Undoing the American Rechtsstaat

What U.S. Law Is (Not) Prepared For

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Donald Trump's return to the forefront of U.S. politics brings an urgent constitutional question back into focus: Can the American administrative state survive another presidency driven by executive absolutism? Recent developments before the Supreme Court, especially in Trump v. U. S., suggest that long-standing norms and legal safeguards are under siege.

This post explores how a second Trump term might exploit structural vulnerabilities in U.S. public law, with consequences that extend far beyond American borders.

From progressive democracy to plebiscitary presidentialism

The American administrative state that has developed since the Founding has historically been authorized and constrained by multiple constitutional actors and principles. While the Constitution assigns to the President "the executive power", the legal norms and processes the President must implement are set by Congress. The Legislature has imposed constraints on how officials administer the law since it created the first executive "departments" in 1789. Civil service laws and restrictions on presidential removal of department heads date back to the late nineteenth century. These laws separate the administrative agencies from presidential will. Judicial control of administrative action has also afforded private parties, as well as some officials, the right to challenge unlawful and arbitrary governmental actions.

The Progressive Era of the late-nineteenth and early-twentieth century also saw the emergence of robustly democratic conceptions of administration. American Progressives like John Dewey were influenced by Hegelian conceptions of the state. Like Hegel and other theorists in his tradition, like Lorenz von Stein and Rudolf von Gneist, these Progressives wanted to recreate a state that would promote individual freedom by providing social and material support. But, unlike Hegel, they sought to democratize the state through public participation in administrative action. This vision could be seen at work in various programs during the New Deal as well as in the administration of civil rights laws during the 1960s.

Today, we are seeing the materialization of a very different vision of the American administrative state. Some have linked it to Carl Schmitt and his vision of the President as a "guardian of the Constitution," unbound by law, subservient only to some nebulous vision of popular legitimacy, and committed to the creation and destruction of enemies, foreign as well as domestic. There are indeed resonances between Schmittian conceptions of the Executive and the Trump Administration, and one can certainly trace the intellectual links among right-wing European and right-wing American thought. However, American problems are distinctive and are the product of long running tendencies within our own constitutional tradition. Authoritarian tendencies within our legal culture have only intensified as reactionary political forces have come into ascendancy in American law and government.

The legal architecture under attack

There are two foundational aspects of administrative law worth focusing on. First, there are numerous statutes that protect administrative officials within the executive branch against political control or removal. These restrictions cover some high-ranking officials, such as the heads of "independent commissions" like the Federal Trade Commission, the Securities and Exchange Commission, and the Federal Reserve, which

is our central bank. They also cover civil servants, who are lower-ranking employees within administrative agencies. There are over two million civilian employees in the executive branch. Trump has fired over 58,000 so far.

Second, there is the Administrative Procedure Act of 1946 (APA). Passed in the wake of Franklin Roosevelt's New Deal, the Act codifies the steps agencies must generally go through before they issue binding regulations or adjudicate the rights of private parties. This includes the "notice-and-comment" procedure for issuing regulations, where anyone who wants can comment on proposed regulations before they are finalized. The APA also provides for judicial review of executive branch action by affected parties. At its core, the Administrative Procedure Act protects what we call due process, or German readers might call the ideal of the *Rechtsstaat*, ensuring compliance with legal rules, impartiality, fairness, and rationality in administrative decision-making. At the same time, the APA gives agencies wide latitude to make policy within the broad bounds set by statutory law.

The Supreme Court and the entrenchment of the unitary executive

The Supreme Court has lately been advancing a "unitary theory of the executive" that undermines these foundational administrative-law frameworks. The theory strengthens the Trump Administration's hand as it uproots the established legal structures and processes of the Executive Branch.

Remember that the Constitution gives the President the "executive power." Proponents of the unitary executive interpret this to mean that the President must have absolute control over the executive branch. That means he must be able to fire any official who exercises significant executive power. The Court has deployed this rule to invalidate legislative restrictions on the heads of independent agencies. Even more troublingly, in *Trump v. U.S.*, the Court relied on this theory to conclude that the President could not be criminally prosecuted for crimes committed in the exercise of his core constitutional responsibilities. The Court reasoned that, because the President must have complete control of executive officers, he cannot be indicted for crimes related to that control. For instance, conversations with the attorney general, even if otherwise criminal, cannot be prosecuted. This has rendered the prosecution of President Trump for unlawful interference in the 2016 election extremely difficult, if not impossible.

Trump has relied on this unitary theory throughout his actions to exert control over the executive branch, to destroy the independence of government agencies, and in some cases to destroy the agencies themselves, and to use the executive power to go after his political opponents. For instance, he has fired inspectors general, who police fraud and abuse of power within the executive branch, without providing reasons to Congress, as required by law. He has fired the heads of independent agencies, like the Merit Systems Protection Board, which protects the independence of the civil service, and the National Labor Relations Board, which administers the fundamental right to collective bargaining. To date, some of these actions have been successfully challenged in the courts, though the outcome remains uncertain.

The Supreme Court will almost certainly weigh in. Given its enthusiasm for the unitary executive, the Court may approve some or all of its actions. Or, perhaps, it may realize the constitutional risks of the present moment, and decide not to throw gasoline on the fire.

The strengths and weaknesses of administrative law

The Administrative Procedure Act, by contrast, has been one of the primary means by which civil servants and others have challenged Trump's actions. The APA does not, as interpreted by the courts, allow for direct review of the President's actions. But it does allow suits against officials and agencies directed by the President. While the courts have found many of Trump's actions unlawful, the remedies have not usually been particularly effective. The APA is primarily geared towards remedying discrete unlawful acts by executive branch officers where they burden people outside the government. These actions can be annulled, or "set aside," if they are "arbitrary," "capri-

cious," procedurally defective, or otherwise contrary to law or the Constitution. This cause of action has been successful in preventing some attempts to cut off federal research grants. For instance, a federal court in Massachusetts permanently enjoined certain limits on National Institutes of Health grants to universities as arbitrary and capricious.[1]

Harvard University and others are also relying on the APA to challenge Trump's termination of federal funds. The Trump Administration claims that they are terminating funds because Harvard and other universities are discriminating against Jewish students. Apart from the merits of that assertion, the Trump Administration has not complied with the procedures required before funds may be cut off, which are set out in the Civil Rights Act of 1964 as well as the APA.

In other cases, however, the APA and other statutory regimes have not prevented extraordinary damage to or even destruction of administrative agencies or mass firings of civil servants. For instance, while courts have held that various actions to dismantle the United States Agency for International Development (USAID) were or may have been unlawful, the remedies have not been sufficient to protect the agency. USAID was created by Congress and cannot be eliminated without congressional action. Though courts have ordered that congressionally appropriated funds be disbursed, they have allowed actions to dismiss or to place on administrative leave thousands of employees.[2] Challenges to Elon Musk's role in the process have also largely not been successful.

Another case is that of the Consumer Financial Protection Bureau, which regulates banks and other financial service providers. The Trump Administration has attempted to shut down the agency entirely, despite the fact that it is established by Congress. A district court has ordered that its legally mandatory operations remain ongoing, while allowing the Trump Administration to take an axe to its core regulation functions.[3] But even that modest order has been stayed pending appeal.

All in all, it is clear that the APA and administrative law are not well positioned to deal with a systemic assault by the President on the rule of law. There is a lot of discretion baked into administrative agencies' mandates, and into the civil service laws, that the Trump Administration can and will exploit. It is therefore likely that the Supreme Court will allow many of the Trump Administrative actions to proceed.

Even in cases where the courts conclude that the government has acted unlawfully, it is not clear that they have the right sorts of tools to fix the problem. Courts are reticent to second-guess decisions regarding discretionary spending or to bypass the administrative process to review adverse employment actions. Moreover, it is hard to compel an intransigent executive, with little regard for law and process, to comply with the spirit as well as the letter of judicial orders, at least without any assistance from Congress.

The courts are, at the same time, placing some roadblocks on some of Trump's most shocking assaults on the rule of law, including removing people from the country and imprisoning them abroad without a hearing. These actions clearly contravene the constitutional requirement of due process. The Supreme Court has ordered the government to facilitate the return of some people wrongfully deported, and ordered the government not to deport others without trial. It is clear that a majority of Justices are duly alarmed by some of the Trump Administration's most aggressive immigration-related actions.

There is also some hope that recent changes to administrative law will reduce the Trump Administration's room to maneuver. The Court has recently overruled a longstanding precedent, *Chevron*, which requires courts to defer to executive branch interpretations of law, so long as they are reasonable. Now, the courts are instructed not to defer to administrative bodies in interpreting the law. The Court has also held

[1] Massachusetts v. Nat'l Institutes of Health, No. 25-CV-10338, 2025 WL 702163, at *2 (D. Mass. Mar. 5, 2025).
[2] E.g, Aids Vaccine Advoc. Coal. v. United States Dep't of State, No. CV 25-00400 (AHA), 2025 WL 752378 (D.D.C. Mar. 10, 2025); Am. Foreign Serv. Ass'n v. Trump, No. 1:25-CV-352 (CJN), 2025 WL 573762 (D.D.C. Feb. 21, 2025.)
[3] Nat'l Treasury Emps. Union v. Vought, No. CV 25-0381 (ABJ), 2025 WL 942772 (D.D.C. Mar. 28, 2025).

that the executive branch cannot take actions of "vast economic and political significance" without explicit statutory authority. This "major questions doctrine" may prove useful in challenging some of Trump's actions, such as his onerous tariffs on foreign goods. The statute he is relying on does not mention tariffs at all. The State of California has therefore sued, and they have a strong case. There is nonetheless some risk that the Court will conclude that the President has inherent power over foreign affairs that is not strictly limited by statute.

Rechtsstaatlichkeit as transatlantic memory

In this dangerous moment in U.S. public law, I think back on my own prior experience with German commitments to *Rechtsstaatlichkeit*, human dignity, and the social state. I had the opportunity during my doctoral research to study at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. I was struck then by the strength of German constitutional culture and the deep connections that exist between our legal communities and concerns. It has therefore been quite disheartening to see the Trump Administration's efforts to back away from our commitments to the Atlantic Alliance, and to interfere in German domestic politics in favor of far-right political parties. In the years that come, we may need to learn, again, from you about how to build a militant democracy, and reinforce commitments to democratic rule and individual dignity, in the wake of authoritarianism.

This blog post is based on a lecture delivered at the University of Münster Law Faculty.

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