

# James Landis and the Dilemmas of Administrative Government

Mariano-Florentino Cuéllar\*

## ABSTRACT

*In the late 1930s, the administrative state was becoming an increasingly important component of American national government as the country recovered from the Depression and emerged as a preeminent geopolitical power. Amidst these changes, James Landis had a distinctive perspective borne from his experience as a public official, institutional architect, scholar, and Harvard Law School Dean. Often provocative, Landis blindsided his former Roosevelt Administration colleagues with his espousal of independent agencies. Later, as a consultant to President-elect John F. Kennedy, Landis wrote the report that served as a major impetus for the creation of the Administrative Conference of the United States (“ACUS”).*

*This Article explains how the themes in Landis’s work and career foreshadowed persistent dilemmas in the modern administrative state—dilemmas that often tend to define as well as constrain the agenda of ACUS. Landis once sought to bolster the legitimacy of the administrative state by celebrating technocratic forms of decisionmaking that could take root in heavily-insulated independent agencies. Though he later embraced a more expansive conception of presidential power, Landis did not fully recognize the tensions that arise between technocratic forms of decisionmaking—whether assisted by agency scientists or modern, adaptive computer algorithms—and the political pressures that simultaneously help make democracy messy while enhancing its legitimacy. Nor did Landis fully explore the implications arising from growing awareness of a convergence, and the blurring divide, between foreign affairs and administrative government—even if some of his own work ironically anticipated this situation. Landis’s reformist ambition found a worthy expression in the idea that coalesced into ACUS. But the conference continues to face some indelible trade-offs that define the modern administrative state even more today than during the mid-twentieth century.*

---

\* Associate Justice, California Supreme Court. Former Stanley Morrison Professor of Law and Director and Senior Fellow, Freeman Spogli Institute for International Studies, and Professor (by courtesy) of Political Science, Stanford University; and former presidential appointee to the Council of the Administrative Conference of the United States (2010–2015). I appreciate feedback from Adrian Vermeule, Gillian Metzger, Larry Kramer, Peter Shane, Kenneth Shepsle, Matthew Stephenson, Jacob Gersen, Gillian Metzger, and participants at a conference at Harvard Law School and attendees at the Yale-Duke Foreign Affairs Law Roundtable, as well as the superb research assistance of Jacob Shelly. Errors are mine.

## TABLE OF CONTENTS

INTRODUCTION .....	1331
I. LANDIS AND "THE ADMINISTRATIVE PROCESS": CONTEXT AND CONSEQUENCE .....	1334
II. QUESTIONING ADMINISTRATIVE DEMOCRACY .....	1339
III. LANDIS' EVOLVING VISION: FOREIGN AFFAIRS AND PRESIDENTIALLY-COORDINATED TECHNOCRATIC GOVERNMENT.....	1344
IV. TENSIONS AND INSIGHTS: REFLECTING ON LANDIS' VISION .....	1351
CONCLUSION .....	1356

## INTRODUCTION

Speaking to a rapt audience as Yale Law School's Storrs Lecturer in 1938, James Landis made the case for a distinctly modernist vision of the administrative state. At a time when many scholars, judges, and members of the public had come to distrust an expanding administrative state, Landis eloquently defended it.<sup>1</sup> The New Deal government that Landis had loyally served as principal architect of the Securities and Exchange Commission ("SEC") was increasingly blocked from implementing its ambitious agenda by a recalcitrant Congress and often-hostile courts. The Brownlow Committee, meanwhile, had referred to independent agencies as a "headless 'fourth branch' of the Government," foreshadowing a now-familiar case for bolstering administrative legitimacy through presidential control of administrative functions.<sup>2</sup> Yet in answering these and other critics, Landis avoided endorsing the arguments of a Roosevelt Administration that was trying to thread the needle by defending the legitimacy of an expanding administrative state while also leveraging the Brownlow Committee's rhetoric of crisis to expand White House control over independent agencies.

A few short years later, the United States would be embroiled in the largest geostrategic conflict in history, and soon thereafter, in the Cold War. The story of the American role in World War II would make clear that the issues Landis was wrestling with in *The Administrative Process*—and indeed, throughout most of his career—were

---

<sup>1</sup> The lectures eventually became an influential book, even if its bland title—*The Administrative Process*—was one that only that dyed-in-the-wool administrative lawyers could love. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

<sup>2</sup> THE PRESIDENT'S COMM. ON ADMIN. MGMT., *ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES* 29 (1937).

central to the role of the United States in an uncertain world.<sup>3</sup> Somewhat more so than most scholars and practitioners of his day, Landis recognized that the success of the United States in its global endeavors pivoted on a sensible approach to administrative governance. He anticipated that such an approach, in turn, depended on how Americans reconciled administration and representative democracy to serve hundreds of millions, and how the country understood executive power. He believed the answers to these questions lay not in balkanized approaches to administrative process or executive power distinguished by substantive issues, but in a practical philosophy of governance that could transcend jurisdictional and substantive boundaries.

Landis's transsubstantive mindset would come to fit nicely with his role in the 1964 creation of an agency with a name sufficiently anodyne to belie the scale of its ambition—the Administrative Conference of the United States (“ACUS”).<sup>4</sup> Although ACUS did not begin operations until the confirmation of its first chairman in 1968, its origins drew on Landis's ideas and reflected longstanding interest—dating from the Eisenhower and Kennedy Administrations—in the creation of a new agency focused on rendering more efficient and just the administrative procedures touching virtually every corner of American life.<sup>5</sup> Born in the midst of the Cold War, at a time of growing awareness of the importance of the administrative state to the American system of government, ACUS embodied the mix of pragmatism and idealism that defined much of the American Cold War project: that agencies could be continuously improved but needed to be constrained; that science, law, and politics, could be reconciled by thoughtful practitioners forging a common vision of enlightened administration; and that American-style governance could be a credit to the nation and a model to the world.

Landis's professional project was motivated by the same idea that galvanized early interest in the creation of ACUS.<sup>6</sup> To wit: courts applying the common law routinely confronted disputes involving parties owing some duty to each other or engaged in discrete, arms-length transactions.<sup>7</sup> But in many quarters of American law, this classic de-

---

<sup>3</sup> See generally Mariano-Florentino Cuéllar, *Administrative War*, 82 GEO. WASH. L. REV. 1343 (2014).

<sup>4</sup> ACUS was created pursuant to the Administrative Conference Act, Pub. L. No. 88-499, 78 Stat. 615 (1964) (codified as amended at 5 U.S.C. §§ 591–596 (2012)).

<sup>5</sup> See, e.g., Exec. Order No. 10,934 §§ 1–2, 26 Fed. Reg. 3233, 3233 (Apr. 15, 1961).

<sup>6</sup> See § 2(b), 78 Stat. at 615.

<sup>7</sup> See LANDIS, *supra* note 1, at 34–40.

piction of the law's development does not fully reflect reality. Statutes affect nearly every aspect of the law.<sup>8</sup> Because so much of our law today pervasively involves statutes and regulations implemented through our administrative system, ACUS exists to help improve the administrative system and its elaborate component parts.<sup>9</sup> Founded during the administration of President Lyndon B. Johnson in the 1960s, ACUS engaged, over the following half-century, in a series of increasingly self-conscious efforts to render federal administrative procedures more efficient and just.<sup>10</sup> And while the familiar common law questions that long occupied American courts are not without consequence today, ACUS trains attention on the administrative machinery of the executive branch—a portion of our legal system that has grown in spectacular fashion over the last century.<sup>11</sup> If agencies are indeed to learn from their mistakes and deliver more services for less value, they must make the most of the organization James Landis founded fifty years ago—even as they also wrestle with some of the very dilemmas Landis left unresolved despite his contributions.

My purpose here is to shed light on James Landis and his distinctive approach to legal problems. Although the ideas Landis forged during decades in academia and government by no means extend to every corner of ACUS's past and future projects, they are reflected to a material degree in the work of the Conference in its early days. Moreover, as this Article will explain, we can learn something about ACUS's substantive dilemmas by exploring the tensions and trade-offs Landis's ideas raise. Though Landis was frequently insightful about the administrative process and was right to recognize the value of a venture such as ACUS, his work often eluded crucial dilemmas or otherwise failed to grapple with core problems in the administrative state. Two of these problems involve, respectively, the rationale for and extent of administrative democracy, and the intersection of administrative process and foreign affairs. Whether or not ACUS chooses to focus on these two problems, both will go a long way to defining the administrative state in the United States, and advanced industrialized countries throughout the world, in the twenty-first century.

---

<sup>8</sup> See, e.g., § 2(a), 78 Stat. at 615.

<sup>9</sup> See generally *id.* § 2.

<sup>10</sup> See *id.* § 2(b).

<sup>11</sup> See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1267–72, 1325–26 (1986).

To develop these themes, this Article proceeds as follows. Part I provides a brief synopsis of Landis's life, highlighting his importance as both a theorist and an architect of (and practitioner within) the modern American administrative state. This Part also describes Landis's role in the history of ACUS, and the relationship between the Conference's early projects and some of Landis's concerns. Parts II and III then explore two of the larger issues implicated in Landis's views about the administrative state, which are of continuing relevance to ACUS's agenda. Part II addresses the nature of democracy in the administrative process, an issue that arises both within and beyond those aspects of foreign affairs that relate most directly to the work of the administrative state. Part III turns to the blurring distinctions between foreign affairs and domestic administration and to Landis's resulting views, developed at the height of the Cold War, about the role of the President in coordinating and managing the administrative state. Part IV concludes by addressing some of the insights and tensions in Landis's work.

#### I. LANDIS AND "THE ADMINISTRATIVE PROCESS": CONTEXT AND CONSEQUENCE

James McCauley Landis was born to Presbyterian missionaries in Tokyo in 1899.<sup>12</sup> Landis's father, Henry Landis, had little hesitation in criticizing his son and was rarely given to praising him.<sup>13</sup> Their complicated and ambivalent relationship persisted over decades.<sup>14</sup> Though Landis claimed to admire his father, he decided not to follow in his father's footsteps by joining the ministry.<sup>15</sup> Instead, the young Landis enlisted in the military at the outset of World War I.<sup>16</sup> Following the war, he graduated first in his class from Princeton University before enrolling at Harvard Law School—where he would once again graduate first in his class and eventually served as a faculty member and the youngest dean in Harvard Law School's history.<sup>17</sup>

After law school, Landis journeyed from Cambridge to what would become the first of several sojourns in Washington. He became a clerk for U.S. Supreme Court Justice Louis Brandeis with the help

---

<sup>12</sup> See THOMAS K. McCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN* 155 (1984).

<sup>13</sup> See Michael R. Beschloss, *The Life of James Landis*, 95 HARV. L. REV. 1179, 1179 (1982) (reviewing DONALD A. RITCHIE, *JAMES M. LANDIS: DEAN OF THE REGULATORS* (1980)).

<sup>14</sup> See *id.*

<sup>15</sup> See *id.* at 1180.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.* at 1180, 1182; see also McCRAW, *supra* note 12, at 156.

of his law school mentor Felix Frankfurter, and returned to Cambridge to teach at Harvard Law School following his clerkship.<sup>18</sup> His interest at the time was in the drafting of legislation, an early scholarly focus that would later perhaps contribute to the view that technocratic virtues should remain the ideal in legislative drafting.<sup>19</sup> Landis later became a lawyer in the Roosevelt Administration, helping to design the SEC, before serving as a Commissioner of the Federal Trade Commission (“FTC”) and later of the SEC.<sup>20</sup>

Between the period when Landis penned his earlier work on administrative process and when he came to focus on presidential power before the start of the Kennedy Administration, Landis also held a number of positions relevant to foreign affairs.<sup>21</sup> He temporarily left the deanship of Harvard Law School in 1941 to become Regional Director of the United States Office of Civil Defense.<sup>22</sup> The following year, he became Director of the National Office of Civil Defense, and from 1943 to 1945, this administrative law expert held the unassuming title of Director of American Economic Operations and Minister to the Middle East.<sup>23</sup> As the war came to a close, Landis left Harvard and again moved to Washington.<sup>24</sup> He became chairman of the Civil Aeronautics Board (“CAB”), and later spent time in private practice.<sup>25</sup>

In 1960, after having returned to the faculty of Harvard Law School, Landis served as Special Counsel to President-elect John F. Kennedy during the transition.<sup>26</sup> A longstanding friend of the Kennedy clan, Landis had served as a legal advisor to Joseph Kennedy.<sup>27</sup> During the transition, he was entrusted to analyze the performance of administrative agencies and to make recommendations to the President-elect on administrative matters.<sup>28</sup> As we shall see below, Landis’s authorship of this influential report (now known as the “Landis Report”) appears to have afforded him the chance to further develop his views about the role of presidential oversight and accountability in

---

<sup>18</sup> See Beschloss, *supra* note 13, at 1180.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.* at 1181.

<sup>21</sup> See Erwin N. Griswold, In Memoriam, *James McCauley Landis—1899–1964*, 78 HARV. L. REV. 313, 316 (1964).

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*; see also Beschloss, *supra* note 13, at 1183–84.

<sup>26</sup> See RITCHIE, *supra* note 13, at 176–77.

<sup>27</sup> See *id.* at 159; see also McCRAW, *supra* note 12 at 206.

<sup>28</sup> See RITCHIE, *supra* note 13, at 176–77; see also McCRAW, *supra* note 12, at 206.

the administrative state.<sup>29</sup> Significantly, the report also built on previous White House interest in administrative procedures during the Eisenhower Administration to recommend the creation of a permanent “administrative conference” focused on improving federal administrative procedures.<sup>30</sup>

Despite his continuing influence, Landis’s last few years took occasional darker turns. The airline industry aggressively opposed his reappointment to the CAB after Landis sought to block airline expansion and opposed government subsidies.<sup>31</sup> In time, Truman relented and declined to renominate Landis.<sup>32</sup> Landis and his wife divorced,<sup>33</sup> and later, the government learned that he had failed to pay income taxes for several years, for which he had to spend a month in jail in 1963.<sup>34</sup> About a year later, he was found floating face down in his pool, dead.<sup>35</sup>

Landis is most renowned as a scholar, academic administrator, and practitioner concerned with the domestic administrative state. But the scholarly work for which he is most known, *The Administrative State*, is far more than an analysis of domestic administrative agencies. It reads more like a wide-ranging vision describing the role and operations of government across domestic *and* foreign affairs domains of expertise.<sup>36</sup> Landis also wrote about the pivotal role of the public’s morale in civil defense efforts, and how the work of administrative agencies supporting the war effort depended on “the reactivation of democratic ideals and the acceptance by the American people of their responsibility for total defense efforts.”<sup>37</sup> Along with a co-author, Landis emphasized the importance of clear lines of bureaucratic and hierarchical authority in the war effort, including with respect to civilian defense units.<sup>38</sup> He recognized the interdependence of private en-

---

<sup>29</sup> See *infra* Part II.

<sup>30</sup> See CHAIRMAN OF THE SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE, 86TH CONG., REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 87 (Comm. Print 1960) (report of James McCauley Landis) [hereinafter LANDIS REPORT].

<sup>31</sup> See Beschloss, *supra* note 13, at 1183–84.

<sup>32</sup> See RITCHIE, *supra* note 13, at 153.

<sup>33</sup> See *id.* at 139.

<sup>34</sup> See McCRAW, *supra* note 12, at 207–08.

<sup>35</sup> See *id.* at 208 (“Speculation hinted at suicide, but the evidence was inconclusive. The coroner ruled accidental drowning, probably caused by a heart attack that came upon Landis as he was swimming.”).

<sup>36</sup> See generally Charles H. Koch, Jr., *James Landis: The Administrative Process*, 48 ADMIN. L. REV. 419 (1996).

<sup>37</sup> James M. Landis, *Morale and Civilian Defense*, 47 AM. J. SOC. 331, 331 (1941).

<sup>38</sup> See Norman H. Davis & James M. Landis, *War Activities: Civilian Defense*, 226 NEW ENG. J. MED. 1004, 1004 (1942).

terprise and administrative agencies in promoting foreign trade at a time when the United States was assuming an increasingly prominent position in international geopolitics.<sup>39</sup> On a rare occasion when he explicitly discussed international law, Landis cautioned against the view that the relevance of law—whether domestic or international—depended entirely on “sanctions, and the bayonets that may be behind them.”<sup>40</sup> Far more consistent with both *The Administrative Process* and his later works was the idea that the relevance of law depended only to a limited extent on the consequence and probability of the imposition of sanctions. Instead, Landis’s work focused more on the consequences of the legitimacy of shared values about institutions such as the presidency or the democratic process, coupled with a degree of respect for and deference to expert technical knowledge.

These values could be difficult to reconcile in practice. By the time Landis wrote *The Administrative Process*, much of the scholarly and policy discussion of the administrative state had become entangled with the debate over the New Deal. Landis the scholar wanted no part in any knee-jerk effort to defend Franklin Roosevelt’s government. Instead, he offered a more comprehensive justification for the administrative state.<sup>41</sup> His vision cut across substantive domains, and to some extent, foreshadowed the converging spheres of domestic and foreign affairs in a United States that was in the process of growing a robust federal state and was on its way to becoming a global superpower. Both in *The Administrative Process* and other works, he repeatedly emphasized the value of expertise, the virtues of specialization, and the capacity of administrative adjudication to synthesize the best of judging and lawmaking.<sup>42</sup> His prose reflected a strong faith in what he took to be an American approach to solving social and economic problems—an approach reflecting the country’s unusual range of intellectual talent and the willingness of its lawmakers to empower competent bureaucracies.

In describing his vision of the federal agency within the American constitutional system, Landis toggled between describing administrative agencies as they were, and as they could be.<sup>43</sup> While he acknowl-

---

<sup>39</sup> See generally James M. Landis, *Restoring World Trade*, 21 PROC. ACAD. POL. SCI. 175 (1945).

<sup>40</sup> James M. Landis, Address at Annual Toastmaster Dinner (Apr. 30, 1949), in 43 PROC. AM. SOC’Y INT’L L. 148, 149 (1949).

<sup>41</sup> See LANDIS, *supra* note 1, at 15 (“[I]t is obvious that the resort to the administrative process is not, as some suppose, simply an extension of executive power.”).

<sup>42</sup> See, e.g., *id.* at 23–26.

<sup>43</sup> See *infra* notes 44–50 and accompanying text.



edged that even independent agencies were subject to constraints from democratic and judicial institutions, he also believed that the country would be well-served by further developing the expertise and independence of agencies given their advantages over other institutions (such as conventional courts),<sup>44</sup> and by involving agencies more thoroughly in the legislative process.<sup>45</sup> By offering a compelling account of the American administrative state at a critical time in its history, Landis earned his place in the pantheon of administrative law.

But there is also a more provocative reading of *The Administrative Process*. The more intriguing interpretation might look past New Deal implications to train attention on Landis's longer-term—and admittedly sometimes implicit—vision for administrative governance. Landis wanted to assuage his audience's concerns about the administrative state by acknowledging how lawmakers could constrain agencies and executive branch priorities.<sup>46</sup> He was nonetheless also profoundly skeptical of democratic politics.<sup>47</sup> He described both formal and de facto agency independence from control by a political executive as a valuable ingredient in insulating agencies from the dangers of political influence, thereby allowing expertise to take root.<sup>48</sup> He decried how “professionalism in the nonindependent agencies has suffered on occasion at the hands of political superiors.”<sup>49</sup> Landis described lawmakers, too, as feckless even as he conceded their importance in the American scheme of government.<sup>50</sup>

The extent of Landis's concerns about democracy and legislative interference in the administrative process raises a variety of questions. Could his concessions to representative democracy reflect more of a temporary accommodation than a long-term endorsement of the prescriptive merits of democracy in the administrative process across different substantive domains? Moreover, can one reconcile Landis's views in *The Administrative Process* with his endorsement some decades later, in the midst of the Cold War, of a more robust presidential role in coordinating agencies?<sup>51</sup>

---

<sup>44</sup> See generally LANDIS, *supra* note 1, at 123–55.

<sup>45</sup> See generally *id.* at 47–88.

<sup>46</sup> See *id.* at 98–101 (discussing “the presence of several checks” on the administrative process).

<sup>47</sup> See *id.* at 51.

<sup>48</sup> See *id.* at 115–16.

<sup>49</sup> *Id.* at 114.

<sup>50</sup> See *id.* at 51.

<sup>51</sup> See *supra* notes 29–30 and accompanying text; see also LANDIS REPORT, *supra* note 30, at 84–87.

To be sure, Landis occasionally acknowledged the potentially valuable role of lawmakers (and, somewhat less frequently, laypeople). He was not ready to throw representative or popular democracy under the bus. He went so far as to dedicate *The Administrative Process* to Sam Rayburn, former Speaker of the House of Representatives and an American original who was as much a product of American representative democracy as anyone in his generation.<sup>52</sup> That said, much of *The Administrative Process* brims with skepticism about legislatures, elected officials, and the associated dynamics of pluralist interest activity by organized interests (though later Landis softened his skepticism about the presidency).<sup>53</sup> It seems a stretch to think that Landis would have equated the values he believed the administrative state should advance (some kind of subtly-crafted, technically coherent version of social welfare in foreign and domestic affairs) with, for example, responsiveness to the median voter, or a formalistic reading of the U.S. Constitution.<sup>54</sup> Even the dedication to Rayburn stems from Landis's desire to laud Rayburn's role in strengthening the administrative process.<sup>55</sup> So, while Landis himself might have occasionally acknowledged the value of some democratic practices, we can certainly use his faith in putatively unbiased, insulated technocratic administrators—one of the major themes in his work at the time—as a point of departure to explore the merits (and costs) of a government of ever more tightly insulated, legally empowered, technocratic agencies.

## II. QUESTIONING ADMINISTRATIVE DEMOCRACY

At its core, *The Administrative Process* sought to explain why administrative agencies were important. And because agencies were important enough to retain as a long-term feature of government, Landis then sought to illuminate what approaches to American constitutional government would most help agencies perform their functions effectively. In sharp contrast to his nemesis Roscoe Pound, Landis believed agencies to be a healthy development in the evolution of American government.<sup>56</sup> He believed that administrative lawmaking provided a viable alternative to the uncertainty of the legislative pro-

---

<sup>52</sup> See LANDIS, *supra* note 1 (“To Sam Rayburn of Texas whose quiet desire to serve his country has fashioned so greatly the development of the administrative process.” (inside cover)).

<sup>53</sup> See *id.* at 51; LANDIS REPORT, *supra* note 30.

<sup>54</sup> See LANDIS, *supra* note 1, at 45–46.

<sup>55</sup> See *supra* note 52.

<sup>56</sup> See Koch, *supra* note 36, at 420.

cess.<sup>57</sup> Agencies could also, in Landis's view, avoid some of the limitations of courts by deploying a combination of specialized expertise and synergies between adjudication, rulemaking, and enforcement functions.<sup>58</sup> The presence of agencies' multiple functions, moreover, did not in his view offend separation of powers principles, but rather offered an important (indeed, perhaps the single most important) resource for the legislature to perform its constitutional functions.<sup>59</sup>

Landis certainly envisaged a limited role for democratic politics in this milieu. But he was keen to protect the instrumentalities of government from what he considered to be political dysfunction or corruption. His vision of administrative government might be understood to depend on the existence of certain islands of integrity. Each would be found at a specific location within the larger ocean of government, and each could withstand the less laudable aspects of politics: crass partisanship, venal corruption, and the kind of political paralysis that would impede the work of agencies to which the legislature had entrusted vital missions. He would have no doubt celebrated the extent to which ACUS's mission over the years has often come to reflect an abiding concern with *ex parte* contacts in administrative decisions,<sup>60</sup> with developing sufficient autonomy within agencies to guard against undue interference,<sup>61</sup> and other measures to protect the integrity of administrative decisions from improper influence.

As an alternative to the kind of messiness associated with conventional democratic politics even in advanced industrialized countries, would Landis today extoll the virtues of a kind of neo-Singaporean administrative state? Imagine for a moment the kind of hyper-empowered technocratic machinery managing much of Singapore, but engineered to guide a nation one hundred times the size. While Landis spares hardly a paragraph to international comparisons, and of course his book predated modern Singapore,<sup>62</sup> his prose in *The*

---

<sup>57</sup> See LANDIS, *supra* note 1, at 46 ("The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes.").

<sup>58</sup> See *id.* at 88, 155.

<sup>59</sup> See, e.g., *id.* at 10–17, 122.

<sup>60</sup> See ACUS Recommendation 2014-4, "Ex Parte" Communications in Informal Rulemaking, 79 Fed. Reg. 35,993, 35,993 (June 25, 2014).

<sup>61</sup> See ACUS Recommendation 95-3, Review of Existing Agency Regulations, 60 Fed. Reg. 43,109, 43,109 (Aug. 18, 1995) (recommending that the President, as well as Congress, should avoid mandating standardized or detailed requirements, and that petitions should not be allowed to dominate the agency's agenda).

<sup>62</sup> Compare Michael D. Barr, *Beyond Technocracy: The Culture of Elite Governance in Lee Hsien Loong's Singapore*, 30 ASIAN STUD. REV. 1, 11 (2006) (noting Singapore's independence in 1965), with LANDIS, *supra* note 1 (published in 1938).

*Administrative Process* seems to carry at least a willingness to think along such stark, modernist lines.<sup>63</sup> One would need to envision a government of agencies staffed by officials concerned about “justice” as Landis thought they would be—directed, as one might say in condensing Singaporean administrative law and practice, to act reasonably, in accordance with the law, and with little interference from a compliant legislature.<sup>64</sup> Independent agencies, presumably, would be unimpeded by filibusters of new regulatory authority, by appropriations riders, or by confirmation hearings. Does an agency want compliant legislative overseers? Done. Can we recast less politically independent agencies, such as Housing and Urban Development or the Federal Emergency Management Agency, to function more like the Centers for Disease Control or even the Federal Reserve—i.e., subject to strong *de facto* norms and *de jure* rules of political noninterference? Not a problem. Remove the Food and Drug Administration from the Department of Health and Human Services? Absolutely. Can we build a heavily insulated administrative structure to avoid political interference and more thoughtfully weigh trade-offs not only within particular domains of administrative activity, but across multiple domains of foreign policy and domestic administration? Some lawyering may be needed here to adapt Landis’s concepts of expertise and specialization to the problem at hand, but the conceptual conundrum would be (to the Landis-inspired administrative technophile) perfectly tractable: a more insulated, computer-assisted, and powerful version of the Office of War Mobilization led by Jimmy Byrnes,<sup>65</sup> perhaps with the President more in the role of a deferential overseer than an originator of priorities.

Tractable or not, Landis stopped short of fully endorsing this state of affairs. In fact, by the early 1960s, the Kennedy Administration had come to endorse a version of the presidential accountability thesis that

---

<sup>63</sup> See, e.g., LANDIS, *supra* note 1, at 12 (“The dominant theme in the administrative structure is thus determined not primarily by political conceptualism but rather by concern for an industry whose economic health has become a responsibility of government.”); *id.* at 24 (“Efficiency in the processes of governmental regulation is best served by the creation of more rather than less agencies. And it is efficiency that is the desperate need.”); *id.* at 49–50 (“The administrative process has often to survive in an atmosphere charged with resentment of its significance and of its force. . . . Its relative isolation from the popular democratic processes occasionally arouses the antagonism of legislators who themselves may wish to play a controlling part in some activity subject to its purview.”).

<sup>64</sup> See, e.g., Barr, *supra* note 62, at 5 (“Singapore is tiny, but while most of the world is bound by ‘ideology’ and ‘politics’, Singaporeans punch above their weight because they operate as a ‘pragmatic’ and inherently logical meritocracy . . .”).

<sup>65</sup> See Cuéllar, *supra* note 3, at 1383

sought to reconcile bureaucratic capacity with democratic responsiveness through the role of the White House and “strong executive leadership.”<sup>66</sup> But he nonetheless put his thumb on the scale to favor a procedural and substantive vision that elevated the merits of agency expertise and independence. He articulated the case for specialization and expertise, whether it involved rate-setting for regulated industries or the management of international financial transactions, without contributing much to our understanding of potential risks such as tunnel vision or poor agency responses to political risks.<sup>67</sup> And he was much less inclined to pursue alternatives that might have prioritized democratic responsiveness, either through stronger presidential control or through administrators explicitly inclined to make politically-oriented decisions.<sup>68</sup>

One can readily appreciate the implications of these contrasting visions by considering Landis’s goal of encouraging a connection between administration and legislation. He wanted lawmakers to rely liberally on agencies for legislative drafting, for example, and thought it fairly obvious as a descriptive matter that administrative agencies were—as they *should* be, from his perspective—in the business of legislating through regulation.<sup>69</sup> By accepting a somewhat blurred distinction between legislation and administration, Landis might have hoped to bind the lawmaking process more tightly to the kind of expert knowledge he considered critical for effective government. But there is an irony, because such blurring could also interfere with the ambition (readily apparent in a long line of scholars from Landis to the present day) to remove (crass?) political calculations from the regulatory process, or at least to segregate such concerns to the realm of political deal-making in the legislative sphere.

Yet if agencies are very much in the lawmaking business—through their active collaboration with lawmakers and their decisions implementing open-ended statutes—it is not at all obvious why they would not need to own the kinds of trade-offs that so often define the work of representative politicians. Should the implementation of a new tobacco control rule be delayed temporarily in order to garner greater financing for the agency that will implement it? If a change in the rules governing produce safety with compelling cost-benefit justifi-

---

<sup>66</sup> See LANDIS REPORT, *supra* note 30, at 53; RITCHIE, *supra* note 13, at 177–81; see also *infra* Part IV.

<sup>67</sup> See LANDIS, *supra* note 1, at 23–24, 30.

<sup>68</sup> See RITCHIE, *supra* note 13, at 178.

<sup>69</sup> See LANDIS, *supra* note 1, at 41–42.

cations triggers opposition from some organized groups, should the rules at least partially accommodate these interests in order to preserve broader changes in the agency's power to protect the public from contaminated seafood? Perhaps we can imagine agencies sufficiently capable of leveraging their de facto and de jure independence to skirt these questions. But would we resist a world where agencies are insulated to that degree, or would we welcome the chance to free regulators of the pressures that might encourage them to consider (for example) that consumer "groups will go nuts" if a particular rule is not modified,<sup>70</sup> that a particular decision will complicate the American position relative to other nations negotiating a treaty with the United States,<sup>71</sup> or that an influential senator will be upset about an agency's action?<sup>72</sup>

These dilemmas are not far from the substance of some projects that the Administrative Conference has pursued over the decades. In 1980, the Conference addressed concerns about the exercise of executive influence by recommending appropriate standards for communication between the President and executive agencies during the process of informal rulemaking.<sup>73</sup> Eight years later, the Conference promulgated additional principles to guide presidential review of agency rulemaking, emphasizing the importance of timely review and

---

<sup>70</sup> Cf. Cass R. Sunstein, *Regulatory Moneyball: What Washington Can Learn from Sports Geeks*, FOREIGN AFF., May/June 2013, at 9, 10.

<sup>71</sup> Cf. *Massachusetts v. EPA*, 549 U.S. 497, 513–14 (2007) (discussing EPA's concern that a particular rulemaking might "hamper the President's ability to persuade key developing countries to reduce greenhouse gas emissions").

<sup>72</sup> Cf. Sunstein, *supra* note 70, at 10. "In the past, too many regulators have been tempted to listen a bit too much when they were told that 'the public is very worried,' or that 'polls show that the majority of people strongly favor protection against air pollution,' or that 'the industry has strong views,' or that 'the environmental groups will go nuts,' or that 'a powerful senator is very upset,' or that 'if an accident occurs, there will be hell to pay.' None of those observations addresses the real question, which is what policies and regulations would achieve." *Id.*

What makes these ideas so striking in the context of a narrative otherwise focused on the weighing of costs and benefits is that the author declines to consider how political responses would all but certainly affect the social welfare consequences of particular policies. The rejection of "political" considerations, at least in this context, instead appears to reflect instead a kind of (weakly) perfectionist conclusion that some kinds of consequences are simply not worthy of being tallied up in the social welfare equation. Sunstein does not entirely address the possibility that a more politically-sophisticated agency might not only better protect its autonomy from interest groups working through foreign policy or the representative political process, but also more thoroughly advance its substantive policy goals. For an extended treatment of the idea that agencies should eschew responsiveness to political pressures, see CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* (2013) [hereinafter SUNSTEIN, *SIMPLER*].

<sup>73</sup> See ACUS Recommendation 80-6, 1 C.F.R. § 305.80-6 (1993).

transparency.<sup>74</sup> In 2012, a review of regulatory analysis requirements resulted in recommendations for streamlining the bevy of existing statutory and executive requirements.<sup>75</sup>

Although ACUS recommendations rarely articulate fully the relevance of political judgment to administrative process, the project of sharply limiting or delegitimizing (if not entirely eliminating) agency responsiveness to democratic pressures plays down these questions. The consequences of insulated, expert decisionmaking can be disastrous, and the stakes associated with governmental decisions are arguably heightened as the distinctions between the domestic administrative state and foreign affairs continue to blur.<sup>76</sup> While the project of questioning administrative democracy is not without risks, there is also something to be said for avoiding the temptation to treat some version of democracy—or, for that matter, “transparency”—as axiomatically connected to desirable ends in governance, and for being instead more explicit about the precise institutional mechanisms—ranging from the selection of personnel to limits on agency jurisdiction—that could be used to achieve a measure of political responsiveness in government. So the exchange between Landis and the Brownlow Committee remains quite relevant three quarters of a century later. We might consider, in particular, whether Landis’s faith in the administrative process may eventually translate, after some decades of further institutional invention, into the belief that we could build an insulated administrative mechanism to better inform (or make?) the “apples and oranges” trade-offs that a messy, often gridlocked political process aspires to perform today.

### III. LANDIS’S EVOLVING VISION: FOREIGN AFFAIRS AND PRESIDENTIALLY-COORDINATED TECHNOCRATIC GOVERNMENT

By recognizing the cross-cutting importance of the administrative state at a time when so many scholars and lawyers were still focused on the common law, Landis also foreshadowed the eventual recognition that the administrative state has played a pivotal role in American foreign policy and national security. From World Wars I and II, to the Cold War, to the efforts to prevent and disrupt terrorist attacks

---

<sup>74</sup> See ACUS Recommendation 88-9, 1 C.F.R. § 205.88-9 (1993).

<sup>75</sup> See ACUS Recommendation 2012-1, Regulatory Analysis Requirements, 77 Fed. Reg. 47,800, 47,801–02 (Aug. 10, 2012).

<sup>76</sup> See, e.g., Mariano-Florentino Cuéllar, *American Executive Power in Historical Perspective*, 36 HARV. J.L. & PUB. POL’Y 53, 59 (2013).

following the September 11 attacks, the administrative state has become a major instrumentality for foreign affairs and security.<sup>77</sup> Administrative agencies routinely undertake functions of major importance to the country's domestic life and foreign policy—from implementing international economic sanctions and protecting public health to regulating migration and arms exports.<sup>78</sup> Yet scholars and judges have long sought to articulate—and to police—constitutional and prudential distinctions between the treatment of foreign and domestic affairs in American public law. *United States v. Curtiss-Wright Export Corporation* famously attempted to draw precisely this distinction by finding that nondelegation concerns were less pronounced in the domain of foreign affairs, where the President has a pivotal and long-acknowledged role in light of the structure of the U.S. Constitution.<sup>79</sup> The iconic *Youngstown Sheet & Tube Co. v. Sawyer*<sup>80</sup> case decades later policed that distinction, by rejecting the Truman Administration's position that the President could seize domestic steel mills without legislative authority because of the Korean War.<sup>81</sup>

Foreign affairs exceptionalism remains common more than a half century after the rise of the modern administrative state that major theorists such as Landis sought to describe in the 1930s. Whether through the deployment of constitutional text, structure, or pragmatic argumentation, lawyers routinely draw a strong distinction between presidential power over domestic and foreign affairs.<sup>82</sup> The desire for this distinction is understandable: some of its logic seems to reflect a crucial structural premise of international law, rooted in enlighten-

---

<sup>77</sup> See generally, e.g., MARIANO-FLORENTINO CUÉLLAR, *GOVERNING SECURITY: THE HIDDEN ORIGINS OF AMERICAN SECURITY AGENCIES* (2013); David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359 (2007).

<sup>78</sup> See, e.g., *Mission of the USTR*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/about-ustr> (last visited Sept. 21, 2015); *Mission, Role and Pledge*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/about/organization/mission.htm> (last visited Sept. 21, 2015); *About ATF*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/content/About> (last visited Sept. 21, 2015).

<sup>79</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

<sup>80</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>81</sup> *Id.* at 588–89. Though the case obviously implicated larger separation of powers questions, a core aspect of it concerned the extent to which presidential powers over foreign affairs—when backed by plausible arguments about the foreign affairs consequences of domestic economic turmoil—could in the domestic sphere trump concerns about the absence of presidential statutory authority.

<sup>82</sup> See generally John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293 (1993); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527 (1999).



ment ideas, that foreign affairs could be relatively neatly disentangled from the question of what happens within a sovereign state. And by keeping relatively separate—at least on principle—the spheres of presidential power over domestic and foreign affairs, courts and policymakers end up with a slightly larger toolkit to reconcile competing constitutional (and public) imperatives for action as well as constraint in government.

Yet this picture of easily separable domestic and international spheres is, of course, wrong. National mobilization before and during World War II plainly implicated a huge range of domestic legal authorities.<sup>83</sup> Although most of these were exercised by statute, the mobilization project was premised on the interdependence between national economic and industrial power on the one hand, and foreign policy imperatives, on the other. The Cold War brought more examples of how domestic affairs were understood to affect foreign policy, from the federal response to Southern recalcitrance on civil rights between the 1950s and the 1970s,<sup>84</sup> to the strengthening of the country's transportation and educational infrastructure, to the development of elaborate presidential and administrative agency powers allowing for regulation of domestic economic activity to achieve foreign policy purposes. The national response to the threat of terrorism since the September 11 attacks brought new examples of the entanglement between administrative agencies and international security concerns,<sup>85</sup> as well as arguments from federal officials that the relevant "battlefield" for military operations could include the domestic territory of the United States.<sup>86</sup> ACUS, created first and foremost to improve the fairness and efficiency of the domestic administrative process, has taken on the harmonization of domestic and international regulatory standards,<sup>87</sup> and played a role in advising the Ukraine, Hungary,

---

<sup>83</sup> See generally *The New Deal*, ROOSEVELT INST., <http://rooseveltinstitute.org/policy-and-ideasroosevelt-historyfdr/new-deal> (last visited Sept. 21, 2015); *The War Years*, ROOSEVELT INST., <http://rooseveltinstitute.org/policy-and-ideasroosevelt-historyfdr/war-years> (last visited Sept. 21, 2015).

<sup>84</sup> See generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000) (discussing the civil rights movement as a distinct feature of the Cold War and arguing that the Cold War facilitated the civil rights movement).

<sup>85</sup> See generally Dara Kay Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673 (2006).

<sup>86</sup> See generally Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 U. PA. L. REV. 1165 (2013).

<sup>87</sup> See ACUS Recommendation 2011-6, International Regulatory Cooperation, 77 Fed. Reg. 2259 (Jan. 17, 2012).

South Africa, and the People's Republic of China as they sought to reform their administrative systems.<sup>88</sup>

Blurring distinctions between foreign affairs and domestic administration can raise difficult questions. Skepticism may arise among some observations about using distinct legal standards to evaluate executive actions in the domestic versus international spheres. In some cases, policymakers understandably seek to use foreign policy rationales when working on problems that appear primarily domestic,<sup>89</sup> or when international or security concerns run into legal norms or political responses grounded in domestic political realities.<sup>90</sup> These observations do not necessarily imply that all legal distinctions seeking to establish a domain for foreign affairs as such are unworkable or entirely suspect. Instead one might draw more nuanced conclusions. The experiences of the twentieth century in the United States suggests that there are principled arguments for questioning whether it is desirable to seek completely different treatment (enforced by courts) between putative domestic and foreign affairs spheres. Moreover, even if one believes that distinction should exist, policing it will be difficult given the realities of modern government.

It is for two reasons that arise against the backdrop of these dilemmas that Landis merits further attention. First, some of the recurring concerns of foreign relations law and foreign policy are indeed difficult to segregate—and chronically so—from the issues of administrative government that most occupied Landis. Second, questions about how best to reconcile technical expertise, adjudicatory process, and democratic accountability are profoundly relevant across both the domains of domestic as well as foreign affairs. Where some observers might today see in foreign relations law a *sui generis* domain epitomized by unique presidential discretion and dilemmas associated with emerging technologies, Landis would likely have seen problems of administrative adjudication—whether involving finance, drones, detainees, immigration, or the use of foreign policy rationales for (at least partly) domestic decisions.<sup>91</sup> Landis would almost certainly acknowl-

---

<sup>88</sup> See William Funk, *R.I.P. A.C.U.S.*, A.B.A., [http://apps.americanbar.org/adminlaw/news/vol21no2/acus\\_rip.html](http://apps.americanbar.org/adminlaw/news/vol21no2/acus_rip.html) (last visited Sept. 21, 2015).

<sup>89</sup> Cf. *Massachusetts v. EPA*, 549 U.S. 497, 507–09 (2007) (discussing the Senate's consideration of foreign policy goals in determining U.S. carbon regulations, and recommending the U.S. not enter into the Kyoto Protocol).

<sup>90</sup> See, e.g., Peter Baker & Ellen Barry, *U.S. Traces Path as N.S.A. Leaker Flees Hong Kong*, N.Y. TIMES, June 24, 2013, at A1.

<sup>91</sup> See Koch, *supra* note 36, at 421.

edge some basis for foreign affairs exceptionalism.<sup>92</sup> Yet the fact that his body of work casts the domain of foreign affairs in a somewhat unfamiliar and more administrative light is all the more reason to consider how his thinking might inform our understanding of the dilemmas of foreign relations law.

If the questions about expertise, accountability, and legal constraints that arise in foreign affairs are not entirely *sui generis*, Landis's own life is certainly in a class of its own. He was a New Deal policymaker who helped create the SEC, wrote the seminal work on American administrative government in the early twentieth century, and served as Dean of Harvard Law School.<sup>93</sup> He lived through the Great Depression, World War II, and the Cold War—and remained engaged with problems of executive branch organization through most of his dramatic, and in some ways tragic, life.<sup>94</sup> As scholars increasingly reflect (as do many of the papers for our conference today) an appreciation of the governance problems that cut across domestic and international spheres, it may be instructive to scrutinize Landis's thinking about the nature of administrative government.

Indeed, Landis's work should be of particular interest to scholars of foreign affairs for at least three reasons. First, his fundamental concern was reconciling technical expertise, political accountability, and adherence to legal and adjudicatory constraints.<sup>95</sup> It is, at a minimum, hard to argue that this sort of concern is irrelevant to foreign affairs. Some may go further still, and argue for casting constitutional formalism aside as much as possible and recognizing that advancing national welfare in the foreign affairs domain requires the kind of synthesis of competing imperatives that Landis attempted (however imperfectly) in his work. Second, even if one rejects the idea of complete convergence between foreign affairs law and the instrumentalities of the administrative state—either by distinguishing between foreign policy or national security bureaucracies and domestic agencies, or by arguing that some of foreign affairs law has nothing to do with the administrative state—it is unquestionable that foreign policy depends in large measure on what agencies do. Asset freezing and economic sanctions, immigration and transportation security policies all depend on agencies that confront the challenges Landis described, and in some cases

---

<sup>92</sup> See *id.* (describing Landis's faith in "an American approach to social problems"); see also *supra* Part I (reviewing some of Landis's statements on foreign affairs).

<sup>93</sup> See Koch, *supra* note 36, at 419.

<sup>94</sup> See Griswold, *supra* note 21, at 313–14, 316.

<sup>95</sup> See Koch, *supra* note 36, at 427, 432.

the relevant agencies have the kind of structure that Landis helped pioneer during his years in the Roosevelt Administration. Third, although there is plenty to question in Landis's specific prescriptions for modern administrative government, Landis recognized the importance of adaptive federal agencies engaged in a process of continual improvement and innovation.<sup>96</sup> He recognized the centrality of not only rulemaking but administrative adjudication<sup>97</sup>—and he would have no doubt observed that difficult questions about the targeting of drone strikes are one example of how the problem of modern government is in no small measure the problem of how to structure administrative adjudication.

During the very heart of the Cold War period, Landis eventually came to embrace the idea that the President should play a pivotal role in the administrative state. In 1960, President-elect Kennedy assigned Landis to study the regulatory commissions where he had worked for so much of his professional life.<sup>98</sup> Even at this juncture, Landis clung to the belief that regulatory commissions (and administrative agencies more generally) were structurally suited to manage complex regulatory problems by deploying a carefully-titrated mix of technical expertise and reliance on administrative procedures. Placing that balance at risk was the appointment of senior officials with meager legal or relevant technical expertise—a practice he decried.<sup>99</sup> He chastised Congress and previous administrations for inadequately funding agencies that were increasingly performing complex, transnational functions.<sup>100</sup> And (perhaps most controversially) he proposed the exercise of clear presidential authority over the commissions through an office within the White House mixing elements of the modern Office of Information and Regulatory Affairs with aspects of the White House entities such as the National Security Council or the National Economic Council.<sup>101</sup> Though Kennedy was convinced by his plan and appointed Landis to implement it, skeptical lawmakers objected strongly.<sup>102</sup> The fact that Landis envisioned for the President a somewhat deferential role as a coordinator seeking to protect the agencies'

---

<sup>96</sup> See *id.* at 421.

<sup>97</sup> See *id.* at 430.

<sup>98</sup> See Beschloss, *supra* note 13, at 1184.

<sup>99</sup> See LANDIS REPORT, *supra* note 30, at 66–68.

<sup>100</sup> See *id.* at 6–7.

<sup>101</sup> See *id.* at 81–83.

<sup>102</sup> See RITCHIE, *supra* note 13, at 178–79.

expertise and capacity to implement statutory responsibilities failed to blunt the swift and severe congressional backlash to his proposal.<sup>103</sup>

In advocating a system leveraging greater presidential capacity to coordinate policy, Landis foreshadowed the modern-day policy councils within the White House, particularly the National Economic Council and the Domestic Policy Council.<sup>104</sup> He also channeled at least some of the experience of the United States government with White House led policy coordination during World War II. In many respects, the World War II-era Office of War Mobilization already reflected some of what Landis was ready to laud by 1960.<sup>105</sup>

At the same time, Landis seemed to idealize a specific kind of presidential engagement—where agencies remained the primary repositories of analytical capacity and technical expertise. The White House's role was primarily to resolve when precisely action was needed, what general sort of action, and how to harmonize that action with overlapping mandates. But within agencies, knowledge would accumulate in its corridors and offices, information would receive careful attention from dedicated analysts, and technically-oriented but Washington-wise agency leaders would render routine decisions. In the foreign affairs context, this meant Landis was quite sensitive to the spheres of expertise that agencies would accumulate, whether in choosing the precise assets to block in implementing economic sanctions, acting against particular people to disrupt the mobility of organizations adverse to the interests of the United States, or choosing how best to allocate aid. Even in his (partial) embrace of presidential power, Landis would likely have been quite suspicious of arguments emphasizing presidential prerogatives over internal agency judgments (especially those quasi-adjudicatory ones that are increasingly understood to be relevant in foreign affairs) rather than a presidential role coordinating or adjudicating among different options.

This is not to say that Landis was incapable of fathoming a decisive president vigorously pursuing a major foreign policy goal. He was, after all, a former aide to Franklin Roosevelt.<sup>106</sup> But his approach throughout the years was one that firmly placed expert-led administrative agencies and their work at the center of any

---

<sup>103</sup> See *id.*

<sup>104</sup> See *id.* at 177–78.

<sup>105</sup> See *id.* at 177–81.

<sup>106</sup> For example, Landis served as President Roosevelt's "Director of Economic Operations in the Middle East" during World War II. See CHRISTOPHER D. O'SULLIVAN, *FDR AND THE END OF EMPIRE: THE ORIGINS OF AMERICAN POWER IN THE MIDDLE EAST* 62 (2012).

understanding of modern government, and he would have seen foreign affairs through the lens of this modernist version of administrative government.<sup>107</sup> If that balance between decisive presidential leadership and agency-based technical knowledge is decidedly elusive, Landis also thought it achievable so long as the right mix of decisionmaker values, institutional structure, and technical knowledge was on hand.<sup>108</sup> He was not particularly drawn to any version of orthodox formalism.<sup>109</sup> Instead his approach to the presidency and its relationship to the administrative state seemed more focused on finding appropriate (and if need be, novel) arrangements to realize some version of presidentially-coordinated technocratic governance.<sup>110</sup> One wonders how he might have reacted to the prospect of increasingly computer-assisted decisions involving administrative adjudication tasks with a bearing on foreign affairs, such as asset freezing or drone targeting. Both his earlier and his later scholarly work—along with his government service—suggest that he would have embraced such approaches, provided certain conditions were met that he would have associated with competent administrative adjudication.

#### IV. TENSIONS AND INSIGHTS: REFLECTING ON LANDIS'S VISION

Ultimately, there is much to question both in Landis's views about administrative democracy—particularly as articulated in *The Administrative Process*—and in the vision of presidentially-coordinated technocratic government that he came to support later in his life. He was given to somewhat under-theorized conceptions of politics, and perhaps for that reason, devoted relatively scant attention to the incentives or other conditions necessary to bring about his ideas regarding administrative government.<sup>111</sup> He devoted only occasional attention to the kinds of cultural and political differences that might come into play in different agencies, such as the U.S. Agency for International Development and the Department of Defense.<sup>112</sup> Much of

---

<sup>107</sup> See LANDIS, *supra* note 1, at 1 (“[T]he administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems.”).

<sup>108</sup> See generally Louis L. Jaffe, In Memoriam, *James Landis and the Administrative Process*, 78 HARV. L. REV. 319, 325, 328 (1964).

<sup>109</sup> In fact, some scholars have argued that Landis participated in “destroying the plausibility of formalism at the doctrinal level.” JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 20 (1995).

<sup>110</sup> See, e.g., Jaffe, *supra* note 108, at 325 (discussing the Landis Report’s suggestions to President Kennedy on strengthening the administrative process). See generally LANDIS REPORT, *supra* note 30, at 30–35.

<sup>111</sup> See *infra* notes 125–28 and accompanying text.

<sup>112</sup> See LANDIS REPORT, *supra* note 30, at 85–86 (suggesting the creation of several posi-

his work did not consider the potential that different paradigms of expertise might compete and exist in tension with respect to a particular administrative problem—such as post conflict reconstruction, or the management of economic sanctions.<sup>113</sup>

Still, it is equally true that Landis sounded some themes that remain strikingly contemporary. These themes are perhaps especially relevant to our understanding of the administrative state, including its role in foreign affairs. Landis understood that courts, the presidency, and Congress were relevant less through self-executing determinations within their constitutional competence, but rather in large measure through their impact on administrative agencies.<sup>114</sup> He viewed agencies as adaptive, and capable of learning over time from their adjudicatory activities.<sup>115</sup> He had uncompromising stands for how agencies should perform and the integrity they should embody, though perhaps as a result, his vision was not entirely realistic about the interplay of politics and technical expertise.

Above all, Landis believed that certain common imperatives of administrative government were more important than anything involving the substance of agency missions. What mattered most to Landis was not whether the National Labor Relations Board or the Food and Drug Administration were subject to unique procedures, or possessed of just the right substantive authority to undertake their missions. Instead his focus was on the presence of a White House valuing technical competence, a Congress that could for the most part believe in and (even if grudgingly) respect the role of administrative agencies, and agency leaders attuned to the need to adapt to changing circumstances (particularly emerging knowledge about science).<sup>116</sup> If he was not so keen on popular democracy as a means of directly affecting what agencies were doing, he certainly accepted the public's role in elections that could help shape long-term governmental priori-

---

tions within the Executive Office of the President that would coordinate and implement policies across agencies). Political differences might also come into play between the President and agencies themselves. *But see* JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 210 (1989) (describing Defense Secretary James Schlesinger's motivations under President Gerald Ford as "flow[ing] less from a desire to serve the president's policies than from a detailed analysis of the nation's defense posture"). *See generally* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012).

<sup>113</sup> Cf. LANDIS REPORT, *supra* note 30, at 85–86.

<sup>114</sup> See Jaffe, *supra* note 108, at 324.

<sup>115</sup> See LANDIS, *supra* note 1, at 23–24.

<sup>116</sup> See *id.* at 23–25, 60–61.

ties and (particularly) reinforce Congress's appreciation of its role supporting the work of administrative agencies.<sup>117</sup>

At a time when scholars and policymakers are increasingly aware of the convergence between administrative government and foreign affairs, James Landis's work remains profoundly relevant a half-century after his death. Though not addressing the issue in the most explicit possible way, Landis in some ways anticipated the interconnections between domestic and foreign affairs. At least in his seminal work, *The Administrative Process*, he was presenting a vision for governance that sought to achieve the elusive balance between technical expertise, political accountability, and adjudicatory fairness.<sup>118</sup> He repeatedly passed up opportunities to distinguish foreign affairs issues when describing his scheme for administrative government, and acknowledged instead that the agencies that increasingly constituted modern government had the potential to profoundly affect the trajectory of the nation in the larger world.<sup>119</sup>

Landis also foreshadowed the scholarship of academics such as Cass Sunstein and Richard Revesz who celebrate, for the most part, the technocratic inclinations of administrative government.<sup>120</sup> Yet the relatively thin conception of politics in *The Administrative Process* makes Landis underestimate some division-of-government problems that arise constantly in modern government—perhaps especially at the intersection of foreign and domestic affairs. Landis fails to grapple fully with the prospect that administrative agencies and Congress would be at loggerheads, and treats the task of distinguishing between different agency jurisdictions as a simple technical feat rather than a nuanced enterprise calling for a nuanced mix of careful statutory analysis and pragmatic judgment by a White House attempting to manage a complicated national government.<sup>121</sup> Over time his regard for a presidential role grew as he came to grapple more directly with this sort of problem.

Though he also came to worry somewhat more about divided government over time, Landis appeared to remain, for the most part, an optimist about what Americans could accomplish through their

---

<sup>117</sup> See *id.* at 48, 50.

<sup>118</sup> See generally *id.*

<sup>119</sup> See *id.* at 1, 41.

<sup>120</sup> See generally SUNSTEIN, SIMPLER, *supra* note 72 (describing how agency expertise can be used to simplify government); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013) (proposing a mechanism for OIRA review to combat agency inaction).

<sup>121</sup> See LANDIS, *supra* note 1, at 1, 41.



government and their system of public law.<sup>122</sup> One might imagine that if Landis were here today, he would observe that the often-bemoaned modern problems of political gridlock and polarization left intact the retinue of administrative agencies and presidential initiative necessary to continue addressing the nation's central domestic and international concerns.<sup>123</sup> These capacities would remain and be subject to gradual improvement, he might continue, so long as Congress did not impede the government's work by failing to confirm too many key officials or provide the necessary resources and fiscal framework for the government to operate. He might even note (echoing observations in *The Administrative Process* on how Congress and the public adjusted to the realities of mode life over time) that where the modern Congress created some difficulties on confirmations and fiscal policy, there was eventually an important shift in Senate confirmation procedures and a (mild) pullback from the most pitched conflict on fiscal issues.

At some level, Landis's core concern was with modernity. He believed in a balanced, technically sophisticated but dynamically responsive government.<sup>124</sup> A rigid, formalist conception of the foreign affairs Constitution would have probably led to too much emphasis on the legislative role for Landis's tastes. Far more important for him was giving due attention to the concerns that most animated him—technical competence and capacity within agencies, and an interplay of executive judgment and agency decisionmaking that might be evocative of now-more-familiar discussions about “internal” separation of powers.<sup>125</sup>

How to actually sustain the proper balance between technocratic decisionmaking and executive judgment and accountability was another matter altogether. In fact, Landis was far less focused on the political and institutional foundations that let public law perform its necessary functions. To take but one example: the success and relevance of ACUS to the long-term project of promoting fairness and efficiency in federal administrative government depends only in part on the excellence of its employees. Nor is the future of ACUS purely dependent on the merits of its recommendations relative to some implicit substantive standard that would evoke widespread agreement

---

<sup>122</sup> See Louis L. Jaffe, *Foreword* to JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* vii, vii (7th prtg. 1966).

<sup>123</sup> See generally *SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA* (Nathaniel Persily ed., 2015).

<sup>124</sup> See Koch, *supra* note 36, at 422.

<sup>125</sup> See *id.* at 424 & n.44.

among thoughtful experts of different ideologies. No agency, not even the Federal Reserve can yet entirely transcend the defining constraints of its political economy—even if it is true that those constraints can be shaped by the agency as well as its critics.<sup>126</sup> It is precisely at the fertile intersection of that political economy and an agency's normative ideals, embodied in the cohort of its leadership and support coalitions, that the dilemmas of administrative government are truly faced.

Landis was not alone—certainly not among scholars of administrative government—in his relatively limited attention to analyzing the conditions necessary for legal and political arrangements to function effectively and maintain public support. Prescriptive judgments about expertise and accountability may define a particular period in our legal system—and indeed, institutions matter because they create space for decisionmakers to deliberate about these matters in administrative agencies.<sup>127</sup> But the scope of those choices depends on a kind of equilibrium between politics, institutions, and law that is all but certainly a crucial ingredient in the recipe that allows some countries to develop institutional capacity and organizational integrity and keeps others stuck in a world of graft and institutional weakness.<sup>128</sup> The limited autonomy available for organizations integral to the administrative state, whether ACUS or the agencies to which its recommendations are addressed, therefore, depends not only on a commitment to technical excellence, but an understanding of implicit constraints that, if ignored, can provoke responses powerful enough to weaken or shutter an agency.<sup>129</sup> To manage some headway in the journey towards a leaner, more thoughtful government while avoiding the risks along the way is, in some sense, the essence of leadership in a fragmented administrative state.

Landis probably appreciated the reality of such constraints during some of the long nights he spent in Washington, D.C. office buildings, designing and running federal agencies. Indeed, one might say that he proved more adept at striking the necessary balance between ideals and pragmatism in his professional than his personal pursuits.<sup>130</sup> As a

---

<sup>126</sup> See Mariano-Florentino Cuéllar, *Modeling Partial Agency Autonomy in Public-Health Policymaking*, 15 THEORETICAL INQUIRIES L. 471, 472, 505 (2014).

<sup>127</sup> See Koch, *supra* note 36, at 424.

<sup>128</sup> See Cuéllar, *supra* note 126, at 471–72.

<sup>129</sup> See Gary J. Edles, *The Continuing Need for an Administrative Conference*, 50 ADMIN. L. REV. 101, 127–32 (1998) (noting the confluence of factors that contributed to ACUS's demise in 1995).

<sup>130</sup> In 1963, Landis pled guilty on five counts of failure to file income tax returns. A psychological examiner, finding this failure consistent with Landis's history of unpaid bills, unsent

scholar, Landis remained committed to ideals of technocratic expertise even as he gradually came to acknowledge that such expertise needed to be coordinated by an accountable president (though one who would nonetheless practice a kind of administrative version of the subsidiarity principle and allow experts to make substantive decisions whenever possible).<sup>131</sup> The presidency likely drew Landis's attention at that point in his career because of more than just his links to President Kennedy. The White House—at least when commanded by the right president—could achieve some of what Landis had long aspired to do in his scholarly work: to develop technically-grounded principles of governance that cut across multiple agencies, even while allowing the occasional concession to pragmatic concerns.

The pragmatic side of that equation took on more importance over time for Landis, though it appeared subordinate to the primacy of his more technocratic vision. I suspect that Landis's evolving descriptions about the mix of authority between bureaucrats and politically-accountable policymakers reflected at least some growing awareness of the need for pragmatism—the kind of pragmatism that makes ACUS an essential, if incremental, tool for forging from the modern administrative state a set of institutions more effective at meeting the public's needs and responding to its concerns. Virtually all agencies face their share of tensions about how to navigate the dilemmas Landis himself faced regarding prescriptive, technical decisionmaking and the value of political judgment. In a transsubstantive agency explicitly designed to improve the administrative process, such as ACUS, it might be particularly apposite to find creative and thoughtful ways of acknowledging the importance of political judgment in agency decisionmaking, and to take on projects that recognize the interdependence between domestic administration and foreign affairs, without weakening the technocratic and adjudicatory legitimacy of the administrative state.

### CONCLUSION

Even in latter years, where his thought had evolved somewhat from the picture he painted in the 1938 Storrs Lectures, Landis did not devote quite as much attention as he could have to theorizing about the interplay of prescriptive ideals and pragmatic constraints that are

---

alimony checks, and unanswered mail, diagnosed “strong hostile and destructive impulses, which appear to be associated with pervasive, but denied, dependency needs.” RITCHIE, *supra* note 13, at 197.

<sup>131</sup> See LANDIS REPORT, *supra* note 30, at 52.

so familiar to any president trying to navigate the competing pressures that entangle administrative government. The deceptively simple mapping exercise in which he often engaged recalled Grant Gilmore's observation about the failure of all efforts so far to do away with lawyers by simplifying the law.<sup>132</sup> Though Landis was too ensconced in his profession to ever be tempted by an effort to do away with lawyers, his ideas did more to conjure the description of an alluring destination, than to draw a map of how to wind one's way through the twisting road traversing science, adjudication, and politics that might take one to the destination. Whether intentionally or not, he bequeathed both the journey and the map-making duties to his successors at ACUS and elsewhere in academia and government.

If this division of labor ultimately makes Landis's thought a bit less practical in its tenor, it also makes his work an intriguing reminder of how scholars, policymakers, and the public are still working to achieve a desirable balance of technical rigor, accountability, and adjudicatory fairness in their administrative government. More than a half-century after the death of Landis and the birth of ACUS, that balance remains as elusive as it is alluring, subject to incremental progress across the increasingly brittle separation of domains involving foreign affairs and domestic administration. Landis was right, of course, that no modern administrative government could elude this challenge indefinitely if it sought legitimacy. And because Landis believed that deliberative structures such as ACUS could enhance both the accountability and capacity of administrative government, he helped lay the foundation for careful, measured progress in the governance of the administrative state.

But steady, incremental progress was not what Landis craved. Nearly eight decades after Landis's Storrs Lectures on the administrative process, tensions and trade-offs persist as legislative committees in Sacramento or Washington disentangle the relationship between facts and policy judgments, national security officials decide whether to target a suspicious individual in a caravan of vehicles, and public health agencies crafting regulatory agendas might struggle to reconcile the insights gleaned from expert systems with executive decisions about power and strategy. The project of reconciling political responsiveness with insulated technical expertise and adjudicatory fairness, in short, remains an enterprise fraught with precisely the tensions that Landis's impressive contributions as a scholar and public official never entirely escaped.

---

132 See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 1 (1977).