “the issue is not whether there will be programs with local benefits. The issue is who will decide which localities benefit”—the President or Congress.<sup>7</sup> Yet, just as Christenson and Kriner found that informal checks drive executive self-restraint, White attributes congressional self-restraint primarily to political norms and the pressures of public opinion. The increasing visibility of earmarks, combined with public distrust of legislators and the legislative process, has led to a legislative reform that has turned out to be both impactful and difficult to undo, if also largely counter-productive.

Zachary Price, Associate Professor at University of California Hastings College of Law, places his focus on informal political constraints on presidential *inaction*. In particular, Professor Price asks how strong the norm of executive enforcement duty should be. He concludes that it should be relatively robust, since citizens of all stripes have an interest in ensuring that legislative achievements retain lasting force beyond the administration in which they are enacted. In addition, Professor Price contends that transparency, centralization, and definiteness—though arguably desirable in most administrative contexts—are detrimental to ensuring fidelity to statutory commands in the agency enforcement context. Thus, both Price’s and White’s contributions show that the nation’s long-term interest is not always well-served when short-term concerns motivate the political branches to take actions affecting the distribution of power between them.

Finally, Neal Devins, the Goodrich Professor of Law and Professor of Government at the College of William and Mary, explores congressional oversight of the executive from yet another angle: congressional participation in litigation as *amicus curiae*.<sup>8</sup> In particular, he carefully documents Congress’s transition from acting in a bipartisan manner to protect institutional prerogatives against executive encroachment during the 1970s and 1980s to asserting itself in more partisan ways over the past decade, primarily by filing single-party *amicus* briefs in litigation centering on social issues. Indeed, as Devins demonstrates,

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6. Joseph White, *Jimmy Carter and James Miller’s Revenge: The Reasons and the Consequences for Presidential and Congressional Power of Measures to Ban Congressional “Earmarks,”* 65 CASE W. RES. L. REV. 1175 (2015).

7. *Id.* at 1182.

8. Neal Devins, *Measuring Party Polarization in Congress: Lessons from Congressional Participation as Amicus Curiae,* 65 CASE W. RES. L. REV. 933 (2015).

the bipartisan brief in *Zivotofsky v. Kerry*, argued in the Supreme Court's 2014 Term, is the "exception that proves the rule": lawmakers from both parties came together to file a brief supporting Congress's power to declare that parents whose children are born in Jerusalem should be entitled to list Israel on the child's passport in the face of a State Department policy requiring the birthplace to be listed only as "Jerusalem."<sup>9</sup> In that case, however, as Devins explains, the unifying factor was most likely support for Israel, which both parties wished to emphasize, rather than the power of Congress vis-à-vis the executive. Thus, Devins's article, too, supports the notion that party politics, mostly of the short-term variety, drive important decisions in the separation-of-powers realm.

Two of the contributions to this Symposium view the issue of executive power and its constraints in long-term historical perspective. Jonathan Entin, Associate Dean for Academic Affairs and David L. Brennan Professor of Law and Professor of Political Science, traces the fascinating history of *Myers v. United States*,<sup>10</sup> which he has shown to be "a most curious case."<sup>11</sup> Demonstrating in concrete and colorful detail the persistence of debates over executive power in the domestic realm throughout American history, Dean Entin's article analyzes several of the fascinating puzzles presented by the *Myers* case. First, why did the case come into existence at all? Second, why was it written so expansively? And third, what is its true legacy? These questions seem particularly pertinent in light of the relative insignificance (or at least the unknown significance) of the employment dispute underlying it. Ultimately, it seems that here, as elsewhere, pragmatic political considerations overlapped with more perennial constitutional and policy concerns, creating precedent of continuing if at times uncertain importance.

In addition, Peter Strauss, Betts Professor of Law at Columbia University, places two important recent works on the American Presidency into dialogue with each other: Harold Bruff's *Untrodden Ground: How Presidents Interpret the Constitution* and Heidi Kitrosser's *Reclaiming Accountability: Transparency, Executive Power, and the U.S. Constitution*.<sup>12</sup> Both works attempt to make sense of the

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9. *Id.* at 953–55; see generally *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 201–03 (D.C. Cir. 2013) cert. granted sub nom. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 134 S. Ct. 1873 (2014).
  10. 272 U.S. 52 (1926).
  11. Jonathan L. Entin, *The Curious Case of the Pompous Postmaster: Myers v. United States*, 65 CASE W. RES. L. REV. 1059 (2015).
  12. Peter L. Strauss, *The President and the Constitution*, 65 CASE W. RES. L. REV. 1151 (2015) (citing HAROLD BRUFF, *UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* (2015), and HEIDI KITROSSER, *RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION* (2015)).

relationship among Presidents, politics, and constitutional interpretation. The former book is focused on the “unmediated” Presidency—those domains in which the President can act alone—whereas the latter is focused on the “mediated” Presidency—those areas in which the President acts through administrative agencies. Thoughtfully reviewing the different approaches each work takes, Professor Strauss comes to the conclusion that Presidents’ attitudes toward the Constitution, which determines the likelihood of preserving an effective but accountable executive, depend upon a constellation of formal and informal legal norms as well as individual personalities and experiences. Ultimately, despite the significant changes that the country has undergone since the Founding, Professor Bruff’s optimistic conclusion, quoted in Professor Strauss’s review, seems apt: “Overall, the presidential office in the hands of its occupants has evolved in ways that seem sufficient to protect both the nation and the rule of law.”<sup>13</sup>

Finally, reminding us that hard legal constraints matter as well, two of the Articles in this Symposium focus specifically on legal control of executive authority. First, Susan Dudley, Director of the George Washington University Regulatory Studies Center and Research Professor at the Trachtenberg School of Public Policy and Public Administration at George Washington University, concisely but thoroughly reviews recent efforts, both successful and unsuccessful, to reform the regulatory process.<sup>14</sup> Noting the large array of tools available for encouraging efficiency and accountability within administrative agencies, particularly by the judicial and legislative branches, she ends on a hopeful note, suggesting that the momentum is growing for concrete and meaningful change.

Turning to a less widely examined area of executive discretion, Harold Krent, Dean and Professor at the Chicago-Kent College of Law, analyzes the legal and constitutional constraints on presidential control over agency adjudication.<sup>15</sup> Krent first reviews well-known precedent suggesting that the President’s appointment and removal authority may be limited to a greater extent with respect to officials engaged in judicial functions than with respect to other agency officials. He then turns to the thorny but intriguing question whether the President’s managerial control over such judicial officers is similarly limited. Krent seeks to balance the conflicting imperatives to respect the important policymaking function of agency adjudication and to protect judicial independence, along with the rights of individuals challenging agency action. Thus, he concludes that administrative adjudicators can and should be insulated from control over, or punishment for, the content

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13. *Id.* at 1159.

14. Susan E. Dudley, *Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future*, 65 CASE W. RES. L. REV. 1027 (2015).

15. Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE W. RES. L. REV. 1083 (2015).

of their decisions, though the executive may exercise other kinds of managerial control over them.

Taken together, these articles span a wide array of questions concerning executive power and its limits. They bring nuance and historical perspective to an issue that is too often disposed of through superficial snap judgments. And they make an important contribution to a significant debate that is sure to endure at least into the next two centuries of our constitutional democracy, just as it has preoccupied the first two.