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ARTICLES

FLEXING AGENCY MUSCLE?

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"Muscular" is not an adjective that commentators typically associate with federal agencies. The Office of the President of the United States prides itself in its muscularity, and ever since the days of President Theodore Roosevelt, the President is frequently said to enjoy the rhetorical advantages presented by that Office's "bully pulpit."[1] Congress routinely is characterized as flexing its legislative muscle in the statutory commands and prohibitions included in its enactments, and in the harsh critiques it launches in highly publicized oversight hearings.[2] And the courts are

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[1] *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2299–2300 (2001) (discussing the trend of recent presidents reaching out to the public more often); DORIS KEARNS GOODWIN, THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM (2013).

[2] For a discussion of the impact of appropriations riders on administrative policy see Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 457; Kagan, *supra* note 1, at 2314 (offering examples of proposed bills conditioning presidential authority and describing the successful effort by congressional Republicans to prevent the Clinton Administration's Department of Education from implementing national education tests). For a discussion of Congress's use of aggressive oversight hearings to police executive power, see, for example, Alexis Simendinger, *The Paper Wars*, 30 NAT'L J. 1732 (1998); Kagan, *supra* note 1, at 2257 (noting the rise in congressional oversight hearings in the 1990's); Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA:* Quis Custodiet Ipsos Custodes *(Who Shall Watch the Watchers*

regularly accused by everyone, of every possible ideological stripe, of being excessively muscular every time they strike down an Act of Congress or hold a Presidential action unconstitutional.[3] By contrast, federal agencies are comparably passive creatures. They are subjugated by the (unitary executive) President, denounced by (a polarized) Congress, and reversed by (activist) judges.

And career federal agency employees? Consistent with this same view, they are at best depicted as invisible, faceless bureaucrats clocking in and clocking out. At worst, they are no different from any other recipient of government welfare. They are on the government dole doing little work and producing relatively little, if anything, of social value. In no event are they major policy players affecting important social policies.

Professors Amanda Leiter and Brigham Daniels offer a welcome counter-narrative, inviting us to think about administrative law a bit differently. Daniels portrays federal agencies as powerful, independent political players. They regularly lead (and manipulate) rather than merely follow Congress. As described by Daniels, agencies have effectively turned on its head the presumptive principal/agent conception of the relationship between Congress and agencies.[4] According to Leiter, career agency employees are likewise no more passive than the agencies themselves, and have regularly proven to be enormously influential through an underground practice that Leiter creatively labels "soft whistleblowing": "deliberately leaking information that

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Themselves)?, 54 LAW & CONTEMP. PROBS. 205, 214–18 (1991) (describing the intense and highly critical nature of congressional oversight of the U.S. Environmental Protection Agency).

[3] *See, e.g.*, Geoffrey R. Stone, Citizens United *and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485, 488–90 (criticizing the Supreme Court for conservative "judicial activism" in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)); Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293, 298 (1996) (criticizing liberal judicial activism and claiming that "the effect of rulings of unconstitutionality over the past four decades has been to enact the policy preferences of the cultural elite on the far left of the American political spectrum"); Adam Liptak, *Court is 'One of Most Activist,' Ginsburg Says, Vowing to Stay*, N.Y. TIMES, Aug. 24, 2013, at A1, *available at* http://www.nytimes.com/2013/08/25/us/court-is-one-of-most-activist-ginsburg-says-vowing-to-stay.html.

[4] *See generally* Daniels, *supra* note * ("[S]ometimes agencies can turn the tables on Congress and the Executive. . . . [I[n such situations, we should think about agencies as principals manipulating the elected branches, which in turn take on the role of agents.").

is policy-relevant but evinces no agency malfeasance."[5] By such strategic leaking of confidential information, career employees keep their agencies on course or steer them on radically new courses consistent with the employee's own conception of the public interest. Career employees chart policy pathways for their agencies notwithstanding, and even despite, the competing policy preferences of political appointees who nominally head their offices, or even of the President occupying the White House.[6]

Neither article, however, finds its strength in its refutation of the gross stereotypical characterizations of federal agencies or of career employees set forth at the outset. It is hardly big news that federal agencies are major political players, including in their potential to confront and influence Congress.[7] Federal agencies have naturally long played major roles in crafting legislation that they are in turn charged with administering.[8] And no President or political agency head these days is so naive as not to appreciate that their ability to achieve their policy agenda is heavily dependent on the support and skills of the career government employees.[9] Nor is it a major headline that federal agencies

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[5] Leiter, *supra* note *, at 432.

[6] *Cf.* David Pozen, *The Leaky Leviathan*, 127 HARV. L. REV. 512 (2013) (arguing that pervasive leaking in federal agencies is permitted because of overlapping interests among key institutional actors in the leaking of some information).

[7] *See* David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095 (2008) (arguing that the administrative state since the Reagan administration has become increasingly politicized, making agencies political allies and tools of the President); Daniel Stone, *Regulate, Baby, Regulate*, NEWSWEEK (Apr. 1, 2010, 8:00 PM), http://mag.newsweek.com/2010/04/01/regulate-baby-regulate.html (noting that action by EPA to regulate greenhouse gases may spur congressional action).

[8] *See, e.g.*, Adams v. United States, 319 U.S. 312, 314–15 (1943) (discussing the involvement of the Army and the Department of Justice in the development of a military law jurisdictional statute); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 549 (1940) (noting the involvement of the Interstate Commerce Commission in the development of the Motor Carrier Act of 1935); Middle S. Energy, Inc. v. F.E.R.C., 747 F.2d 763, 769 (D.C. Cir. 1984) (noting that the Federal Energy Regulatory Commission "drafted the statute" it was charged with enforcing). *See generally* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1368 (1998) (arguing that, in a wide variety of industries, agencies "have acted as lobbyists for reform before Congress").

[9] *See* Joshua D. Clinton et al., *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341, 341 (2012) ("The growth in the size, role, and complexity of government activity has forced elected legislators and presidents to increasingly rely on administrative officials to set policy agendas and make

include highly skilled, immensely talented, career employees who take their agency "missions" very much to heart in their work, and are quite capable of undermining a President's political agenda that conflicts with their own.[10] Any political head who ignores this central lesson does so very much at her own peril and is most likely doomed to fail. One rises and falls to a great extent in Washington, D.C., based on the ability and dedication of the career agency employees under one's supervision, and not despite them.

What is instead most telling is the coincidence of these two articles, which the authors and the *Georgia Law Review* have wisely published as companion pieces, and what they together underscore about the across-the-board demise of Congress in federal lawmaking. Congress has in effect gone AWOL for almost two decades and the nation is suffering as a result.[11] Battered and increasingly embittered by a persistent and rancorous partisan divide, the federal legislature has proven largely incapable of addressing the nation's problems and opportunities in a meaningful fashion. Legislative sessions produce little more than constant budgetary battles over a never-ending series of continuing budget resolutions and proposals to raise the national debt ceiling.[12]

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and implement policy decisions."); Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 641 (2009) (explaining the check on presidential power imposed by career civil servants who disagree with the President's policy goals).

[10] *See* Clinton et al., *supra* note 9, at 352 (drawing conclusions about the preferences of federal executives and their agencies); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1775 (2013) (describing the potential for career agency staff to share "the agency's single-mission orientation" and accordingly create the potential for "preference divergence" between the agency and the President).

[11] *See* Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 629–32 (2006) (describing the relative absence of meaningful federal environmental legislation since 1990); Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2217 (2013) (noting congressional gridlock and arguing, "Gridlock not only makes the arbitrary exercise of governmental power more likely, but also implicates a new concern: the problem of arbitrary inaction"); Jody Freeman & David B. Spence, *Old Statutes, New Problems,* 164 U. PA. L. REV. (forthcoming 2014) (manuscript at 49–55), *available at* http://ssrn.com/abstract=2393033 (discussing the vulnerability of agency decisionmaking addressing "new problems" with "old statutes" to judicial invalidation).

[12] *See* Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2066 (2013) (derisively noting as "miraculous" the 112th Congress's passage of a continuing appropriations resolution); Jonathan Zasloff, *Courts in the Age of Dysfunction*, 121 YALE L.J. ONLINE 479, 480 (2012) ("America itself has reached the Age of Dysfunction, when the

Long gone are the days when the nation could justly boast of a Congress capable of signature legislative achievements such as the "New Deal" in the 1930s,[13] the "Great Society" in the 1960s,[14] and the truly transformative environmental legislation of the 1970s and 1980s.[15] No less than the equivalent of an attack on the nation was required to produce significant legislation in the immediate aftermath of 9/11,[16] while the nation's greatest environmental catastrophe threatening our shores along the Gulf of Mexico, the 2010 Gulf Oil Spill, produced no new federal laws aimed at reducing the risks of recurrence.[17] The contrast to 1986 and 1990, when Congress enacted ambitious legislation soon after both the chemical disaster in Bhopal, India, and the Exxon Valdez oil spill off the Alaskan coast to reduce the risk of similar disasters

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formal institutions of U.S. constitutional government have become impotent to deal with the nation's most important challenges.").

[13] Legislative achievements of the New Deal include, *inter alia*, the Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2012)); the Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2012)); and the National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)). *See generally* ARTHUR M. SCHLESINGER, JR., THE COMING OF THE NEW DEAL: 1933–35 (The Age of Roosevelt, Vol. II) (1958).

[14] *E.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h (2012)); Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified as amended at 42 U.S.C. § 2701 (repealed 1981)); Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301–7941 (2012)).

[15] *E.g.*, National Environmental Policy Act of 1969, Pub. L. No. 91–190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4347 (2012)); Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–7671 (2012)); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675 (2012)). *See generally* Lazarus, *supra* note 11, at 623–29 (describing series of sweeping, ambitious federal environmental protection statutes passed during the 1970s and 1980s).

[16] *E.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in various sections of the U.S. Code).

[17] Katie Howell, *A Year After BP's Oil Spill, Congress Sits Idly By*, N.Y. TIMES, Apr. 15, 2011, http://www.nytimes.com/gwire/2011/04/15/15greenwire-a-year-after-bps-oil-spill-congress-sits-idly-29261.html?pagewanted=all. The only federal legislation that Congress has been able to pass is a law that primarily serves to divvy up the potentially billions of dollars federal and state governments expect will result from fines obtained from industrial parties responsible for the spill, rather than legislation aimed at preventing future spills. Pub. L. No. 112-141, 126 Stat. 588-89 (codified at 33 U.S.C. § 1321 (2012) (providing for the establishment of the Gulf Coast Restoration Trust Fund)).

in the future, is both stunning and sobering.[18] And, while congressional passage in 2010 of national health care legislation was plainly a remarkable, albeit anomalous, accomplishment, the drumbeat of those seeking its repeal seems unending.[19]

The rise of federal agencies described by Professor Daniels, and that of their career employees described by Professor Leiter, are both yet a further expression of Congress's fall. As Professor Daniels elaborates, the agencies are where the lawmaking action now increasingly occurs in the federal arena. Agencies are the leaders and Congress has largely become a dysfunctional spectator, even if one that still controls the ever-important purse strings. Playing mostly a reactive role, members of Congress and their staff depend on the agencies for expert guidance and ideas less mired in politics. The congressional committees and their own staff lack the bipartisan culture necessary for honest and candid deliberations and discussion, which is why they need to look to others outside of Congress with the capacity to fill the gap.

The same shift in lawmaking dynamic also explains the increasing influence of career agency employees in general and their increasing engagement in Professor Leiter's "soft whistleblowing." In the wake of Congress's abdication of its lawmaking responsibilities, agencies have to fill the gap, and they necessarily find themselves more often embroiled in highly controversial activities that flirt with the borders of their lawful authority. The reason is simple. The problems of concern to agencies do not go away merely because Congress has left the arena. Federal agencies feel no less compelled to address pressing social problems whether they involve threats to workplace safety, voting rights, or nondiscrimination in employment. But the responsible agencies are simultaneously handcuffed by outdated

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[18] For a federal legislative response to the Bhopal chemical disaster, see Emergency Planning and Community Right-To-Know Act of 1986, Pub. L. No. 99–499, 100 Stat. 1729 (codified at 42 U.S.C. §§ 11001–11050 (2012)). For a response to the Exxon Valdez disaster, see Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 486 (codified as amended at 33 U.S.C. §§ 2701–2762 (2012)).

[19] *See* Jackie Kucinich, *DeMint Calls for Meaningful Vote to Defund Obamacare*, WASH. POST, Sept. 12, 2013, http://www.washingtonpost.com/blogs/post-politics/wp/2013/09/12/demint-calls-for-meaningful-vote-to-defund-obamacare/ (reporting on Heritage Foundation President Jim DeMint's calls for a serious strategy to kill the Affordable Care Act and noting the more than forty votes in the House to repeal "Obamacare").

statutory authorities that do not neatly address today's problems and by diminishing agency resources because of budgetary battles.

The three resulting ingredients—political controversy, ambiguous or tenuous statutory authority, and diminished agency resources—are a recipe for empowering career employees willing to engage in soft whistleblowing. There are almost always constituencies outside the agency interested in undercutting any agency decision that goes against their interests, in whichever ideological direction. The merits of the agency decision will also invariably be ambiguous as a matter of policy, if not basic lawfulness. And, in times of budget shortages, the agency political appointees are not only more dependent on those career agency employees who remain, but those same employees are likely to include those most committed to their own perception of the agency's mission, which is precisely why they have stayed rather than leave. They are, therefore, perfectly positioned and motivated to be "soft whistleblowers."

The demise of Congress as an effective lawmaking entity is plainly a bad thing. There were good reasons why the Framers established Congress and set forth its lawmaking authorities in the Constitution's very first article.[20] And for those very same reasons, the absence of a constructive Congress is a loss that we can ill afford as a nation. What we should think, however, about the rise of federal agencies and their career employees in filling the gap left by Congress is less clear. As suggested by the two Articles, there are clearly both upsides and downsides. Wisely, neither Article suggests a single answer to that question. Thoughtfully and carefully, Professors Leiter and Daniels highlight these two related shifts in lawmaking and they invite us to consider their implications for how we think about federal agencies, their employees, and, of course, administrative law.

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[20] U.S. CONST. art. I.