

# FOREWORD

## Administrative War

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### ABSTRACT

*This Article takes up an issue with major implications for American administrative law, political development, and security studies: what happened to the American administrative state during and immediately after World War II, and what were the consequences of this period? As the Roosevelt Administration rushed to align domestic affairs with American geostrategic priorities at the outset of World War II, it confronted a host of now largely forgotten legal and organizational challenges. These ranged from a federal income tax base that encompassed less than ten percent of the labor force to unresolved legal questions about the scope of agencies' power to issue subpoenas. For policy-makers, organized interests, and the public, these challenges created uncertainty about the success of mobilization and the scale of the changes that the Administration would pursue. In response, the Administration and its legislative supporters made strategic choices to expand the administrative state without pursuing direct public control of industry. They created agencies such as the War Production Board, the Office of Price Administration, and the Office*

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of Economic Stabilization. Within a few years, these organizations became part of a broader structure for legally sanctioned agency action that facilitated price regulation and consumer rationing, mass taxation on an unprecedented scale, and industrial mobilization and coordination.

By 1944, the American economy was producing forty percent of the world's armaments, and by 1945, the United States was the wealthiest society in history. Americans had witnessed an evolutionary transformation of their administrative state—involving greater exposure among the public to powerful, adaptive federal agencies of nationwide scope; newly permissive legal doctrines legitimizing the delegation of legislative authority and routine compliance investigations; new arrangements for mass taxation; White House supervision of agency action; and further entrenchment of procedural constraints meant to shape agencies' weighing of the consequences of official decisions. The resulting framework was defined by high-capacity regulatory agencies and contractual arrangements, but it was also subject to political, ideological, and legal constraints. It reflected an avoidance of radical changes in the American political economy in favor of a circumscribed vision of administrative action relative to private markets. With these features in place, the federal administrative state became a fixture of American life. How this process unfolded holds some important implications for understanding the relationship between law, politics, and organizations.

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INTRODUCTION

*“Everything is very simple in War, but the simplest thing is difficult.”<sup>1</sup>*

The balmy spring days of early May 1940 found President Franklin Roosevelt and his White House advisers reviewing legal options to prepare Americans for war.<sup>2</sup> For months, the European front had been so quiescent that some observers took to calling the conflict a “phony war.”<sup>3</sup> Countries nominally allied with the United States in Europe had mobilized their units, to be sure, but they had pursued only sparse military action against German soldiers. It was these German troops who abruptly ended the “phony war” in May 1940.<sup>4</sup> Nearly 2,000 of their tanks had just roared through the thick forest of the Ardennes, sidestepping the soon-to-be-infamous Maginot Line.<sup>5</sup> Within days, Holland and Belgium had surrendered to the Wehrmacht. When German troops penetrated French defenses shortly thereafter, the chastened French premier, Paul Reynaud, telephoned Winston Churchill to declare (in English, no less) that “[w]e have been defeated.”<sup>6</sup> As the British scrambled to evacuate nearly a

1 1 CARL VON CLAUSEWITZ, *ON WAR* 77 (J.J. Graham trans., 1911).

2 See, e.g., 1 BUREAU OF DEMOBILIZATION, *CIVILIAN PROD. ADMIN., INDUSTRIAL MOBILIZATION FOR WAR: HISTORY OF THE WAR PRODUCTION BOARD AND PREDECESSOR AGENCIES 1940–1945*, at 17–18 (1947) (describing President Roosevelt’s deliberation regarding war preparedness in 1940 and his decision to activate the Office for Emergency Management on May 25, 1940).

3 See Marshall McNeil, *Long Debate on Neutrality Due in Senate*, PITTSBURGH PRESS, Sept. 19, 1939, at A1.

4 See MATTHEW J. DICKINSON, *BITTER HARVEST: FDR, PRESIDENTIAL POWER AND THE GROWTH OF THE PRESIDENTIAL BRANCH* 119–120 (1997).

5 JOHN KEEGAN, *THE SECOND WORLD WAR* 73–87 (1989).

6 DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945*, at 438 (1999) (internal quotation marks omitted).

third of a million soldiers from the French port of Dunkirk—the second such mass evacuation of troops from the continent undertaken by the British in as many months—Roosevelt and his advisers were forced to ponder how much to ratchet up mobilization plans, what to make of unresolved doctrinal questions about the scope of federal power that could affect mobilization,<sup>7</sup> and how to contend with the fact that the American public was still deeply divided about U.S. entanglement in the widening conflict.<sup>8</sup>

This Article analyzes what happened next to the American administrative state. It explains the underappreciated importance of this period for administrative law, for the history of American public institutions, and for understanding the relationship between administrative governance and transnational security. When the Roosevelt Administration rushed to align domestic affairs with American geostrategic priorities at the outset of World War II, it confronted a host of now largely forgotten legal and organizational challenges. These ranged from a federal income tax base that encompassed less than ten percent of the labor force to unresolved legal questions about the scope of agencies' power to issue subpoenas.<sup>9</sup> For policymakers, organized interests, and the public, these challenges created uncertainty about the success of mobilization and the scale of the changes that the Administration would pursue.

In response, the Administration and its legislative supporters adopted a mix of canny strategic choices, carefully calibrated legal positions, and pluralist accommodations. They sought to expand the ad-

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7 A number of cases addressing the scope of the federal government's authority and related issues, for instance, also left unresolved certain quandaries that could become more important in the event of war mobilization. For example, in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the Court concluded that the doctrine holding that the federal government can only exercise powers specifically enumerated in the Constitution or implied from enumerated powers is categorically true only with respect to internal affairs, but it offered little guidance about how to draw precise distinctions between internal and foreign affairs in the event of an expansive war triggering a national mobilization effort. And in *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), an opinion issued just days before German tanks plowed through the Ardennes, the Court held that the federal government enjoyed unrestricted power to fix the terms and conditions upon which it will make needed purchases. At the same time, the Court concluded that standing to undertake a judicial challenge to federal action requires an injury or threat to a particular right, but it did not resolve the kind of legal injury necessary to meet the relevant threshold. See *infra* Part II for other examples of the lingering uncertainty regarding the scope of federal power and the potential for judicial challenges to federal administrative activity.

8 See KENNEDY, *supra* note 6, at 431–34.

9 See *infra* Part II.



ministrative state without pursuing direct public control of industry.<sup>10</sup> They created agencies such as the War Production Board, the Office of Price Administration, and the Office of Economic Stabilization.<sup>11</sup> Within a few years, these organizations became part of a broader structure for legally sanctioned agency action that facilitated industrial coordination, price regulation and consumer rationing, and mass taxation on an unprecedented scale—activities that helped forge an economy that was producing forty percent of the world's armaments by 1944, and created—by 1945—what was then the wealthiest society in history.<sup>12</sup>

Just as important, by the end of the war, Americans had witnessed an evolutionary transformation of their administrative state.<sup>13</sup> The public was far more exposed to powerful, adaptive federal agencies of nationwide scope.<sup>14</sup> Newly permissive legal doctrines legitimized the delegation of legislative authority and routine compliance investigations to agencies.<sup>15</sup> The country pursued novel arrangements for mass taxation.<sup>16</sup> The White House engaged in routine supervision of agency action, and lawyers witnessed further entrenchment of procedural constraints meant to shape agencies' weighing of the consequences of official decisions.<sup>17</sup>

The resulting framework led to a surge in the power and size of the federal administrative state. The number of civilian federal employees swelled. These new employees worked in high capacity regulatory agencies—including one that monitored prices and consumer behavior nationwide.<sup>18</sup> Expanded federal tax revenues financed both these civilian organizations and the military, and courts increasingly and explicitly accepted the propriety of broad legislative delegations.<sup>19</sup> Elaborate contractual arrangements entangled public agencies and private companies.<sup>20</sup> But the growth of the federal administrative machinery was also subject to political, ideological, and legal constraints. It reflected an avoidance of radical changes in the American political economy in favor of a circumscribed vision of administrative action

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10 See *infra* Part II.

11 See *infra* Part II.

12 See *infra* Part I.

13 See *infra* Part II.

14 See *infra* Part II.

15 See *infra* Part II.C.

16 See *infra* Part II.B.

17 See *infra* Part II.E.

18 See *infra* Part II.B.

19 See *infra* Part II.B.

20 See *infra* Part II.

relative to private markets.<sup>21</sup> With these features in place, the federal administrative state became a fixture of American life. As the post-war period gave way to the Cold War and the Korean War, portions of this new framework were codified in the Administrative Procedure Act (“APA”).<sup>22</sup> And in contrast to the pattern following World War I, the federal government retained its large size and revenues during the Cold War, along with its capacity to shape behavior through taxation, contracting, and administrative regulation.<sup>23</sup>

Despite this legacy, the period is often overlooked as a seminal one in the history of the American administrative state.<sup>24</sup> Close scrutiny of the wartime period belies the idea that the development of the administrative state was placed on hold during the war.<sup>25</sup> The wartime chapter in the history of the administrative state may have garnered less scholarly attention in part because of an unusual feat that appears to have succeeded during the World War II years. The federal state greatly expanded in organization and legal power, yet preserved the illusion that what had occurred during the war years was largely a temporary deviation from a norm of relatively flexible market activity that had prevailed before the war and would continue thereafter.<sup>26</sup> If it was long true that what appeared to be a free market was in fact structured by legal baselines regulating social and economic transactions, it was also true that World War II was an inflection point for the administrative state—the dawn of mass taxation in the United States,

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<sup>21</sup> See *infra* notes 545–49 and accompanying text.

<sup>22</sup> Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–559, 701–706 (2012)); see *infra* Part III.

<sup>23</sup> See *infra* Part III.

<sup>24</sup> Scholars of administrative governance occasionally devote brief attention to the wartime period, but they rarely focus sustained attention. George Shepherd’s otherwise thorough and insightful analysis of the legislative bargains and antecedents that created the Administrative Procedure Act, for example, gives relatively limited attention to the wartime period that preceded passage of the law. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. REV. 1557, 1641–49 (1996).

<sup>25</sup> See, e.g., Arthur T. Vanderbilt, *Administrative Law*, 1942 ANN. SURV. AM. L. 89, 91 (“The War, coming to the United States at the close 1941, blocked any prospect of administrative reform the following year.”). Modern administrative law casebooks rarely if ever explore the implications for the administrative state of the World War II period, focusing instead on developments in the New Deal and the 1946 passage of the Administrative Procedure Act. For one example of a leading casebook that does not even mention World War II in its opening summary of the history of the American administrative state, see JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 5 (6th ed. 2009).

<sup>26</sup> See, e.g., RICHARD POLENBERG, *WAR AND SOCIETY: THE UNITED STATES 1941–1945*, at 7–8 (1972) (describing how President Roosevelt sought to reassure the public about the extent and permanence of wartime economic changes).

the time when agencies finally came to be treated differently than police when issuing routine subpoenas, and the period when broad delegations of legislative power to the executive were legitimized. At the same time, policymakers, workers, and the private sector enjoyed relative success in preserving a consumer economy even in wartime,<sup>27</sup> and policymakers declined to pursue the most radical measures possible—including direct control of industry—during wartime.<sup>28</sup>

As those compromises matured, the American administrative state was reformed by the experience of a severe external crisis. A half-century later, and two decades after the end of the Cold War, lawyers, judges, and policymakers sometimes encounter fierce controversy about the role of administrative agencies in the nation's life.<sup>29</sup> But if questions arise at the intersection of national security, foreign policy, and administrative law, a different calculus tends to play out. To wit: “extremely deferential” review is quite common in the courts,<sup>30</sup> and legislative action supportive of expansive and flexible executive branch authority is not unusual.<sup>31</sup> What is intriguing about the World War II period is the extent to which policymakers, lawyers, judges, and the public acted as though the *entire* administrative state—rather than merely specialized domains involving matters such as surveillance and economic sanctions—was operating at that intersection.<sup>32</sup>

To develop these ideas, Part I of this Article reviews the historical background and theoretical ideas relevant to the intersection of administration and war. Among other things, it explores why policymakers could encounter ample difficulties during mobilization, and how legal constraints might affect those difficulties. Part II then retraces some of the history of the administrative state in the war years.

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<sup>27</sup> See *infra* notes 210–14 and accompanying text.

<sup>28</sup> See *infra* notes 544–48.

<sup>29</sup> Examples abound, including a few recent ones. Compare *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 n.4 (2013) (“[T]he dissent overstates when it claims that agencies exercise ‘legislative power’ and ‘judicial power.’”), with *id.* at 1877–79 (Roberts, C.J., dissenting) (describing agencies as exercising legislative, judicial, and executive power, and concluding that “the danger posed by the growing power of the administrative state cannot be dismissed”). See also *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (“Our respect for Congress’s policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed.”).

<sup>30</sup> *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 734 (D.C. Cir. 2007); *NCL Logistics Co. v. United States*, 109 Fed. Cl. 596, 627 (Fed. Cl. 2012).

<sup>31</sup> See, e.g., 18 U.S.C. § 2516 (2012) (expanding executive authority to wiretap and investigate terrorist activities).

<sup>32</sup> See *infra* Part II.

It chronicles shifts in the legal terrain relevant to the work of federal agencies, and it considers their role in light of insights from administrative law and scholarship on American political development and security studies. Finally, Part III explores how—viewed in this different light—the crucial wartime period and its aftermath are all the more worthy of scrutiny in order to provide historical context for some ongoing dilemmas about administrative governance.

Then as now, observers questioned the capacity of administrative agencies to operate flexibly and experiment with different regulatory tools.<sup>33</sup> Policymakers grappled with still-familiar questions about the role of domestic administration in meeting external security threats,<sup>34</sup> the place of private contractors in administration,<sup>35</sup> and the capacity of the administrative state to operate impartially when overseeing economic activities involving individuals or private organizations.<sup>36</sup> Participants navigating those dilemmas in wartime faced constraints rooted in political economy, ideology, and legal norms.<sup>37</sup> Although specific federal activities occasionally faced difficulties,<sup>38</sup> the resulting arrangement as a whole created powerful, adaptive federal agencies that maintained legitimacy throughout the war.<sup>39</sup> The administrative state forged in wartime became increasingly capable of asserting expanded power through regulation, taxation, and contracting, while eschewing direct federal control of industry and subjecting agency action to constraints of procedure and judicial review.<sup>40</sup>

For the White House, there was a critical link between military power; managing the competing needs of families, farmers, and factory workers; and governing the machinery of federal administration in the 1940s.<sup>41</sup> Even if the Administration was only partially correct in

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<sup>33</sup> See, e.g., Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 57, 64 (2011).

<sup>34</sup> See Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1655–58 (2006); David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1359–66 (2007).

<sup>35</sup> See PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 1 (2007).

<sup>36</sup> See STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* 1–5 (2008).

<sup>37</sup> See BARTHOLOMEW H. SPARROW, *FROM THE OUTSIDE IN: WORLD WAR II AND THE AMERICAN STATE* 269–75 (1996). For further discussion, see *infra* Part II.A.

<sup>38</sup> See ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 177–82 (1995) (discussing several failed administrative agencies used by the federal government to mobilize for war).

<sup>39</sup> See *infra* notes 544–48 and accompanying text.

<sup>40</sup> See *infra* notes 544–48 and accompanying text.

<sup>41</sup> See generally SPARROW, *supra* note 37.

the end, its approach underscores a certain tension that would arise if one were to embrace the project of building a national security state with the capacity to advance American geopolitical interests while simultaneously rejecting the broad legislative delegations and robust federal administration used to bolster that capacity. It is telling, perhaps, that it became feasible for a President to herald the end of the “era of big government” only after the close of the Cold War.<sup>42</sup> In the ensuing years, citizens have nonetheless remained exposed to complex cross-border threats from states and nonstate actors, and they routinely expect their government to manage external risks.<sup>43</sup> History suggests that the efforts of lawyers and policymakers to frame the discussion of these threats will drive, in no small measure, how Americans govern the complex administrative machinery that implements their laws.

# I. THE CONCEPT OF ADMINISTRATIVE WAR: HISTORY AND THEORY

Roosevelt was chary about the prospect of war only in part because it was difficult to persuade the American public of the country’s strategic interests in Europe and the Pacific. He was also facing the potentially daunting task of translating strategic goals into military assistance, budget provisions, and industrial output against the backdrop of a wary public.<sup>44</sup> The Administration would soon confront complicated decisions about these matters at a time when surveys indicated that more than sixty percent of Americans queried thought it more important “to keep out of the war” than to “help England even at the risk of getting into war.”<sup>45</sup> Meanwhile, the United States had the eighteenth-largest army in the world, slightly smaller than the Dutch

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42 William J. Clinton, President of the United States, Address Before a Joint Session of Congress on the State of the Union (Jan. 23, 1996), *available at* <http://www.gpo.gov/fdsys/pkg/WCPD-1996-01-29/pdf/WCPD-1996-01-29-Pg90.pdf>.

43 See *Majority Views NSA Phone Tracking as Acceptable Anti-Terror Tactic*, PEWRESEARCH (June 10, 2013), <http://www.people-press.org/2013/06/10/majority-views-nsa-phone-tracking-as-acceptable-anti-terror-tactic/> (sixty-two percent of respondents surveyed in a nationwide, representative survey responded that it was “more important for the federal government to investigate possible terrorist threats, even if that intrudes on personal privacy”).

44 WILLIAM HARDY MCNEILL, *AMERICA, BRITAIN, AND RUSSIA: THEIR CO-OPERATION AND CONFLICT 1941–1946*, at 3 (1953) (“American opinion had long been deeply divided on the question of participation in the European war.”).

45 See BUREAU OF THE BUDGET, *THE UNITED STATES AT WAR: DEVELOPMENT AND ADMINISTRATION OF THE WAR PROGRAM BY THE FEDERAL GOVERNMENT* 47 (1946).

army that had just surrendered to Germany.<sup>46</sup> And American munitions production was of an order of magnitude lower than that of any of the European powers.<sup>47</sup> Given these difficulties, it is no surprise that scholars have shown considerable interest in the Administration's choices regarding assistance to Allied nations prior to the attack on Pearl Harbor,<sup>48</sup> along with the wily President's strategy to ready the public for war.<sup>49</sup>

But that strategy faced a complementary challenge. How would American policymakers build the organizational capacity and legal legitimacy of a federal administrative state that could effectively carry out the myriad functions—from allocating scarce goods to collecting taxes—necessary for wartime success?<sup>50</sup> In the type of nation-state that the United States and other industrialized countries had become by the first third of the twentieth century, a *geostrategic* administrative war of coordination, mobilization, rationing, and domestic enforcement would need to exist alongside war's purely military aspect. And executive officials would need to pursue it without precipitating a *domestic* administrative war of a more prosaic sort—entangling the state in the sort of bureaucratic infighting, legal controversy, and domestic opposition sufficient to risk foiling the federal government's core objectives. Because the administrative structures of World War I had long been dismantled,<sup>51</sup> building the necessary administrative capacity when the United States had not even fully emerged from its decade-

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<sup>46</sup> Arthur Herman, *The FDR Lesson Obama Should Follow*, WALL ST. J., May 10, 2012, at A15.

<sup>47</sup> ERIC LARRABEE, COMMANDER IN CHIEF: FRANKLIN DELANO ROOSEVELT, HIS LIEUTENANTS, AND THEIR WAR 41 (1987).

<sup>48</sup> See, e.g., McNEILL, *supra* note 44, at 3.

<sup>49</sup> See, e.g., KENT ROBERTS GREENFIELD, AMERICAN STRATEGY IN WORLD WAR II: A RECONSIDERATION 1 (1963) ("The making of strategy is a subject of intense public interest during the course of a war . . ."); LARRABEE, *supra* note 47, at 2 ("In the Roosevelt administrations his control of a situation was . . . evidenced only by the inability of anyone else to control it."). For a discussion of the legal complexities associated with the neutrality laws and the Lend-Lease program to provide supplies to allied nations, see Aaron Xavier Fellmeth, *A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935–1941*, 3 BUFF. J. INT'L L. 413 (1996–97).

<sup>50</sup> In this context, the term "federal administrative state" refers to (1) a network of federal administrative agencies legally and practically capable of carrying out ambitious statutory mandates that have the potential to materially affect the daily activities of millions of people, and (2) the constitutional and statutory rules governing the actions of these agencies. During the wartime period, the functions of these agencies included, among others, coordinating wartime industrial production, vigorously enforcing economic sanctions, regulating markets for labor and economic activity, protecting public health, and administering benefits and education programs.

<sup>51</sup> See BUREAU OF DEMOBILIZATION, *supra* note 2, at 17 (noting that politicians and businesses requested the return of World War I agencies during the mobilization for World War II).

long economic difficulties would almost certainly prove a daunting project in a country with a relatively small central government.<sup>52</sup> The resulting interactions between law, institutions, and politics are best appreciated with some historical and theoretical context.

*A. Historical Context and Puzzles: Administrative Governance on the Eve of War*

For some observers, the executive branch's prewar administrative situation amounted to the predicament that wasn't. From this perspective, the New Deal-era United States already had a modern administrative state to work with, made up of high-capacity, legally legitimate federal agencies that could be readily deployed (or easily adapted) to perform a variety of functions sanctioned by the democratic process, including war-related tasks.<sup>53</sup> Conceivably, war-related needs could rapidly soak up idle labor and productive capacity. Roosevelt had been in the White House for nearly eight years, during which the so-called New Deal had flourished enough to create a setting quite favorable for a large-scale federal administrative role in shaping market transactions.<sup>54</sup> Large federal agencies operating pursuant to broad legal authority administered agriculture programs, conducted food safety inspections, and allocated Social Security benefits.<sup>55</sup> Legislative statutes and court decisions had presumably legitimized the administrative state enough to help Roosevelt and his advisers avoid the task of forging a new federal administrative apparatus in an otherwise decentralized state—instead leaving the Administration with the milder dilemma of deciding exactly how to use that

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<sup>52</sup> In 1940, for example, federal outlays as a percentage of overall U.S. economic activity were only about ten percent. They had been over twenty percent at the height of World War I, in 1919. See *infra* Appendix Figure 2.

<sup>53</sup> See, e.g., Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 406 (2007) (the New Deal gave rise to a "prescriptive vision of how public policy should be made" according to which "[t]he democratic process identified social problems at the most general level" and "[i]t was then the job of experts to discern the best way to solve a particular problem and implement the appropriate policy"); see also JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 142–45 (1938) (7th prtg. 1966) (expressing confidence in the capacity of appropriately empowered administrative agencies to address emerging policy problems effectively).

<sup>54</sup> See Daniel R. Ernst, *The Ideal and the Actual in the State: Willard Hurst at the Board of Economic Warfare*, in *TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II* 149, 149–50 (Daniel R. Ernst & Victor Jew eds., 2002) (noting that lawyers and scholars believed that the New Deal economy needed administrative agencies for effective regulation).

<sup>55</sup> See *infra* Part II.B.

administrative capacity to bolster the American strategic position.<sup>56</sup> This account would help explain why scholars of the American administrative state have had so little to say about the wartime period.<sup>57</sup> It is also consistent with theoretical accounts in international relations presuming that a country such as the United States would simply find a sensible way to increase production, manage the public's expectations, and otherwise meet external strategic demands.

Closer scrutiny reveals a far more intriguing picture. Although the New Deal period was a time of important expansion and consolidation in some aspects of federal agency capacity, during the 1930s the federal administrative state remained a pale shadow of its future self. Taxation involved a tiny fraction of the labor force; no en masse fiscal citizenship existed.<sup>58</sup> Courts still entertained strong legal challenges to statutes delegating broad legislative authority to executive organizations, thereby frustrating policymakers' desire to empower federal agencies.<sup>59</sup> Federal agencies even ran into problems when attempting to discharge routine enforcement functions by gathering required records from the private sector.<sup>60</sup> Economic, industrial, and public health regulation would be all but impossible if agencies lacked the power to issue subpoenas compelling production of records from private companies.<sup>61</sup> Yet some courts presumed that federal agencies were akin to the police for constitutional purposes.<sup>62</sup> In some cases, courts wanted agencies to demonstrate—as a prerequisite for obtaining information—the very kind of individualized suspicion that agencies were attempting to confirm by requesting the records in the first place.<sup>63</sup>

Americans, in short, stood on the verge of having to adapt their laws and domestic institutions to modern warfare on a global scale. Yet considerable uncertainty remained at the time about the country's framework for managing the enormous administrative challenges implicit in rapid industrial mobilization.<sup>64</sup> Because of the likely trade-offs involving the allocation of scarce goods in wartime, problems

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<sup>56</sup> See Ernst, *supra* note 54, at 149–50 (noting that by 1934, seventy percent of major law firm practice was before newly formed government agencies).

<sup>57</sup> For a notable exception, see *id.* at 149–84.

<sup>58</sup> See *infra* Part II.B.

<sup>59</sup> See *infra* Part II.C.

<sup>60</sup> See *infra* Part II.D.

<sup>61</sup> See *infra* Part II.D.

<sup>62</sup> See *infra* Part II.D.

<sup>63</sup> See *infra* Part II.D.

<sup>64</sup> See, e.g., Vanderbilt, *supra* note 25, at 89–90.



would also arise regarding the satisfaction of consumer demand in what was viewed by many observers as (at least before the war) only a partially regulated market economy.<sup>65</sup> Administration officials had little choice but to face the reality that industrial production would falter if rampant inflation arose.<sup>66</sup> Inflation could also foment unrest and undermine morale among civilians.<sup>67</sup>

To these new problems, one could add the management of lingering legal and political disputes about existing federal agencies—from the Department of Agriculture to the Treasury—in the administrative state.<sup>68</sup> The federal executive was faced with an administrative framework of limited capacity and legal uncertainty.<sup>69</sup> Even taking into account the distinctive pluralist features of the American political economy, perhaps the President would sponsor legislation or invoke inherent powers to mount an aggressive plan seeking tighter control over industry (whether involving nationalization or not)—as had occurred in some European countries preparing for war. Knowledgeable observers at the time rightly wondered—as do some Americans in the twenty-first century—how domestic law and organization would adapt, and what the longer-term consequences might be for Americans during and after the war.<sup>70</sup>

Yet previous works have explored only some of those consequences. Existing scholarship, for example, explores the significance of the wartime period by focusing on the history of specific policy domains such as labor regulation and pensions,<sup>71</sup> changes in social organization and public attitudes,<sup>72</sup> or evolving legal doctrine in cases involving important civil liberties.<sup>73</sup> Scholars have spent far less attention placing the wartime experience in the context of American public law and organization, leaving basic questions about the nature of ad-

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<sup>65</sup> See, e.g., LUTHER GULICK, *ADMINISTRATIVE REFLECTIONS FROM WORLD WAR II* 37–38 (1948).

<sup>66</sup> BUREAU OF THE BUDGET, *supra* note 45, at 240.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 26 (“Government ownership of plants and machinery was anathema to many business and financial men.”).

<sup>69</sup> See *infra* Part II.B.

<sup>70</sup> See, e.g., Louis Brownlow, *A General View*, 1 PUB. ADMIN. REV. 101, 105 (1941).

<sup>71</sup> See SPARROW, *supra* note 37, at 67–96.

<sup>72</sup> See JAMES T. SPARROW, *WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT* 3 (2011); see also Kennedy, *supra* note 6, at 427 (noting the difference in presidential preferences for involvement in both World War I and World War II).

<sup>73</sup> See generally ERIC L. MULLER, *AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II* (2007); Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005) (examining whether the United States Supreme Court curtails civil liberties more often during times of war).

ministrative and legal change at the time—and, indeed, about the origins of the modern administrative state—unresolved.

What scholarship to date fails to describe fully is how the American administrative state underwent a stark change in character and scope in World War II, and how it adapted to the distinctive institutional constraints of the American political economy. How exactly, for instance, did the United States confront strategic conditions that policymakers believed to require massive economic changes and growth in the power of federal agencies when existing administrative capacity and legal authority was limited at the time war began?<sup>74</sup> If one is willing to stipulate that at least a minimal degree of enforceable coordination and regulation was necessary at the time,<sup>75</sup> then one might say that *something* had to give in order for domestic mobilization to succeed. Perhaps Roosevelt and his advisors would revisit the earlier, failed New Deal efforts to build a far more robust degree of direct federal control over industrial practices—going even beyond the corporatist logic of the National Industrial Recovery Act (“NIRA”)<sup>76</sup> invalidated in *A.L.A. Schechter Poultry Corp. v. United States*.<sup>77</sup> At the other end of the spectrum, the Administration could have also contemplated accepting at least some of the existing limitations on the authority of administrative agencies arising from broader constraints on federal power, given legal doctrine as it existed by about 1940.<sup>78</sup>

The country’s economic challenges at the time cut against a more cautious approach. From the fall of France through the end of 1940, manufacturing output in the United States remained flat.<sup>79</sup> What increased instead was the Administration’s rush of activity to institute some of the preconditions necessary for lasting changes in production and economic activity.<sup>80</sup> Roosevelt had tread cautiously in building the case that the uncertainty in international relations was analogous to the economic upheaval that the New Deal had sought to curb.<sup>81</sup> By

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<sup>74</sup> See *supra* Parts II.A, II.C.

<sup>75</sup> This is hardly a debatable proposition. For discussion, see generally BUREAU OF THE BUDGET, *supra* note 45, at 168 (discussing need for regulations).

<sup>76</sup> National Industrial Recovery Act (NIRA), Pub. L. No. 73-67, 48 Stat. 195 (1933).

<sup>77</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 495 (1935).

<sup>78</sup> See Louis Fisher, *The Law: Presidential Inherent Power: The “Sole Organ” Doctrine*, 37 PRESIDENTIAL STUD. Q. 139, 143–44 (2007).

<sup>79</sup> See BUREAU OF THE BUDGET, *supra* note 45, at 29 (“Progress in defense production from the fall of France to the end of 1940 was not impressive in terms of defense articles actually manufactured.”).

<sup>80</sup> See SPARROW, *supra* note 72, at 25–26.

<sup>81</sup> See *id.* at 26.

May 1940, the President was somewhat less cautious.<sup>82</sup> He set in motion the legal machinery that would eventually facilitate mobilization.<sup>83</sup> Rejecting calls to seek a broad package of mobilization-related changes from Congress, Roosevelt instead vigorously deployed his existing statutory authority,<sup>84</sup> and he eventually sought more measured changes in presidential economic powers from Congress.<sup>85</sup> Against the backdrop of an increasing risk of war, he created an Office of Emergency Management within the White House to engage in internal federal planning efforts and to coordinate the federal agencies involved in any future mobilization.<sup>86</sup> Using a different statutory provision, Roosevelt established a new Council of National Defense, along with an advisory commission that would facilitate communication between the federal government, business, and labor—as well as any shared planning involving these sectors.<sup>87</sup> By using existing authority, Roosevelt sidestepped what would have almost certainly been a tricky legislative negotiation over mobilization.<sup>88</sup> When radio signals carried the President's announcement to millions of Americans, he sought to modulate the public's response to these changes: "Therefore, this is not a complete, immediate national mobilization," the President explained, but rather simple recourse to a mechanism that had been "planned . . . for a long, long time."<sup>89</sup>

Preplanned or not, Roosevelt's less-than-complete mobilization reflected a pragmatic commitment to pluralist accommodation. Recognizing that rising military spending could add to the Administration's labor relations headaches, presidential advisors accordingly took steps to limit the military's opposition to a legislative amendment to disqualify companies with labor violations from receiving military

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<sup>82</sup> See generally *The Six Hundred and Forty-Seventh Press Conference*, in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1940 WAR—AND AID TO DEMOCRACIES* 241, 241–44 (Samuel I. Rosenman ed., 1941) [hereinafter Response to "Fireside Chat" on Defense] (discussing President Roosevelt's plans to engage existing agencies to promote mobilization efforts).

<sup>83</sup> *Id.* at 243–44.

<sup>84</sup> See *id.* at 241–43.

<sup>85</sup> See VICTOR A. THOMPSON, *THE REGULATORY PROCESS IN OPA RATIONING* 4–5 (1950) (discussing legislative changes in presidential authority over production and allocation in 1940, and how presidential power grew in subsequent legislation).

<sup>86</sup> DICKINSON, *supra* note 4, at 120–23.

<sup>87</sup> See *id.* at 121, 123–24.

<sup>88</sup> Response to "Fireside Chat" on Defense, *supra* note 82, at 243 (in justifying using existing statutes to begin mobilization efforts, Roosevelt noted that "new . . . legislation . . . would take weeks and months . . . and would probably end up in practically the same thing we have on the statute books now").

<sup>89</sup> *Id.* at 242–43.

contracts.<sup>90</sup> Having reestablished the Advisory Commission to the Council of National Defense, Roosevelt almost immediately signaled an interest in pluralist accommodation by appointing a mix of familiar, high-profile individuals with experience in business, labor, and government—from Edward Stettinius to William Knudsen and Leon Henderson.<sup>91</sup> In doing so, he rejected advice from those who believed Roosevelt would do better with an “impartial,” technocratic tribunal.<sup>92</sup> This was decidedly not what the President had in mind. Instead, the Commission was an indication of both the risks of domestic discord the President perceived with a more technocratic approach and an early indication of how the Administration was beginning to approach mobilization.

Early involvement from business signaled the White House’s disinclination to pursue a more confrontational strategy. Executive branch officials did not set in motion measures to assert direct control over industrial production.<sup>93</sup> Commission members and staff officials from business, such as Knudsen and then-coordinator of purchases Don Nelson, went about smoothing communications between the Administration and companies, which were beginning to receive defense-related production contracts.<sup>94</sup> Although actual manufacturing output in the United States failed to change dramatically, a huge increase in federal defense funding was underway. By the end of fiscal year 1941, federal defense-related appropriations increased almost tenfold, from roughly \$2.5 billion in the previous year to over \$20 billion.<sup>95</sup>

Now fast forward to the end of the war. By 1945, Americans had realized astonishing feats of production with as much consequence for geopolitics as for domestic consumers. Annual rifle production, for example, had risen from 38,000 in 1941 to 1.6 million in 1945.<sup>96</sup> Amer-

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<sup>90</sup> See Memorandum from James Rowe, Jr. to President Franklin D. Roosevelt (Mar. 9, 1939) (on file with The George Washington Law Review) (expressing concern that a union-backed amendment to a military bill, providing that firms failing to honor their responsibilities under the National Labor Relations Act would not be eligible to bid on work done for the military under the bill, was being targeted by the Assistant Secretary of the Navy).

<sup>91</sup> See Response to “Fireside Chat” on Defense, *supra* note 82, at 245–48 (describing the background of each member of the Commission of the Council of National Defense).

<sup>92</sup> POLENBERG, *supra* note 26, at 157.

<sup>93</sup> See Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L.J. 553, 625–27 (1994) (noting how the Roosevelt Administration sought to avoid direct governmental control over businesses).

<sup>94</sup> See POLENBERG, *supra* note 26, at 9 (noting the crucial role Nelson played in relations between the government and businesses).

<sup>95</sup> See JOHN MORTON BLUM, *V WAS FOR VICTORY: POLITICS AND AMERICAN CULTURE DURING WORLD WAR II* 91 (1976).

<sup>96</sup> Mark Harrison, *The Economics of World War II: An Overview*, in THE ECONOMICS OF

ican factories went from building roughly 1,400 combat aircrafts a year in 1941 to 74,000 in 1944.<sup>97</sup> The annual number of major naval vessels built rose to 2,247 in 1944 from 544 just three years earlier.<sup>98</sup> At the same time, American economic capacity also played a direct role in geopolitics through economic and military aid. In the midst of war, the United Kingdom and the Soviet Union fought in large measure because of American assistance. American industry delivered to the Soviets half a million tons of rails, which the Soviets used to lay more railroad tracks than had been built during the entire period between 1928 and 1939.<sup>99</sup> By 1944, Americans were providing nearly thirty percent of all the military equipment used by the British armed forces.<sup>100</sup>

Profound social and economic consequences for Americans arose from the production increases necessary to supply such equipment. Across large Eastern and Midwestern cities, farms in the Plains and in the South, and in the states with expanding populations in the West, millions of American workers began earning far larger sums than they had been previously—working in armament factories or farms exporting food to Allied countries.<sup>101</sup> Their paychecks allowed them to participate in a resilient consumer economy that continued to function throughout the war years.<sup>102</sup> In constant (1990) dollars, the real gross domestic product (“GDP”) of the American economy nearly doubled from about \$800 billion in 1938 to almost \$1.5 trillion by 1945.<sup>103</sup> As a result, even consumer expenditures (in adjusted dollars) rose about twelve percent between 1939 and 1944.<sup>104</sup> Indeed, by 1945 the United States had become what one observer described as the wealthiest country that had ever existed, with an economy almost equal in its productive capacity to that of the rest of the world combined.<sup>105</sup>

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WORLD WAR II: SIX GREAT POWERS IN INTERNATIONAL COMPARISON 1, 15 (Mark Harrison ed., 1998).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> KEEGAN, *supra* note 5, at 218.

<sup>100</sup> *Id.*

<sup>101</sup> See BLUM, *supra* note 95, at 92 (“Business and farm profits were rising, as were wages, salaries, and other elements of personal income.”).

<sup>102</sup> *Id.* at 92.

<sup>103</sup> Harrison, *supra* note 96, at 10–11. Comparable figures for the United Kingdom show modest growth from \$284 billion in 1938 to \$331 billion by 1945. German real GDP went from \$351 billion in 1938 to \$437 billion by the end of the war. *Id.*

<sup>104</sup> See GULICK, *supra* note 65, at 67.

<sup>105</sup> KEEGAN, *supra* note 5, at 219.

Achieving these results implicated serious organizational challenges. The federal government would need laws authorizing the collection of new revenue in order to finance war-related expansion, as well as an expanded administrative system credibly signaling the capacity to collect such revenue in order to pay debt obligations.<sup>106</sup> Explosive growth in production called for a system of coordination and priority-setting in the allocation of scarce supplies—including both manufactured goods and raw materials. Facing an analogous coordination problem in World War I, the Wilson Administration had created an administrative body, with Bernard Baruch at its apex,<sup>107</sup> but this was largely dismantled at the end of the war.<sup>108</sup>

Some two decades later, the administrative and political challenges now confronting the federal government involved both the production of weapons and the maintenance of domestic welfare. The fate of the domestic economy could do much to determine the intensity and persistence of domestic support for the war. Although many citizens understood the potential for conflict in the Pacific and Europe, they did not necessarily understand the nature of American strategic interests that would make it necessary to engage in the stark trade-offs associated with war.<sup>109</sup> Even Roosevelt's allies in Congress wondered how the Administration would handle assertions that "we are not at war, [so] why become hysterical?"<sup>110</sup> Longtime New Deal supporters raised concerns about both the material implications and human consequences of war. Congresswoman Caroline O'Day, for example, eschewed Administration entreaties to vote for the neutrality bill, writing the President that she could not "think it right for our country to furnish arms or implements of war and slaughter to other nations."<sup>111</sup> Roosevelt would need to count on his unusual capacity to narrate developments abroad to advance American interests.

That capacity would not be enough. In an environment where millions of Americans had lived through the painful economic ordeal

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<sup>106</sup> Cf. Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 803–32 (1989).

<sup>107</sup> BRINKLEY, *supra* note 38, at 178.

<sup>108</sup> See DICKINSON, *supra* note 4, at 81.

<sup>109</sup> See KENNEDY, *supra* note 6, at 432–34 (explaining the Roosevelt Administration's concerns regarding skepticism about war from lawmakers and the public).

<sup>110</sup> Letter from Congresswoman Mary T. Norton, Chair, House Comm. on Labor, to First Lady Eleanor Roosevelt (Jan. 21, 1941) (on file with The George Washington Law Review) (internal quotation marks omitted) (discussing a possible "Home Defense Commission").

<sup>111</sup> Letter from Congresswoman Caroline O'Day to President Franklin D. Roosevelt (July 7, 1939) (on file with The George Washington Law Review).

of the Great Depression, the Administration understood it needed to fashion a means through which to harmonize war requirements with the needs of a consumer economy.<sup>112</sup> Doing so would require the administrative capacity to protect consumers from the most severe scenarios involving inflation that could arise in light of the contemplated rapid growth in military production (scenarios that could also bedevil war production more directly).<sup>113</sup> The Administration also anticipated the value of protecting some flow of consumer goods—though subject to rationing—from American factories and farms to the domestic economy.<sup>114</sup>

Unquestionably, the New Deal experience had begun to reshape some aspects of American federal governance.<sup>115</sup> But if one expected that by the late 1930s the capacity of the federal state had matured enough to make these tasks relatively uncomplicated, reality was in fact more daunting for the Roosevelt Administration. The New Deal had indeed created a new organizational landscape within the federal government, in which agencies such as the Food and Drug Administration (“FDA”) assumed much of their modern character.<sup>116</sup> Social Security became a reality.<sup>117</sup> The President fashioned a long-lasting coalition for winning presidential elections, but by his second term its counterpoint had emerged in the form of a conservative coalition of Southern Democrats and business-oriented Republicans in Congress.<sup>118</sup>

Still, for all its significance, the New Deal did *not* entirely resolve the contested position of federal agencies in American life. As one

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112 Roosevelt eventually created the Office of Price Administration to harmonize rationing for war with consumer demands. See Meg Jacobs, “How About Some Meat?": *The Office of Price Administration, Consumption Politics, and State Building from the Bottom Up, 1941–1946*, 84 J. Am. Hist. 910, 919–23 (1997) (discussing how the OPA attempted to balance war requirements with the needs of the domestic economy).

113 For a general discussion of these concerns as viewed by some of the participants at the time, see SAMUEL I. ROSENMAN, *WORKING WITH ROOSEVELT* 333, 357–58 (1952). See also POLENBERG, *supra* note 26, at 22–24, 88–89 (discussing the extraordinary priority that the Administration attached to controlling inflation).

114 See GULICK, *supra* note 65, at 116–17 & n.11 (describing “the major defense of the civilian against unnecessary hardships” as a major priority of the President).

115 See KENNEDY, *supra* note 6, at 363–81 (discussing how the New Deal impacted the United States).

116 See DANIEL CARPENTER, *REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA* 80–117 (2010).

117 See Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935).

118 See generally ERIC SCHICKLER, *DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS* 136–88 (2001) (discussing the development and activities of the new “Conservative Coalition” in Congress from 1937–1952).

observer put it, "[t]he federal bureaucracy had expanded considerably in the 1930s, but very little of that growth had enhanced the state's capacity to administer industrial production."<sup>119</sup> Given this difficulty, it was conceivable that history could have moved in a range of different directions. Conflict amounting to a stalemate over the powers of federal administrative agencies could have persisted, complicating mobilization in a manner akin to the experience of other countries. Americans could have tolerated a leaner federal government, more heavily dependent on states to engage in functions currently viewed as relatively routine federal roles. Even taking into account the war, history could have taken a different course. The President and his allies could have pursued more radical change, undermining separation of powers or seeking closer control of industrial activity.<sup>120</sup>

*B. Theory: External Pressure, Domestic Institutions, and Friction*

To think systematically about what happened next, consider a few plausible theoretical presumptions about the likely relationship between law, politics, and the institutions of a nation-state such as the United States. These premises cast in stark relief both the opportunities and difficulties reformers faced in the administrative realm. They also link our discussion of the evolving American administrative state in wartime to a broader theoretical literature involving the evolution of the state, and of law and public organizations within the state.<sup>121</sup>

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<sup>119</sup> BRINKLEY, *supra* note 38, at 177.

<sup>120</sup> See *id.* at 175–76. As just one example of the voices calling for more dramatic and long-term reforms in the relationship between government and private industry, Roosevelt ally and Federal Communications Commission Chairman Clifford Durr (writing in 1943) explained it thus:

We have learned already that we cannot obtain the production we need for waging the war as an undirected by-product of what we commonly refer to as "sound business principles." Neither can we expect such by-product to furnish us after the war with the standard of living we shall be warranted in expecting . . . There must be some over-all source of direction more concerned with [these] objectives . . . than with the profits or losses of individual business concerns.

Clifford J. Durr, *The Postwar Relationship Between Government and Business*, 33 AM. ECON. REV. (PAPERS & PROC.) 45, 47 (1943).

<sup>121</sup> This discussion of theory complements the historical narrative by making transparent to the reader the basic premises used to explain institutional developments and generating inferences about the likely consequences or antecedents of particular events. I return to these premises in the course of exploring the significance of particular developments, e.g., the consequences of Roosevelt's choice not to pursue direct industrial control. Without basic premises such as bounded rationality and the possibility of partial agency autonomy arising from civil servants' identification of their own personal goals with those of the agency, it would be more difficult to make sense of why certain interest groups feared growth in agency power, or why Roosevelt and



First, one may presume that the United States, like many other nation-states, responds to *external pressures from the international system as well as domestic institutions, interests, and public priorities*.<sup>122</sup> This is especially likely to be true in the United States, where institutions are assumed to constrain public and private action and pluralist conflict among organized interests drives some (though not all) legal and policy changes.<sup>123</sup> For example, while democratic pressures do not determine every aspect of the policymaking agenda, policymakers are constrained by public priorities in the American system.<sup>124</sup> Moreover, organized interests representing business and labor can impose considerable costs on policymakers by affecting (though not necessarily determining) public responses, either by increasing the risk of policymakers losing elections or appointed office or by frustrating their ability to enact preferred policies.<sup>125</sup>

It would be difficult to reject the relevance of such practical constraints when explaining the evolution of American institutions. Doing so would require heavy reliance on unrealistic assumptions playing down the contingency of domestic politics—the risks of conflict, whether involving political strategy within institutions or violent tensions about those institutions themselves. It would also require disregarding some of the strikingly different legal arrangements that some countries create to deal with domestic disputes or mediate the relationship between the state and individuals or organizations. The history of war and strategic conflict is replete with examples of states that are rife with internal conflict or that fail to implement effectively a strategy that appears warranted given its external context.<sup>126</sup>

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his allies sometimes frantically shifted bureaucratic responsibilities and arrangements without a plan or much public explanation.

<sup>122</sup> See generally O'Connell, *supra* note 34 (discussing national security reactions following 9/11).

<sup>123</sup> See MARIANO-FLORENTINO CUÉLLAR, *GOVERNING SECURITY: THE HIDDEN ORIGINS OF AMERICAN SECURITY AGENCIES* 14 (2013); cf. AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC 52–53* (1999) (arguing that the “evolution of national security agencies is driven by institutional birthmarks, by the constellation of political interests and capabilities, and by events”).

<sup>124</sup> See KENNEDY, *supra* note 6, at 432–34 (explaining the Roosevelt Administration's concerns regarding skepticism about war from lawmakers and the public).

<sup>125</sup> Cf. Terry M. Moe, *Power and Political Institutions*, 3 *PERSP. ON POLITICS* 215, 216–17 (2005) (discussing the institutional arrangement of rules, incentive structures, and monitoring mechanisms that facilitate cooperation between parties and their representatives).

<sup>126</sup> Cf. Kenneth A. Schultz, *Domestic Opposition and Signaling in International Crises*, 92 *AM. POL. SCI. REV.* 829, 832–34 (1998) (comparing wartime success of nations with varying levels of internal conflict and dissent).

Second, such internal conflict could arise specifically around *resources for the expansion of state capacity*. That is, nation-states depend on resources, including tax receipts, legal authority, personnel, and reputation, in order to increase their capacity (e.g., their ability to shape outcomes) in a pluralist system. Accordingly, expanding the scope of the state can require some mix of negotiation, accommodation, and pressure on nongovernmental actors to secure such resources.<sup>127</sup>

Third, a lack of at least rough alignment between the policies the state is attempting to implement and legal doctrine, as understood through the lens of prevailing ideas about interpretation and the role of the law, *could create, at a minimum, a kind of "friction" that imposes costs on policymakers*. Although executives or agencies can circumvent many legal constraints, a mismatch between legal constraints and preferred forms of executive action<sup>128</sup> creates a species of transaction costs in carrying out the executive's or agency's preferred policies.<sup>129</sup> Moreover, such friction could also arise despite considerable effort to harmonize administrative action with legal constraints if the resulting scheme nonetheless is difficult to mesh with prevailing ideas (if any) regarding the proper role of the national government, or the type of legal recourse generally expected as a constraint on government power—including, potentially, individualized hearings.<sup>130</sup>

Why might such friction arise? Social psychologists would readily acknowledge the affective costs that could emerge for an individual or an organization because of a lack of consistency with explicit or implicit norms.<sup>131</sup> Scholars more inclined to focus on political economy would also tend to recognize the risks of failing to comply with a given

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<sup>127</sup> Cf. SPARROW, *supra* note 37, at 272.

<sup>128</sup> Preferred because of external national needs, parochial policymaking agendas, or even public demands.

<sup>129</sup> See generally David B. Spence, *Agency Policy Making and Political Control: Modeling Away the Delegation Problem*, 7 J. PUB. ADMIN. RES. THEORY 199 (1997) (discussing the transaction costs imposed upon an agency by the Administrative Procedure Act's procedural rules); see also Mariano-Florentino Cuéllar, *Coalitions, Autonomy, and Regulatory Bargains in Public Health Law*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 326, 332–33 (Daniel Carpenter & David A. Moss eds., 2014).

<sup>130</sup> See generally JERRY L. MASHAW, *Bureaucratic Justice: Managing Social Security Disability Claims* 226 (1983) (discussing public expectations regarding the nature of legal recourse and constraints on executive action in the realm of administrative adjudication); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 246 (1997) (discussing the possibility of coordination among divergent or even competing groups in society around expectations regarding the availability of certain legal procedures).

<sup>131</sup> See generally Robert B. Cialdini & Noah J. Goldstein, *Social Influence: Compliance and Conformity*, 55 ANN. REV. PSYCHOL. 591, 596 (2004).

set of existing legal or institutional norms, not only because of the risk of sanctions,<sup>132</sup> but because the coalitions necessary to achieve a particular legal or policy goal often depend on attracting supporters reluctant to disavow existing norms.<sup>133</sup>

Fourth, the constraints arising from legal doctrine and ideology could arise in part because of the presence of *bounded rationality* among policymakers and the public. That is, one may presume that political decisionmakers approach problems in a manner that reflects bounded rationality, leaving some room for strategies that might seem ill-conceived or otherwise difficult to explain in a world of perfectly rational individual decisionmakers.<sup>134</sup> Bounded rationality also makes it easier to see how individuals might identify with particular agencies or organizational cultures in pursuing their own interests.<sup>135</sup> Individuals whose rationality is bounded might also view legal decisions with uncertain consequences as constraints,<sup>136</sup> or they might deploy simple heuristics evaluating the desirability of legal procedures on the basis of whether they appear similar to practices previously deemed acceptable.

Finally, even in a system constraining policymakers, the federal agencies that played preeminent roles in wartime mobilization—like those that preceded them—could probably achieve a measure of *partial autonomy*.<sup>137</sup> This means, for example, that organized interests could fear changes in the administrative state that might empower agencies over time to act in a more autonomous fashion, even if business or industry would plausibly retain some degree of power.<sup>138</sup> Although agencies are not unitary actors, they can be usefully described

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132 See, e.g., Raymond Fishman & Edward Miguel, *Corruption, Norms, and Legal Enforcement: Evidence from Diplomatic Parking Tickets*, 115 J. POL. ECON. 1020, 1020 (2007) (analyzing how removal of diplomatic immunity from parking tickets reduced parking violations).

133 See generally DOUGLASS C. NORTH, JOHN JOSEPH WALLIS & BARRY R. WEINGAST, *VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY* (2009) (discussing the importance of social organization in formulating credible institutions and decisionmaking); Beth A. Simmons, *Compliance with International Agreements*, 1 ANN. REV. POL. SCI. 75 (1998).

134 See Bryan D. Jones, *Bounded Rationality and Political Science: Lessons from Public Administration and Public Policy*, 13 J. PUB. ADMIN. RES. & THEORY 395, 396–99 (2003).

135 See *id.*

136 See generally BRYAN D. JONES, *POLITICS AND THE ARCHITECTURE OF CHOICE: BOUNDED RATIONALITY AND GOVERNANCE* (2001) (discussing the various factors that influence decisionmaking).

137 See Cuéllar, *supra* note 129, at 333–35.

138 *Id.* at 332 (“Problems may still arise when policymakers harbor starkly different views from those prevalent in the private sector, because agencies may lack the capacity to resist restraints imposed on them . . . by interested parties.”).

as reflecting interests embodied in the priorities of coalitions, including their leaders and agency career staff (priorities that could, because of bounded rationality, be used as a heuristic by agency employees as a proxy for their own goals).

Taking these ideas into account, we can see that quite different configurations are possible for the administrative state. Its evolution would depend on parameters affected both by the exogenous shock of war and the strategy chosen by the Roosevelt Administration. Genuine administrative change was possible amidst the pressures associated with war. It is plausible to think (and for participants at the time to have inferred) that the war raised to some degree the probability of the Administration's success defending domestic federal actions in courts<sup>139</sup> and garnering support from a public still skeptical about external entanglement.<sup>140</sup> Beyond some threshold parameter, a greater and more legally uncontroversial role for federal administrative agencies could also dampen public hostility to the administrative state in the future. But the precise consequences of these changes for efforts to build greater federal agency capacity would depend not only on those parameters.

Consequences would follow, too, from choices made by the President and his allies. Perhaps a White House too confident of its prerogatives could risk the viability of changes in administrative government because of the friction that might arise if mobilization ignored existing interests, ideological attitudes, and legal norms. A more aggressive presidential strategy to take control of industry could precipitate extensive conflict with business. Even if the Administration had succeeded during wartime, conflict could have ensued over a postwar order that might have more permanently altered the extent of federal control over business and workplaces. By contrast, it was at least conceivable that the Administration and its congressional allies could achieve their wartime administrative goals by pursuing more of an accommodation with business and labor. Such a course would, however, disappoint committed New Deal reformers who believed the war would (given the aforementioned exogenous shock) embolden

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<sup>139</sup> See Epstein et al., *supra* note 73, at 9. The authors adopt a somewhat different definition of "war-related" than the one I pursue here (as my project seeks to expand somewhat the colloquial understanding of what counts as war-related, whereas the authors look to whether the genesis of the case was the war itself). Still, the results of their exhaustive, general-level, large-N study suggest the presence of positive wartime effects on the probability of government victories in court.

<sup>140</sup> See George Soule, *The War in Washington*, NEW REPUBLIC, Sept. 27, 1939, at 204, 205-06.

the Administration to pursue a more ambitious project of industrial planning and workplace democracy.<sup>141</sup>

To summarize, our theoretical discussion suggests at least three potentially important characteristics that could emerge for the administrative state during and immediately following World War II. Given the ability of a crisis as momentous as war to reshape the incentives of policymakers, to change public perceptions, and to restructure coalitions, the wartime period could turn out to represent a point of considerable inflection for the laws and norms governing the federal administrative state. Moreover, the changed perceptions and expectations of the public—along with the country's continued engagement in the world during the Cold War—could make it more likely that an expanded administrative state would persist over time. Finally, the aforementioned concept of friction can result in various kinds of costs for policymakers if they ignore certain legal, political, and ideological conventions. With these possibilities on the table, we can explore not only how much change was unleashed on the American scene as World War II loomed (and how durable it was), but also what considerations policymakers seemed to prioritize at a time of national crisis.

## II. UNDERSTANDING THE ADMINISTRATIVE STATE IN WORLD WAR II

World War II redrew national borders and scrambled geopolitical alliances. Politicians and lawyers drafted plans for a new system of postwar international institutions. The Cold War emerged. Within many countries, nation-states slowly rebuilt their social and physical infrastructures while confronting enormous changes in their societies. Addressing these consequences, the historian Richard Polenberg describes a world remade not only by the staggering direct impact of the conflict itself, but by the new jurisdictional lines reshaping international borders and the role of the state:

[For the] English, French, German, Russian, Chinese and Japanese people the war meant air raids, armies of invasion and occupation, devastation and terror, fields turned into battlefields. The war also remade the maps of Europe and Asia: some countries disappeared, others gobbled up their neighbors, and still others were eventually split in two. Em-

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<sup>141</sup> Thurman Arnold, *How Monopolies Have Hobbled Defense*, *READER'S DIGEST*, July 1941, at 51, 55.

pires were lost, great powers became second-rate powers, and whole systems of government were overturned.<sup>142</sup>

Americans were spared invasion, the truncating of national territory, or the complete break with the past in social organization.<sup>143</sup> But the United States nonetheless also endured stark changes in social organization and witnessed major social transformations.<sup>144</sup> For example, between 1941 and 1943 five million women joined the workforce, with wages for women working in factories rising by fifty percent in those two years.<sup>145</sup> Vast numbers of African Americans migrated to Northern, Midwestern, and Western cities, and the number of individuals in the military skyrocketed.<sup>146</sup>

Receiving far less attention were profound and lasting changes involving the federal administrative state that implemented the law on behalf of the public. These changes repeatedly interacted with the more familiar social changes that Americans lived through as their country became a preeminent global power and adapted its domestic institutions accordingly.

#### A. *New Wartime Agencies Overseen by the White House*

Between 1940 and 1945, the federal administrative state grew into a means of coordinating industrial production and managing macroeconomic activity.<sup>147</sup> Of the dozens of wartime agencies that the Roosevelt Administration forged, the War Production Board ("WPB") and the Office of Price Administration ("OPA") were perhaps the ones empowered to make decisions of greatest consequence for Americans.<sup>148</sup> Although the White House Office of Emergency Management ("OEM") served as an "incubator" for these agencies during the initial stage of mobilization,<sup>149</sup> both later became formally independent, and the OPA acquired statutory authority after the Ad-

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<sup>142</sup> See POLENBERG, *supra* note 26, at 239.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> BLUM, *supra* note 95, at 95.

<sup>146</sup> See SPARROW, *supra* note 72, at 5, 114.

<sup>147</sup> See Response to "Fireside Chat" on Defense, *supra* note 82, at 245-47 (Roosevelt discussing the authority granted to the Council of National Defense to coordinate everything from industrial production to farm products to consumer prices).

<sup>148</sup> See BRINKLEY, *supra* note 38, at 183 ("The next morning the 'WPB,' the most important . . . production agency of the war, began its troubled life."); Jacobs, *supra* note 112, at 910 ("Established . . . to administer a system of rationing and price controls, OPA came to loom larger than any other wartime agency . . .").

<sup>149</sup> See DICKINSON, *supra* note 4, at 120-21 ("[T]he OEM served as the administrative umbrella that eventually sheltered almost all of the nation's wartime agencies.").

ministration secured support for the Emergency Price Control Act ("EPCA")<sup>150</sup> in early 1942.<sup>151</sup> Throughout most of their existence, however, the WPB and OPA were subject to oversight by new entities within the Executive Office of the President<sup>152</sup>—entities that allowed high-profile Roosevelt appointees such as Jimmy Byrnes to act as quasi-adjudicators for conflicts arising from overlapping agency jurisdictions.<sup>153</sup>

These agencies were forged from presidential authority. Before these agencies took their eventual form, it was the President who acquired—a year and a half before the attack on Pearl Harbor—enormous statutory authority to regulate economic production. On June 28, 1940, Congress passed an act to "expedite the national defense and for other purposes," providing that Army and Navy orders and contracts "shall, in the discretion of the President, take priority over all deliveries for private account or for export."<sup>154</sup> Lawmakers amended the law in May 1941 to confer on the President the power to allocate materials in short supply "in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."<sup>155</sup> Through enactment of the Second War Powers Act<sup>156</sup> in 1942, the President's power grew further to encompass the allocation of any "material or facilities" whenever the President believed that the fulfillment of requirements for the defense of the United States would result in a shortage in the supply of such material or facilities.<sup>157</sup> No provision was made in the statute for an administrative structure to govern this far-reaching power; instead, the President was given authority to delegate this power in any manner.<sup>158</sup>

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<sup>150</sup> Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23.

<sup>151</sup> *Id.*

<sup>152</sup> DICKINSON, *supra* note 4, at 120–23.

<sup>153</sup> *See id.* at 118 (noting that Byrnes "functioned essentially as a judge, adjudicating . . . disputes on FDR's behalf").

<sup>154</sup> Act of June 28, 1940, Pub. L. No. 76-671, § 2(a), 54 Stat. 676, 676.

<sup>155</sup> Act of May 31, 1941, Pub. L. No. 77-89, 55 Stat. 236.

<sup>156</sup> Second War Powers Act, Pub. L. No. 77-507, 56 Stat. 176 (1942).

<sup>157</sup> After amendment, Section 2(a) of the 1940 Act read as follows:

Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

Second War Powers Act § 301.

<sup>158</sup> *See id.*

### 1. War Production Board

With the attack on Pearl Harbor came a reorganization of the administrative structure overseeing war production. On January 13, 1942, President Roosevelt established the WPB and granted it authority that went beyond previous boards.<sup>159</sup> Under the direction of a chairman, the WPB was authorized to be a central clearinghouse for all areas of procurement, production, and consumption. It replaced the Supply Priorities and Allocations Board and the Office of Production Management and became the lynchpin of an elaborate system to oversee production and allocation within the context of continued private ownership of industry.<sup>160</sup>

After several false starts in its attempts to harmonize priority-setting in administration during mobilization and wartime, the White House expected the new WPB would serve as an administrative nerve center for managing decisions about war production and procurement. The Executive Order creating the Board referenced five specific powers. First, the Board would "[e]xercise general direction over the war procurement and production program."<sup>161</sup> Second, the Chairman would exercise administrative control over federal agencies with relevant statutory authority in order to achieve the goals of the aforementioned procurement and production program.<sup>162</sup> The board was also responsible for reporting back to the President on the progress of war procurement and production, as well as performing other duties delegated by the President.<sup>163</sup>

Because the President had concentrated such a sprawling range of responsibilities in a single entity, the Board's statutory authority arose from a panoply of different statutory provisions. Even the agency's own lawyers found it difficult to disentangle the different

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<sup>159</sup> BRINKLEY, *supra* note 38, at 182.

<sup>160</sup> *See id.* at 182-83.

<sup>161</sup> Establishing the War Production Board in the Executive Office of the President and Defining Its Functions and Duties, 7 Fed. Reg. 329, 330 (Jan. 17, 1942).

<sup>162</sup> *Id.* The Chairman would essentially be free to deploy the legal authority of virtually any agency, as he was able to

determine the policies, plans, procedures, and methods of the several Federal departments, establishments, and agencies in respect to war procurement and production, including purchasing, contracting, specifications, and construction; and including conversion, requisitioning, plant expansion, and the financing thereof; and issue such directives in respect thereto as he may deem necessary or appropriate.

*Id.*

<sup>163</sup> *Id.*



statutes.<sup>164</sup> A portion of the Board's authority stemmed from the Priorities Statute.<sup>165</sup> Section 2(a) of the Priorities Statute was amended in 1941, delegating certain powers to the WPB's predecessor agency, the Office of Production Management. That amendment enabled the WPB to assign priority to "deliveries of material under contracts or orders of the Army or Navy," or others that the President believed "vital to the defense of the United States."<sup>166</sup> The Priorities Statute granted broad power to prioritize contracts for the war effort, but it also enabled the President—and thus eventually the Board—to allocate materials needed in the war effort subject to only mild statutory constraints.<sup>167</sup> In addition, Section 2(a) was amended in 1942 and incorporated into the Second War Powers Act.<sup>168</sup> This statute not only criminalized violations of priority ratings and other orders and subjected violators to civil injunction proceedings, it also expanded the President's power to allocate facilities, rather than simply materials, in connection with war efforts.<sup>169</sup> Finally, the Requisitioning Act of 1941<sup>170</sup> enlarged the President's power to requisition equipment, supplies, and munitions when he deemed it necessary for the national defense.<sup>171</sup>

In addition to overseeing public contracting, the Board issued a variety of regulatory rules and orders that allowed it—among other things—to govern how businesses set priorities in fulfilling contracts. Controlled materials plans ("CMP"), for example, governed access to certain controlled materials by "persons outside of the Claimant Agencies and the War Production Board."<sup>172</sup> The Requirements Committee of the War Production Board, acting through its chairman, technically controlled the allotment of a given amount of controlled

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164 Two agency lawyers undertook just such an effort in 1944, acknowledging in the process the difficulty of discerning the full extent of the Board's overlapping delegations of statutory powers. John Lord O'Brian & Manly Fleischmann, *The War Production Board Administrative Policies and Procedures*, 13 GEO. WASH. L. REV. 1, 1–2 (1944).

165 Act of June 28, 1940, Pub. L. No. 76-671, 54 Stat. 676.

166 O'Brian & Fleischmann, *supra* note 164, at 10.

167 *Id.* at 11.

168 *Id.* at 12.

169 *See id.* at 12–13 (describing how the statutory provisions of the Second War Powers Act gave the federal government the power, for example, to allocate the facilities of a particular business exclusively to meeting military contracts).

170 Requisitioning Act of 1941, Pub. L. No. 77-274, § 1, 55 Stat. 742, 742.

171 O'Brian & Fleischmann, *supra* note 164, at 13.

172 CMP Regulation 1, 8 Fed. Reg. 482, 482 (Jan. 13, 1943). The Claimant Agencies included the War Department, Aircraft Resources Control Office, Office of Rubber Director, National Housing Agency, and others, and the controlled materials governed by the regulation were steel, copper, and aluminum. *See* CMP Regulation 1, 8 Fed. Reg. at 483.

materials to various agencies or industries.<sup>173</sup> The WPB also played the pivotal role in rationing,<sup>174</sup> though responsibility for consumer-related rationing was delegated to the OPA (discussed below). The Board could also requisition equipment that the President deemed necessary to the national defense.<sup>175</sup> The Board issued detailed regulations concerning its general power to requisition—and to delegate that power to the heads of other agencies.<sup>176</sup> These regulations centered largely on compensation, and they provided for administrative review of compensation determinations.<sup>177</sup>

To enforce its orders, the Board could deploy a mix of powers. So-called “suspension orders” could bar companies from receiving future contracts and, even more dramatically, deprive them from using a host of industrial facilities (even if privately owned) that were considered strategically important.<sup>178</sup> Suspension orders were used primarily before passage of the Second War Powers Act in March of 1942.<sup>179</sup> Thereafter, WPB began taking advantage of new statutory provisions explicitly establishing criminal and other penalties, as well as relying on referrals to the Justice Department for civil injunctions or criminal proceedings.<sup>180</sup>

To oversee the Board’s work, Roosevelt chose Don Nelson, an unflappable former Sears purchasing executive.<sup>181</sup> The enormous

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<sup>173</sup> *Id.* at 483.

<sup>174</sup> *See, e.g.*, 7 Fed. Reg. 1632 (Mar. 3, 1942) (Part 1111—Rationing of New Commercial Motor Vehicles).

<sup>175</sup> *See* O’Brien & Fleischmann, *supra* note 164, at 10–11.

<sup>176</sup> The Chairman of the WPB or the agency or department head became the “Requisitioning Authority” when exercising this power. *See* 7 Fed. Reg. 5746 (July 28, 1942).

<sup>177</sup> The framework governing compensation for requisitioning was an open-ended standard if there ever was one, though it was subject to judicial review. The standard provided:

As promptly as practicable after property has been requisitioned, the Requisitioning Authority shall make a preliminary determination of the fair and just compensation to be paid for such property. It shall, to the extent practicable, give notice of such determination to all persons known to have or claim an interest in the property requisitioned. Within 30 days after such notice, any claimant may file written objections to such preliminary determinations, specifying in reasonable detail the grounds for his objection.

*See id.*

<sup>178</sup> *See* 8 Fed. Reg. 6419 (May 18, 1943).

<sup>179</sup> *See* O’Brien & Fleischmann, *supra* note 164, at 46–49.

<sup>180</sup> *See id.* at 46, 50–52.

<sup>181</sup> BRINKLEY, *supra* note 38, at 184. Nelson was already playing a subordinate role in the previously existing but much-criticized Supply Priorities Allocation Board. Because of his ability to make both progressive New Deal partisans and business executives feel as though he generally supported their views, Nelson had emerged from the early phases of war planning with a more positive reputation—both within government and outside it—compared to others involved in the war effort. *See id.* at 183.

scope of the Board's contracting, policy implementation, and enforcement responsibilities underscore some of the challenges Nelson faced when Roosevelt appointed him the Board's Chairman.<sup>182</sup> The Executive Order authorizing the WPB conferred to the Chairman all the statutory powers for war-related industrial coordination lodged in the President, but it did not specify a structure.<sup>183</sup> Therefore, Nelson had wide latitude in setting it up.<sup>184</sup> Initially, the WPB consisted of divisions of Purchases, Production, Materials, Labor, Civilian Supply, and Industry Operation, as well as a Requirements Committee, an Office of Progress Reports, and a Planning Committee.<sup>185</sup> The structure was reorganized in July 1942 as the main focus of the organization shifted from converting civilian production to military production to aligning production with military needs.<sup>186</sup> The WPB would implement its decisions by specifying provisions in large government contracts that could then be enforced against the private sector.<sup>187</sup> Supplementing the strategy of using contracts to administer production decisions, the WPB also viewed itself as retaining a measure of authority to issue orders—which could be enforced through other agencies—against the use of particular raw materials or manufactured goods for unapproved purposes.<sup>188</sup> As consumer rationing responsibilities moved to the OPA,<sup>189</sup> the WPB came to be less focused on representing consumer concerns.<sup>190</sup> The OPA could then make decisions about how to use its nationwide capacity for routine enforcement in coordination with the WPB. Where disputes arose, they could be mediated by the White House coordination entities described below.

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<sup>182</sup> *Id.* at 183, 186.

<sup>183</sup> Exec. Order No. 9024, 7 Fed. Reg. 329 (Jan. 16, 1942).

<sup>184</sup> BRINKLEY, *supra* note 38, at 183 (noting the Nelson had absolute power over production and procurement, and authority second only to the president).

<sup>185</sup> See DONALD M. NELSON, *ARSENAL OF DEMOCRACY: THE STORY OF AMERICAN WAR PRODUCTION* 142, 203–04 (De Capo Press 1973) (1946); see also BRINKLEY, *supra* note 38, at 183 (discussing tensions within the WPB); BUREAU OF THE BUDGET, *supra* note 45, at 109–10.

<sup>186</sup> See BUREAU OF THE BUDGET, *supra* note 45, at 120, 122–23, 133.

<sup>187</sup> See NELSON, *supra* note 185, at 208 (“We had authority to force a manufacturer to accept a contract, and we occasionally employed it. We had authority to requisition private property for the war, and at times we did just that. We had authority to stop the production of all kinds of goods, and we certainly used it up to the hilt.”).

<sup>188</sup> *Id.* Given the limited statutory authority under which the work of the WPB was occurring, almost any plausible account under which the WPB might possess such residual authority to issue orders would involve inherent presidential powers. See generally O'Brian & Fleischmann, *supra* note 164, at 38–40 (explaining the basic procedures of the WPB).

<sup>189</sup> See BRINKLEY, *supra* note 38, at 147.

<sup>190</sup> See GULICK, *supra* note 65, at 116 n.11 (describing the “checkered career” of consumer protection within the WPB).

The procedure for decisionmaking in the WPB required Nelson and his colleagues to weigh technical as well as political considerations. Synthetic rubber policy showcases both concerns. Rubber was necessary for the civilian economy and a high priority item for the Army and the Navy, despite their erstwhile insistence that it was not a priority.<sup>191</sup> The United States lost access to most supplies of natural rubber after Pearl Harbor.<sup>192</sup> The United States could produce synthetic rubber domestically, but it lacked sufficient facilities.<sup>193</sup> In such a situation, the first step was to find out the scope of the shortage, which meant evaluating available supplies and projected need. Nelson commissioned a report from the newly appointed head of the rubber branch, Arthur Newhall.<sup>194</sup> Nelson and the WPB then used this report, as well as reports from the military services and the Civilian Supply Division of the WPB, to develop a plan to increase production of synthetic rubber.<sup>195</sup> The WPB approved this plan on March 9, 1942.<sup>196</sup> Nelson used the information from his planners to determine what the "essential" amount of rubber was and set the cap there—not at the amount the economy could have actually produced—in order to avoid taking resources away from other aspects of the war economy.<sup>197</sup>

An initial challenge for the WPB in this context showcases the pressure to reconcile technical considerations with pluralist accommodation, even in wartime. Early in the mobilization process, the Board considered whether federal contractors should manufacture synthetic rubber from petroleum or alcohol.<sup>198</sup> From a technical perspective, it was clear that alcohol was a more expensive precursor, so the Board initially preferred petroleum.<sup>199</sup> The farm lobby, however, sought to promote the use of alcohol because it was derived from farm product.<sup>200</sup> The Agriculture Committee in the Senate pushed to have all synthetic rubber made from alcohol, and Nelson had to testify in front of seventeen congressional committees about the rubber problem.<sup>201</sup> Congress even passed a law putting rubber production outside the

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191 See NELSON, *supra* note 185, at 290, 306.

192 *Id.* at 291.

193 See *id.* at 291–93; see also BUREAU OF THE BUDGET, *supra* note 45, at 293 ("Over ninety percent of our crude rubber imports were cut off when the Japanese attacked Pearl Harbor.").

194 NELSON, *supra* note 185, at 294.

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.* at 296.

199 *Id.*

200 *Id.* at 297.

201 *Id.*

purview of the WPB, but the President vetoed it.<sup>202</sup> Some individual citizens came to Washington to suggest new ways of producing rubber; they were, in accordance with existing WPB procedures for public consultation, given a chance to petition the WPB.<sup>203</sup> Nelson notes how the WPB at times had to face pressure from individuals who felt they were not being given sufficient attention, and who sought to mobilize public opinion or leverage relationships with legislative or executive branch policymakers to garner more attention for their (technically far from ideal) perspectives.<sup>204</sup> Meanwhile, the public battles over rubber continued in the form of a debate over gasoline rationing. In order to minimize the degradation of car tires, the largest civilian use of rubber, the WPB believed it was necessary to ration gasoline, but it failed to get presidential approval in a meeting in early August.<sup>205</sup> Other federal representatives, and members of the larger public, were skeptical about the need to ration gasoline and questioned whether there was indeed such a pronounced rubber shortage.<sup>206</sup>

As these developments played out, the President set up a special committee, headed by former World War I production czar Bernard Baruch, to evaluate the rubber situation.<sup>207</sup> The committee foresaw a shortage and recommended gasoline rationing, and it coordinated with the WPB in pushing through the plan for expanded production.<sup>208</sup> The WPB faced continued resistance from the Army and the Navy. Both organizations strenuously argued that rubber production would take away from other priorities.<sup>209</sup> The final decision regarding expanding production came down to the President, who approved the expansion on the WPB's recommendation that such expansion would not interfere with other priorities.

The rubber episode reflects the significance of two early decisions made by the White House. The first was to focus on pluralist accommodation of distinct interests—including, crucially, those represented

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<sup>202</sup> See *The President Vetoes a Bill to Promote the Production of Synthetic Rubber from Grain Alcohol*, August 6, 1942, in PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 82, at 312 (1942); see also 88 Cong. Rec. 6752 (1942) (statement of President Franklin D. Roosevelt).

<sup>203</sup> See NELSON, *supra* note 185, at 298.

<sup>204</sup> See *id.* at 298–301.

<sup>205</sup> *Id.* at 303–04 (noting meeting was held “about August 1”).

<sup>206</sup> *Id.* at 303.

<sup>207</sup> *Id.* at 305.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 305–06.

by military bureaucracies themselves.<sup>210</sup> The second was to experiment with structural changes—as with the creation of an ad hoc rubber committee, or with the expansion of White House staff responsibilities discussed below—that could help strike a balance between pressures emanating from organized interests and American strategic concerns. Even at the height of its formal authority, the WPB was not insulated from politics, or even from the interests of other agencies.

From an administrative perspective, the result was messy. Still, the WPB was successful in working with the private sector and labor to meet American military needs without squelching the viability of a robust domestic consumer economy. Internally, the WPB was characterized by the kind of bureaucratic conflict that can arise in organizations with little shared agreement about culture and different power centers representing industry and government.<sup>211</sup> Externally, perhaps the WPB's greatest limitation was its inability to put into practice the formal authority it harbored over the powerful Army-Navy Munitions Board.<sup>212</sup> The WPB still played the preeminent role in the setting of supply priorities that could realize the goals conveyed by the Munitions Board, and, in the process, it worked with the OPA and other agencies to balance the military's priorities with consumer concerns.<sup>213</sup> But the Munitions Board, in close partnership with the emerging cadre of large industrial military contractors, remained almost unencumbered in deciding on the size and substance of munitions priorities.<sup>214</sup> The extent of the WPB's deference in this context thus diminished considerably the agency's ability to use the considerable discretionary flexibility it had been initially delegated by the President.

As the war wound down, the performance of the WPB became something of a Rorschach test for domestic players with different views about the role of the federal government in administering economic activity. For advocates of far-reaching federal industrial coordination across the economy who believed it was possible to reconcile technocratic efficiency and democratic responsiveness, the experience

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<sup>210</sup> See, e.g., JEFFERY M. DORWART, *EBERSTADT AND FORRESTAL: A NATIONAL SECURITY PARTNERSHIP, 1909–1949*, at 50–53 (1991).

<sup>211</sup> See BRINKLEY, *supra* note 38, at 235–40.

<sup>212</sup> See *id.* at 186–88 (noting that Nelson “could [have tried] to seize control of procurement from the military . . . [but] [i]nstead . . . chose to try to work through the existing military agencies”).

<sup>213</sup> See *id.* at 186–89.

<sup>214</sup> See *id.*

with the WPB was hardly encouraging.<sup>215</sup> But for the various organizational players in industry and government who would shape the American response to the Cold War, the experience of World War II offered a precedent for coordinating large-scale production in a manner that met military needs while also taking into account political considerations.

## 2. *Office of Price Administration*

If the WPB appeared to function as a hybrid between a powerful, if not politically insulated, administrative bureau and an overseer of large government contracts, the OPA was in some respects remarkably similar to modern federal administrative agencies with nationwide statutory jurisdiction over many aspects of economic life. As a matter of formal legal authority, the OPA regulated prices and implemented rationing.<sup>216</sup> Its larger role in the panoply of wartime agencies, however, was to serve as advocate and implementer for policies designed to harmonize wartime constraints with the needs of a consumer economy.<sup>217</sup> It was comprised of five departments: rent, prices, rationing, enforcement, and administration. Different procedures governed the regulation of each of the OPA's three primary areas of responsibility—rent control, general control on prices for consumer and industrial goods, and rationing of scarce commodities.<sup>218</sup> As with the modern EPA or OSHA, the OPA had national, district, and local offices, though policy decisions were concentrated in the national office.<sup>219</sup> The OPA initially operated under executive authority, and in early 1942, the OPA received a grant of statutory authority through the Emergency Price Control Act negotiated by the Administration with Congress.<sup>220</sup>

Given the nature of its responsibilities, perhaps it is not surprising that at times the OPA triggered scorn from organized interests and members of the public. Its first Administrator, former Securities and Exchange Commission ("SEC") Commissioner Leon Henderson, was particularly disliked by organizations representing farm and rural interests because of his perceived unwillingness to use discretionary authority to accommodate distinct economic conditions affecting

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<sup>215</sup> Cf. BRINKLEY, *supra* note 38, at 198–200 (discussing the perceived problems of the WPB as a model for broader industrial coordination).

<sup>216</sup> See Jacobs, *supra* note 112, at 914.

<sup>217</sup> *Id.* at 920–23.

<sup>218</sup> See *id.* at 914.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 914.

farmers.<sup>221</sup> Tensions between the OPA and farm interests persisted throughout the war, though such tensions were assuaged to some extent when subsequent administrators decided to accommodate some of the concerns in rural states.<sup>222</sup> Tensions also arose within the agency and between the bureau's civil servants and the larger public. Among other things, the OPA conducted investigations to clamp down on the use of gasoline for pleasure driving.<sup>223</sup> What was for some agency employees an exalted mission "hold[ing] the line against war profiteers, price gougers, greedy landlords, [and] violators of rationing regulations"<sup>224</sup> was for other employees—including erstwhile agency lawyer Richard Nixon—a stark demonstration of overweening bureaucratic meddling.<sup>225</sup>

It was true enough that most of the OPA's work proceeded from a set of implicit economic assumptions about how best to manage economic shocks in a manner that advances domestic social welfare.<sup>226</sup> By most accounts, the OPA proved only partially successful in controlling inflation.<sup>227</sup> It would be exceedingly difficult to argue, however, that an equal or greater degree of price stability would have ensued if the OPA had not played the role that it did, and it is instructive that policymakers at the time considered the OPA's role to be so central in maintaining a viable consumer economy in the midst of staggering (and partially debt-financed) increases in public sector consumption and military pressure for rationing.<sup>228</sup> Over time, agency officials sought to blunt harder edges of the OPA's rationing role by assuming the role as advocate for consumers in the interagency process, and even by appointing an "ordinary consumer and housewife" to the role of "Consumer Relations Adviser" within the agency.<sup>229</sup>

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221 Andrew H. Bartels, *The Office of Price Administration and the Legacy of the New Deal, 1939–1946*, Summer 1983, at 5, 14–16.

222 See *id.* at 18, 20–22.

223 See, e.g., THOMPSON, *supra* note 85, at 128.

224 Jacobs, *supra* note 112, at 910 (internal quotation marks omitted).

225 *Id.* at 910–11.

226 *Id.* at 915–16.

227 The OPA was bedeviled, for example, by the practice of changing product classifications or features in order to justify distinct prices. See Hugh Rockoff, *The United States: From Ploughshares to Swords*, in *THE ECONOMICS OF WORLD WAR II: SIX GREAT POWERS IN INTERNATIONAL COMPARISON* 81, 109–10 (Mark Harrison ed., 1998).

228 See BUREAU OF THE BUDGET, *supra* note 45, at 392 (OPA "became involved in disputes with the War Production Board . . . OPA contended that rationing programs should assure a distribution of the rationed commodit[ies] in accordance with consumer needs . . .").

229 GULICK, *supra* note 65, at 116 n.11.



The OPA's legal authority varied in scope, but it was epitomized by substantial grants of discretion to the Administrator—a matter that was ultimately subject to considerable litigation (discussed below). In order to fix rents, for example, the Administrator must first find that rent had increased in an area because of defense-related activities.<sup>230</sup> He would then declare it a “defense-rental area.”<sup>231</sup> The Administrator would then recommend that state or local authorities regulate the rent within sixty days.<sup>232</sup> If that did not occur, the Administrator could issue a regulation to set a maximum rent that was “fair and equitable,” taking into consideration prevailing rent for similar accommodations on or around April 1, 1941.<sup>233</sup> The EPCA established several grounds for individual exceptions, and landlords could petition for relief under one of these.<sup>234</sup>

With respect to prices more generally, the Act authorized the Administrator to set price ceilings that “in his judgment will be generally fair and equitable and will effectuate the purposes of this Act.”<sup>235</sup> He was obligated to give “due consideration” to prices during the time period from October 1 to October 15, 1941.<sup>236</sup> The Administrator adopted industry earnings standards and product standards by which to evaluate price ceilings.<sup>237</sup> Industry earnings standards took 1936 to 1939 as a baseline (or another time period if this was not fairly representative).<sup>238</sup> If costs went up such that income would decrease below this level (with some qualifications), the Administrator was required to raise the maximum price for the commodity.<sup>239</sup> Under the product standard, the Administrator had to raise the price ceiling if the marginal cost of producing any individual product rose above its price for the highest-cost firm “which [is] not included in the industry's high-cost marginal fringe.”<sup>240</sup> In litigation, and in a memo prepared for congressional committees, the OPA took the position that this process was essentially the only feasible way of accomplishing its statutory objectives.<sup>241</sup> The substance of the analysis contained in the memo

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<sup>230</sup> Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 2, 56 Stat. 23, 24–26.

<sup>231</sup> *Id.* § 2(b), 56 Stat. at 25.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* § 2(c), 56 Stat. at 26.

<sup>235</sup> *Id.* § 2(a), 56 Stat. at 24.

<sup>236</sup> *Id.*

<sup>237</sup> *See, e.g.,* Gillespie-Rogers-Pyatt Co. v. Bowles, 144 F.2d 361, 363 (Emer. Ct. App. 1944).

<sup>238</sup> *See id.* (citing S. REP. NO. 78-922, at 45, 47 (1944)).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* (internal quotation marks omitted).

<sup>241</sup> *Id.* at 364–66.

was later incorporated into the federal statutory scheme through the Stabilization Extension Act.<sup>242</sup>

Oversight of civilian rationing also became a major responsibility. In consultation with the White House, the WPB agreed to delegate authority involving the enforcement of consumer rationing.<sup>243</sup> Although the OPA did not directly determine which products should be rationed, it was consulted by the WPB and other relevant agencies on the substantive decision.<sup>244</sup> Once the agency with substantive jurisdiction placed an item on the ration list, the OPA implemented the decision.<sup>245</sup> Thus, for instance, the War Food Administration determined which food products to ration while the Department of Agriculture determined which agricultural commodities required rationing.<sup>246</sup> The OPA then ensured that the available "currency" to purchase a good (i.e., stamps) did not exceed the actual amount of the item available on the market.<sup>247</sup>

Similarly, removing an item from the ration list required the coordination of multiple agencies. A letter to James Byrnes, the Director of War Mobilization, from Marvin Jones, the War Food Administrator, described the following process: After a conference between himself, Byrnes, Fred Vinson (Director of Economic Stabilization), and James Brownlee (Acting Administrator of the OPA), Jones discussed a list of food to take off rationing with Byrnes and Vinson.<sup>248</sup> Jones then submitted the list to the OPA.<sup>249</sup> The OPA and the War Food Administration agreed on the list.<sup>250</sup> Jones then wrote to Byrnes and Chester Bowles (now OPA Administrator) on August 31, 1944, taking certain foods out of the rationing scheme.<sup>251</sup>

The EPCA created a formal procedure for enforcing the regulations and consulting the public, but the OPA also relied on broader appeals to the public, emphasizing patriotism and public education about the goals of the OPA to encourage compliance and seek public input.<sup>252</sup> Local boards had discretion in many areas, particularly re-

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242 Stabilization Extension Act of 1944, Pub. L. No. 78-383, 58 Stat. 632.

243 THOMAS G. MANNING, *THE OFFICE OF PRICE ADMINISTRATION: A WORLD WAR II AGENCY OF CONTROL* 25 (1960).

244 *Id.*

245 *Id.*

246 *Id.*

247 *Id.*

248 *Id.* at 33-35.

249 *Id.* at 34.

250 *Id.*

251 *Id.* at 35.

252 See generally Jacobs, *supra* note 112, at 910-13.

garding rationing as it affected individuals.<sup>253</sup> National policy was often amended to better reflect actual practice.<sup>254</sup> To initiate formal action against a person or entity suspected of violating any price, rent, or market regulation, the Administrator had to first send a warning letter.<sup>255</sup> If the violations were “willful,” the district court had jurisdiction to hear criminal proceedings, and could issue a suspension order barring the entity from selling the relevant commodities for up to one year.<sup>256</sup> Individuals who were overcharged could also sue.<sup>257</sup> Procedural constraints, moreover, governed agency administrative decisions. Anyone subject to a price or rent regulation could protest its application directly to the Administrator, who was required to respond to the protest within thirty days.<sup>258</sup> If the Administrator denied the request, the applicant could proceed to the Emergency Court of Appeals.<sup>259</sup> The court could only set aside a regulation if it found it to be illegal or “arbitrary and capricious”; in that case, the judgment would not go into effect for thirty days or until addressed by the Supreme Court.<sup>260</sup>

### 3. *White House Oversight and Quasi-Adjudication*

The ability to oversee the administrative machinery of government was enormously important to Franklin Roosevelt. A former subcabinet official in the Department of the Navy, President Roosevelt readily understood the vast amount of power exercised by the bureaucracy.<sup>261</sup> Roosevelt had previously been frustrated in his efforts to create an Executive Office of the President with the organizational capacity to manage the federal budget process and more formally coordinate policy.<sup>262</sup> He did not succeed in creating an Executive Office of the President until 1939, and in the meantime, he instead found it useful to change the organization of federal agencies as a substitute strategy.<sup>263</sup>

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<sup>253</sup> THOMPSON, *supra* note 85, at 16–18.

<sup>254</sup> For example, the gasoline eligibility committee granted local boards discretion, within a quota, to allow special gasoline rations to visit the sick or attend funerals. Local boards had been doing this anyway. *Id.*

<sup>255</sup> Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 205, 56 Stat. 23, 35.

<sup>256</sup> *Id.* § 205, 56 Stat. at 33, 35.

<sup>257</sup> *Id.* § 205, 56 Stat. at 34.

<sup>258</sup> *Id.* § 203, 56 Stat. at 31.

<sup>259</sup> *Id.* § 204, 56 Stat. at 31.

<sup>260</sup> *Id.* § 204, 56 Stat. at 32.

<sup>261</sup> See CUÉLLAR, *supra* note 123, at 83.

<sup>262</sup> See *id.* at 50.

<sup>263</sup> See *id.* at 82.

When the war in Europe entered its new phase in May 1940, Roosevelt was busy pressing for greater White House engagement in federal policymaking. The President spurned the highly centralized War Resources Board as a vehicle for coordinating government and private mobilization activity because it would (in his view) drain too much authority from his position: "I would simply be abdicating the presidency" under their model, he explained.<sup>264</sup> In the midst of planning for mobilization, the President sought a fine-grained understanding of developments in antitrust policy at the Department of Justice.<sup>265</sup> He wanted to know why the Attorney General had failed to pursue a grand jury investigation of the financial sources behind an "America First Committee" critical of the administration.<sup>266</sup> Cabinet agencies, too, sought to engage the White House. War Department officials readily acknowledged that domestic administrative concerns affected the war effort, and they became increasingly willing to write the President. In 1942, for instance, War Secretary Henry Stimson wrote President Roosevelt to highlight the extent to which the administrative exemption process governing domestic deferments could create enormous backlash among those conscripted into the military.<sup>267</sup> The conscripts' pay would be a pittance compared to the high wages that deferred agricultural laborers could command in such a tight labor market.<sup>268</sup>

By 1943, the documents describing White House engagement with day-to-day developments of regulation became even more commonplace. Whether the substance involved food production<sup>269</sup> or selective service,<sup>270</sup> the White House was routinely briefed on regulatory developments during this time. These and other matters sometimes

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<sup>264</sup> POLENBERG, *supra* note 26, at 6.

<sup>265</sup> See generally Letter from Thurman Arnold, Assistant Attorney Gen. (Antitrust), to Ralph Budd, Advisory Comm'n to the Council of Nat'l Def. (July 29, 1940) (on file with The George Washington Law Review).

<sup>266</sup> Memorandum from President Franklin D. Roosevelt to Francis Biddle, Attorney Gen. (Nov. 17, 1941) ("Will you please speak to me about the possibility of a Grand Jury investigation of the money sources behind the America First Committee? It certainly ought to be looked into and I cannot get any action out of Congress.").

<sup>267</sup> Letter from Henry Stimson, Sec'y of War, to President Franklin D. Roosevelt (Nov. 13, 1942).

<sup>268</sup> *Id.*

<sup>269</sup> Letter from Chester Davis, War Food Adm'r, to President Franklin D. Roosevelt, in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: 1943 THE TIDE TURNS 272-75 (Samuel I. Rosenman ed., 1950)

<sup>270</sup> Memorandum from Lewis B. Hershey, Dir., Selective Serv. Sys., to President Franklin D. Roosevelt (Feb. 19, 1943) (on file with The George Washington Law Review) (describing the need for regulatory rule to implement legislative changes on farm labor deferments).

created severe potential for interagency conflicts. Taking advantage of the newly created structure for an Executive Office of the President, Roosevelt responded by establishing a novel structure connecting the White House to administrative decisionmaking. Despite empowering Donald Nelson to exercise central authority on war production and coordination through the WPB, Roosevelt had earlier created a White House staff office to oversee Nelson.<sup>271</sup> Roosevelt found that initial arrangement wanting, so he pursued the kind of interagency coordination and involvement in administrative policymaking that came to characterize the latter part of the twentieth century. In the realm of war-related production and economic policy, Supreme Court Justice Jimmy Byrnes was hand-picked to lead the White House's oversight operation.<sup>272</sup> He described the President's instructions:

Jimmy, most of my time is devoted to the consideration of problems . . . connected with the conduct of war. It just isn't possible for me to devote sufficient time to the domestic problems. All these new agencies we have had to create mean an increasing number of jurisdictional conflicts which come to me for decision. I want you to settle those conflicts for me; I'll issue an executive order giving you power to settle them, and I'll let it be known that your decision is my decision.<sup>273</sup>

Byrnes worked with other White House aides (notably Samuel Rosenman) to ensure that the Office of War Mobilization empowered him to play precisely this role.<sup>274</sup> The Executive Order emphasized the Office's broad jurisdictional reach and its role in resolving the disputes that had by then begun to proliferate among entities that represented distinct priorities in an environment where policy decisions implicated both civilian economic interests and war production:

It shall be the function of the Office of War Mobilization, acting in consultation with the Committee and *subject*

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271 Cf. BUREAU OF DEMOBILIZATION, *supra* note 2, at 18 ("The functions of the Office for Emergency Management were to maintain coordination between the President and whatever defense agencies would be established . . . OEM was to be the 'eyes and ears' of the President.").

272 Luther Gulick, *War Organization of the Federal Government*, 38 AM. POL. SCI. REV. 1166, 1171 (1944).

273 JAMES F. BYRNES, *SPEAKING FRANKLY* 18 (1947).

274 Memorandum from James F. Byrnes, Dir., Office of Econ. Stabilization, to President Franklin D. Roosevelt (May 22, 1943) (on file with The George Washington Law Review) (describing the development of the Executive Order creating the Office of War Mobilization).

*to the direction and control of the President, . . . (a) To develop unified programs and to establish policies for the maximum use of the nation's natural and industrial resources for military and civilian needs, for the effective use of the national manpower not in the armed forces, for the maintenance and stabilization of the civilian economy, and for the adjustment of such economy to war needs and conditions; (b) To unify the activities of Federal agencies and departments engaged in or concerned with production, procurement, distribution or transportation of military or civilian supplies, materials, and products and to resolve and determine controversies between such agencies or departments . . . [and] [i]t shall be the duty of all such agencies and departments to execute these directives, and to make to the Office of War Mobilization such progress reports as may be required.*<sup>275</sup>

Although the war effort gave the White House a powerful reason to institutionalize greater capacity to review administrative action, demobilization also spurred White House engagement. Cuts in expenditures,<sup>276</sup> and questions about the speed and sequence of demobilization, left the White House with a range of dilemmas, as well as entry points to influence agency action. Presaging the prominent role of the Office of Management and Budget in advancing presidential control of the federal bureaucracy, President Truman's budget director Harold Smith worked to bolster Truman's influence on executive action.<sup>277</sup> Not only did Smith's priorities appear to comport with broad legal understandings of executive power, but he openly contemplated presidential interference in the affairs of agencies such as the Veterans Administration, even if the actions were politically motivated.<sup>278</sup>

Commentators today assign some credence to the idea that the President should refrain from routine engagement in "insignificant" agency actions—by which one might mean those decisions of insuffi-

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<sup>275</sup> Exec. Order No. 9347, 8 Fed. Reg. 7207 (June 1, 1943) (emphasis added).

<sup>276</sup> See News Release, Exec. Office of the President, White House, President Recommends \$80,000,000 Cut in Budgets of Eight Agencies (May 2, 1945) (on file with The George Washington Law Review).

<sup>277</sup> See Memorandum from Harold D. Smith, Dir., Bureau of the Budget, to President Harry S. Truman (May 3, 1946) (on file with The George Washington Law Review) (discussing techniques the President can use to pursue reorganization that would bolster his authority).

<sup>278</sup> Memorandum from Harold D. Smith, Dir., Bureau of the Budget, to President Harry S. Truman (Nov. 20, 1945) (on file with The George Washington Law Review) ("[I]f there are to be any changes made for political reasons [in a Veterans Administration's program] the President is the only person who can make such changes and none of his subordinates should do so.").

cient policy, legal, or political importance to be brought to the President's attention. Witness, for example, Peter Strauss's conception of the President as a distant "coordinator" rather than a routinely involved decisionmaker.<sup>279</sup> By contrast, Roosevelt's and Truman's Oval Office correspondence suggests a very different background norm, one where the President is routinely prodding agencies such as the Justice Department for action in particular cases.<sup>280</sup> Against this backdrop, President Roosevelt's desire for a more explicit, elaborate institutional structure to control agency agendas in the midst of a growing federal government during wartime is understandable. Indeed, one might observe that Roosevelt sought such capacity earlier, even well before wartime, but that Congress largely thwarted his efforts to expand starkly the White House staff.<sup>281</sup> War offered a new opportunity, and perhaps a heightened reason, to forge a White House-based structure to unify and manage agency activity directly.

The assertive White House role under Roosevelt and Truman constitutes one example of how wartime changes went far beyond simply the maturation of new agencies such as the WPB and the OPA. But how might one gauge the ambition and scale of the reforms attempted, particularly with respect to those two agencies, given how much the wartime crisis had changed the political landscape for the President? The historian Alan Brinkley has observed that during the latter period of the New Deal, when the President's agenda was increasingly bedeviled by the conservative coalition of Southern Democrats and business-oriented Republicans, executive branch policymakers reflected an eroding appetite for ideas that involved pronounced, federally led changes in the structure and ownership of business activity.<sup>282</sup> It is interesting to juxtapose the Roosevelt Administration's inclination to avoid direct federal ownership or control of war-related industries with the Truman Administration's attempt to seize a steel mill—and its legal strategy in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>283</sup>—some years later. *Youngstown* is an example of the opposite impulse—to seize direct control of industrial or economic activity—though admittedly on a small scale.<sup>284</sup> Of course, *Youngstown* is not unique to the era; Roosevelt himself presided over the seizure

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279 See Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704–05 (2007).

280 See *supra* notes 265–69 and accompanying text.

281 See CUÉLLAR, *supra* note 123, at 10.

282 See BRINKLEY, *supra* note 38, at 266–68; SHICKLER, *supra* note 118, at 136.

283 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

284 See *id.* at 583.

of the Montgomery Ward chain in 1944.<sup>285</sup> Still, those episodes stand out because they are exceptional—involving sustained labor strife during war, and an unusual tactic relative to the more pervasive strategy adopted by Roosevelt and continued by similarly burdened successors.<sup>286</sup>

That strategy involved using the administrative state to distribute public benefits and to regulate various aspects of economic activity against a backdrop of choices made by participants in private markets.<sup>287</sup> With rare exceptions, the course taken did not involve extensive federal positions acquiring equity in companies, or corporatist coordinating arrangements that treated private enterprise as an appendage of the state.<sup>288</sup> What assumed greater relative importance are thus the elements of the administrative state subject to evolutionary transformation—including a legal and organizational capacity to investigate, large contracts (especially, given their scale, military ones), and broad delegations of legislative authority to simplify administrative activities. And although the wartime agencies did not go as far as NIRA in empowering industry to make choices that deployed a mix of public and private authority, they did swell their ranks with so-called “dollar-a-year” men who brought with them the experience of serving as industry officials to domestic agencies.<sup>289</sup> Continued reliance on conventional regulation and administration in the midst of war is a major reason why change in the American political economy was evolutionary instead of revolutionary. What change occurred nonetheless left agencies capable of experimentation, flexibility, and cooperation with private entities—very much at odds with the orthodox image of “command and control” regulation.<sup>290</sup>

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285 See POLENBERG, *supra* note 26, at 175.

286 The President, for example, did not make it a priority to obtain statutory authority to seize control of industrial facilities, nor did he support broad arguments involving inherent presidential authority to seize such facilities in a routine fashion. It was not until 1943 that Congress even enacted (over the President's veto) the Smith-Connally War Labor Disputes Act, authorizing the President to take over plants that were needed for the war effort and which were stopped because of a labor dispute. See Gerard D. Reilly, *The Legislative History of the Taft-Hartley Act*, 29 GEO. WASH. L. REV. 285, 285 (1960).

287 See BRINKLEY, *supra* note 38, at 268.

288 See *id.*

289 See POLENBERG, *supra* note 26, at 91.

290 Such experimentation could arise, for example, from the basic fact that the universe of violations of regulatory rules was far greater than what agencies could police given scarce resources. Agencies' enforcement decisions could thus reflect a degree of priority-setting and de facto delegation (within constraints) to private entities. Far from being frowned upon by the judiciary, such experimentation has been legitimized to a degree in decisions such as *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), which acknowledged the legitimacy of agency choices setting



*B. Structural Changes in Public Finance, Staffing, and Strategic Functions Affecting Domestic Administration*

Before the outset of World War II, the limited amount of money in federal coffers constrained the capacity of the entire federal administrative apparatus. Yet here war worked a remarkable, and largely permanent, change. To put it simply, the era of mass taxation arrived during World War II. In the span of a few short years, the increase in the federal tax base was meteoric.<sup>291</sup> The percentage of the U.S. labor force paying income taxes went from less than fifteen percent in about 1940 to about sixty-five percent by 1945.<sup>292</sup> By contrast, at the height of World War I, the percentage of the labor force paying income taxes was scarcely above ten percent.<sup>293</sup> After a temporary peak of near fifteen percent, the percent of labor force taxpayers then declined to just over five percent for much of the period between the 1920s and the late 1930s.<sup>294</sup> At the same time, as Figure 1 in the Appendix shows, the percentage of U.S. GDP represented by federal income and corporate taxes skyrocketed, from about two percent in 1940 to sixteen percent by 1944.<sup>295</sup>

Even more telling as an indicator of the inflection point represented by the war, the percentage of the labor force paying taxes remained relatively stable from the late 1940s through the rest of the twentieth century.<sup>296</sup> And as Figure 2 in the Appendix shows, the consequences were reflected in the rising percentage of federal outlays as a percentage of overall economic activity. From a high of over forty-five percent in 1945, the percentage of economic activity attributable to federal spending declined to fifteen percent before settling at about twenty percent.<sup>297</sup> This was more than twice the relevant percentage even at the height of the New Deal period before the war was underway.

External strategic concerns combined with structural realities of the federal budget to keep the scope of taxation quite broad. After a

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enforcement priorities and insulated most such priority-setting from judicial review. *But see* *Arizona v. United States*, 132 S. Ct. 2492, 2527 (2012) (Alito, J., concurring in part and dissenting in part) (“[Enforcement priorities] are not law. They are nothing more than agency policy.”).

<sup>291</sup> See SPARROW, *supra* note 72, at 263 app.

<sup>292</sup> See *id.*

<sup>293</sup> See *id.*

<sup>294</sup> See *id.*

<sup>295</sup> Office of Mgmt. & Budget, *Historical Tables*, WHITE HOUSE, <http://www.whitehouse.gov/omb/budget/Historicals> (last visited Oct. 10, 2014) (follow link for “Table 2.3”); see *infra* Appendix Figure 1.

<sup>296</sup> See SPARROW, *supra* note 72, at 263; see *infra* Appendix Figure 1.

<sup>297</sup> See SPARROW, *supra* note 72, at 261; see *infra* Appendix Figure 2.

short-lived reduction in overall tax rates during the late 1940s, the era of mass taxation inaugurated in World War II almost certainly persisted in part because of the substantially greater national debt incurred during the wartime years—but also because of the Korean War and continuing pressure for high military expenditures associated with the Cold War. In addition, debts of a more symbolic nature—involving veterans' benefits and more capacious expectations of the federal government—made it difficult for policymakers to implement a dramatic change in the scope of the tax base.

Although a large proportion of the new resources flowed to the wartime agencies, they guaranteed a measure of fiscal support for more conventional domestic organizations that operated alongside the new wartime federal bureaucracies.<sup>298</sup> A nascent federal administrative apparatus had already played a role in war-related matters earlier in American history. As the War of 1812 loomed, for example, a thinly staffed federal government enforced an embargo—amounting to severe restrictions on economic transactions with Great Britain.<sup>299</sup> But during World War II, the role of federal administrative agencies in implementing functions motivated by external strategic objectives became even more extensive. The Treasury Department had a preexisting role in enforcing economic sanctions, but following the German invasion of Norway in 1940, it created a new administrative unit, the Office of Foreign Funds Control (“FFC”), to administer economic sanctions.<sup>300</sup> In the succeeding years, the FFC asserted new authority and expanded its capacity to monitor transactions.<sup>301</sup> Agencies acquiring new financial and staff-related resources, particularly the State and Justice Departments, enhanced the federal government's ability to implement restrictions on entry for foreigners and travel for Americans.<sup>302</sup> The executive branch's limited discretion to alter the implementation of immigration-related statutory authority aligned

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298 Mariano-Florentino Cuéllar, “Securing” the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939–1953, 76 U. CHI. L. REV. 587, 620–22 (2009). For example, the U.S. Department of the Interior's Office of Education had its annual budget increased from roughly twenty million dollars in 1940 to over 153 million dollars by 1943.

299 See JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 92–100 (2012).

300 Ward Stewart, *Freezing Axis Funds*, 2 PUB. ADMIN. REV. 281, 281–82 (1942).

301 See generally *id.*; BARNETT HOLLANDER, CONFISCATION (SOVIET), AGGRESSION (GERMAN), AND FOREIGN-FUNDS CONTROL IN AMERICAN LAW (1942); GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT & KIMBERLY ANN ELLIOTT, ECONOMIC SANCTIONS RECONSIDERED: SUPPLEMENTAL CASE HISTORIES 41–61 (2d ed. 1990).

302 See, e.g., Jeffrey Kahn, *The Extraordinary Mrs. Shipley: How the United States Controlled International Travel Before the Age of Terrorism*, 43 CONN. L. REV. 819, 839 (2011).

immigration policy with wartime concerns regarding humanitarian immigration priorities,<sup>303</sup> as well as labor-related immigration as a growing number of American men were deployed in Europe and Asia.<sup>304</sup> Given the wide-ranging relationship between geostrategic goals and administrative functions—particularly involving the transnational flow of people, goods, and money—the role of federal agencies with expanded capacity in what has come to be known as the domain of “national security” set a precedent that persisted through the Cold War and the post-9/11 era.<sup>305</sup>

Many other agencies, from the U.S. Department of Agriculture (“USDA”) to the mixed domestic-and-defense-oriented Federal Security Agency, had gradually expanded their responsibilities even in the midst of New Deal-era conflict about the scope of the federal government. Bureaus such as the Office of Education, the USDA, and the FDA had seen substantial increases in their budgets and responsibilities over the preceding four years.<sup>306</sup> In some cases, their responsibilities would almost certainly become relevant to the war effort. For example, the vocational training grants overseen by the Office of Education would facilitate retraining for war-related industries.<sup>307</sup> In other cases, such as the USDA’s and the FDA’s role in food safety, the agencies played a role in the consumer economy.<sup>308</sup> If it was part of the Roosevelt Administration’s agenda to insulate domestic economic and social conditions from the full impact of war, resources would need to be found for these bureaus.<sup>309</sup> By the same token, legal changes facilitating the work of wartime agencies could also potentially affect the ability of the more conventional, domestically focused administrative agencies. Although all of the nonwartime, nondefense agencies experienced drastic decreases in their overall share of the federal budget, some of these organizations—particularly the ones that could effectively articulate connections between their domestic

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303 See ARISTIDE ZOLBERG, *A NATION BY DESIGN* 286–91 (1st paperback ed., Harvard University Press 2008) (2006) (noting initial reluctance to increase immigration limits out of security concerns, followed by an increase in refugee admissions in 1944).

304 See KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 1–2 (1992).

305 For a critique arguing that the “securitization” of the administrative state is more recent, see David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359 (2007).

306 See Cuéllar, *supra* note 298, at 620–22 (2009).

307 See *id.* at 627 & n.153.

308 See *id.* at 628–29.

309 See *id.* at 678.

missions and the war effort—increased their resources in absolute terms during the wartime years.<sup>310</sup>

New tax resources and persistent wartime needs translated into a vastly larger federal government, with both greater manpower and debts.<sup>311</sup> After 1945, the size of the federal debt per capita remained substantial in the postwar years, as shown in Figure 3 in the Appendix.<sup>312</sup> Moreover, almost as striking as the rate of the increase in taxation and federal civilian employment during the wartime years is that higher taxes and a far larger workforce became a fixture of American life in the rest of the twentieth century. Figure 4 in the Appendix shows the long-term trend in civilian employment after World War II, and Figure 5 displays federal (nonpostal) civilian employees as a percentage of the labor force.<sup>313</sup> Leaving military personnel entirely aside, the federal government entered a strikingly different phase of its existence in the postwar years, a story that readily emerges from examining changes in federal employment, taxation capacity, and legal authority in tandem.

These evolving features of the administrative state reflected White House views not only about the country's wartime needs, but also about the extent of its capacity to implement institutional changes at a given moment. By the middle of the wartime years, another episode involving potentially far-reaching changes in federal law shed light on the limits of that capacity. As labor-market pressures intensified and workers became more scarce, policymakers considered an alternative even more radical than government control of industry—for federal officials to gain authority to draft civilians directly into war-related industries through statutory authority to compel individuals to engage in “national service.”<sup>314</sup> Although the idea obviously triggered alarm in certain quarters, some war planners and private-sector leaders viewed the change as an essential ingredient to the success of the domestic front once increases in industrial production began to level off.<sup>315</sup> Although there was some precedent in the existence of rarely used statutory arrangements to compel labor during World War I,<sup>316</sup> the exigencies of war did not change the Administration's ultimate

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310 See *infra* Appendix Figure 4.

311 See *infra* Appendix Figures 3, 4.

312 See *infra* Appendix Figure 3.

313 See *infra* Appendix Figures 4, 5.

314 See POLENBERG, *supra* note 26, at 176.

315 See *id.* at 176–77.

316 See Francis Hoague et al., *Wartime Conscription and Control of Labor*, 54 HARV. L. REV. 50, 53 (1940) (discussing the Food Control Act and the Priority Shipment Act).

conclusion: the degree of federal administrative control over labor markets contemplated by the national service legislation proved a bridge too far.<sup>317</sup>

President Roosevelt's political instincts were no doubt part of the reason he was so cautious initially, but he reluctantly and temporarily came to support national service after risks of labor unrest increased. If enacted, compulsory national service would have remade a vast chunk of the administrative state, taking it in an unusual, legally and politically complicated direction. Even under the more circumscribed conception of procedural due process that prevailed at the time,<sup>318</sup> the federal government would have needed elaborate adjudicatory arrangements to manage appeals and clarify orders. Implementing national service would have required new arrangements to share information between business, labor, and different parts of government and would have embodied the limits of what the American political economy would bear, particularly as both business and labor severely opposed the move. Roosevelt eventually backed down, but the risk of labor unrest also appeared to subside after the debate over national service legislation.<sup>319</sup>

Crucial to the Administration's changes in domestic organization and public finance, and to its decisions about the limits of the country's capacity to absorb change, was the White House's relationship with Congress. The Roosevelt Administration succeeded in crafting a mobilization program that garnered support from a legislature that had become somewhat more pliant as war began, yet White House advisers and the President remained deeply concerned about relations with Congress well into the mobilization process.<sup>320</sup> Roosevelt's office maintained a lively correspondence with individual lawmakers, and presidential advisors helped the President keep track of the various geographically and politically specific concerns of lawmakers.<sup>321</sup>

### C. *Legitimizing Broad Delegations*

By 1942, lawmakers had been persuaded to confer on the President the power to set priorities for industrial production and control

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317 See SPARROW, *supra* note 37, at 75.

318 See, e.g., *Williams v. North Carolina*, 317 U.S. 287 (1942).

319 See POLENBERG, *supra* note 26, at 177–83.

320 See, e.g., Letter from Caroline O'Day, *supra* note 111; Letter from President Franklin D. Roosevelt to Congressman Henry B. Steagall, Chairman of the House Banking & Currency Comm. (Nov. 5, 1941).

321 See *supra* note 320.

prices.<sup>322</sup> But the President had neither the intention nor the ability to manage wartime mobilization on his own. In order to manage domestic mobilization, the federal government would need to navigate a doctrinal problem that had bedeviled the Roosevelt Administration for a half-decade: how to empower bureaucratic agencies through grants of general, open-ended authority without running afoul of courts determined to rein in broad, open-ended statutory authority.<sup>323</sup> Recall that the Second War Powers Act conferred on the President authority to “allocate materials or facilities” in accordance with the public interest and the needs of national defense.<sup>324</sup> The same statute then allowed the President to delegate such authority as he saw fit, thus allowing the White House to create, in agencies such as the WPB and the OPA, quasi-legislators and adjudicators with the power to manage how the American economy handled trade-offs that arose from production and supply constraints.<sup>325</sup> Indeed, rapid, flexible agency action is difficult to envision if the relevant bureaus harbor little more than ministerial, quasi-clerical functions specified in excruciating detail by Congress. But expansive delegations of authority were vulnerable under the so-called “nondelegation doctrine.”<sup>326</sup>

In an environment where lawmakers routinely enact statutes granting open-ended powers to executive agencies, it is difficult for modern lawyers to appreciate the intensity of concern that once existed over such delegation. The normally circumspect Wall Street lawyer Elihu Root once described broad delegations as carrying within them the enormous potential for “oppression and wrong.”<sup>327</sup> The canonical case of *Schechter Poultry*<sup>328</sup> plays a starring role in depictions of the conflict between the New Deal coalition and the Supreme Court. The nature of the Court’s doctrinal conclusion contributed to the President’s pursuit of judicial reorganization,<sup>329</sup> an effort that

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<sup>322</sup> See *supra* Part II.A.

<sup>323</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935).

<sup>324</sup> See *supra* note 169 and accompanying text.

<sup>325</sup> See *supra* Part II.A.

<sup>326</sup> See *Schechter Poultry*, 295 U.S. at 537, 546–50 (invalidating portions of the National Industrial Recovery Act as unconstitutional delegations and finding that Congress lacked power to pass such legislation under the Commerce Clause); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430–33 (1935) (finding the National Industrial Recovery Act was an unconstitutional delegation of power to the president).

<sup>327</sup> Ernst, *supra* note 54, at 149.

<sup>328</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>329</sup> See Dale B. Thompson, *Optimal Federalism Across Institutions: Theory and Applications from Environmental and Health Care Policies*, 40 *LOV. U. CHI. L.J.* 437, 438 n.9 (2009) (noting that Roosevelt’s court-packing plan arose after decisions such as *Schechter Poultry*).

eventually failed and left the President and supportive lawmakers with a practical and doctrinal question.<sup>330</sup> The Supreme Court had invalidated the National Industrial Recovery Act as an unconstitutional delegation of legislative power.<sup>331</sup> The Court determined that poultry regulations issued under NIRA and covering the prices and characteristics of chicken fit for commerce were unconstitutional.<sup>332</sup> In reaching this conclusion, the Supreme Court placed itself sharply at odds with the Roosevelt Administration and helped trigger the President's now-familiar decision to pursue an ill-fated judicial reorganization initiative.<sup>333</sup> Important though NIRA was to the New Deal, for the President and his allies it was obvious that the stakes involved in the battle over the nondelegation doctrine went far beyond the fate of NIRA.<sup>334</sup> If Congress lacked the power to delegate broad authority to the executive, the White House risked court decisions that could frustrate virtually any aspect of federal policy that depended on broadly empowered administrative agencies, particularly where the issue did not directly implicate the President's foreign affairs role.<sup>335</sup>

Less than a decade later, however, the Supreme Court struck a far more permissive note on delegation. In *Yakus v. United States*,<sup>336</sup> the Court upheld the Emergency Price Control Act—the statute at the core of the Administration's strategy to reconcile war mobilization efforts and consumer concerns.<sup>337</sup> Although it is perhaps possible to find some plausible distinction between the unwieldy assemblage of public and private authority in the statute at issue in *Schechter* and the more conventional regulatory statute that was the subject of *Yakus*, in some respects the laws at issue in both cases were strikingly similar. Both lodged broad, largely open-ended authority to control prices in a

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<sup>330</sup> See Laura A. Cisneros, *Transformative Properties of FDR's Court-Packing Plan and the Significance of Symbol*, 15 U. PA. J. CONST. L. 61, 61–63 (2012).

<sup>331</sup> *Schechter Poultry*, 295 U.S. at 537.

<sup>332</sup> *Id.* at 520–26, 537.

<sup>333</sup> See *id.* at 542; see also Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69 (2010) (discussing FDR's proposed court-packing plan and the effect it had on Justice Roberts). See generally Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165 (1999).

<sup>334</sup> See Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 255 (1996) (reviewing WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995)) (“With reason to think that the Old Court would continue to invalidate governmental reform efforts, Roosevelt appropriately feared for the future of his New Deal.”).

<sup>335</sup> See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (upholding a statute that delegated broad authority to the President in the realm of foreign affairs).

<sup>336</sup> *Yakus v. United States*, 321 U.S. 414 (1944).

<sup>337</sup> *Id.* at 422–23.

federal bureaucracy.<sup>338</sup> But whereas the *Schechter* Court emphasized a formally understood constitutional prohibition on legislative delegations of authority to agencies,<sup>339</sup> a different complement of Justices in *Yakus* cited a mix of administrative logic and wartime exigency to make a case for broad delegation.<sup>340</sup> Writing for the majority, Chief Justice Stone noted not only the presence of standards in the statute, but also the “statement of considerations” that the Price Administrator was required to make in justifying his wartime decisions.<sup>341</sup> Though taking care not to explicitly overrule *Schechter*, the Court upheld the OPA’s broad authority over prices from an attack based on nondelegation grounds, and in the companion case of *Bowles v. Willingham*,<sup>342</sup> the Court also upheld the OPA’s powers involving rent control.<sup>343</sup>

With the benefit of hindsight, it may sometimes appear as though the nondelegation doctrine had only one good year in American courts. Even prior to *Yakus* and *Bowles*, certain lower court cases had begun to erode the broad scope of the *Schechter* ruling in decisions involving agricultural policy,<sup>344</sup> and the Court had no trouble upholding, in 1941, a broad grant of authority from Congress for the Supreme Court to prescribe “by general rules” procedures for federal district courts.<sup>345</sup> But to understand how these disputes created uncertainty for the executive branch and its allies, it is worth reviewing some of prewar disputes about delegation that played out before *Yakus*. In a sense, the *Schechter* decision carried at its core an implicit theory of legislative capacity that made it easier for the Court to embrace a more formalistic account of the separation of powers.<sup>346</sup> To the *Schechter* Court, governance at the federal level had to thread a

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338 Compare *id.* at 420 (noting that the Emergency Price Control Act authorizes the executive to “promulgate regulations fixing prices of commodities”), with *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541 (1935) (noting that the NLRA empowers the executive to limit wages with almost no limitations).

339 *Schechter Poultry*, 295 U.S. at 541–42.

340 *Yakus*, 321 U.S. at 431–32.

341 *Id.* at 426 (internal quotation marks omitted).

342 *Bowles v. Willingham*, 321 U.S. 503 (1944).

343 *Id.* at 513–14.

344 See *Edwards v. United States*, 91 F.2d 767, 787 (9th Cir. 1937).

345 *Sibbach v. Wilson & Co.*, 312 U.S. 1, 7–8 (1941) (internal quotation marks omitted).

346 See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935) (“We pointed out in the *Panama Company* case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards . . . . But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to ob-



needle with respect to the role of the legislature.<sup>347</sup> Without becoming so engaged in day-to-day administration that it would usurp the role of the executive, Congress was presumed capable of enacting sufficiently specific (and responsive) decisions about the details of administration to facilitate modern government.<sup>348</sup>

If one questioned whether the architecture of the Constitution meant entirely to deprive the executive of the broad flexibility that expansive statutory delegations of authority provided, the Supreme Court's soon-to-be issued decision in *United States v. Curtiss-Wright Export Corp.*<sup>349</sup> could prove relevant by distinguishing the President's broader authority in the realm of foreign affairs.<sup>350</sup> Of course, treating the distinction between *Schechter* and *Curtiss-Wright* as formal, stable, and self-explanatory meant implicitly minimizing the potential significance of domestic administration to national security.<sup>351</sup> But in the period anchored by *Schechter* and *Curtiss-Wright* at one end and *Yakus* at the other end—about eight years later—such matters received little attention, as delegation-related disputes ground on in the lower courts.

When considering delegation-related challenges, lower courts split between the more formalistic approach taken in *Schechter*—presuming a relatively fixed, essential distinction between legislative and executive power—and a more functional approach implicitly rejecting the existence of inviolable distinctions, and recognizing the strength of the rationale for broad delegation in particular contexts. Courts taking different approaches split, for example, in considering the constitutional merits of the Agricultural Adjustment Act (“AAA”).<sup>352</sup> In *Butler v. United States*,<sup>353</sup> the First Circuit held that Section 9 of the AAA unconstitutionally delegated to the Agriculture Secretary Congress's taxation power, as Congress failed to establish explicit, sufficiently precise standards for administrative decisionmaking.<sup>354</sup> The First Circuit clearly disapproved of the open-ended nature

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scure the limitations of the authority to delegate, if our constitutional system is to be maintained.”).

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

<sup>350</sup> *Id.* at 319.

<sup>351</sup> *Id.* at 315–18.

<sup>352</sup> Agricultural Adjustment Act, Pub. L. No. 73-10, 48 Stat. 31 (1933).

<sup>353</sup> *Butler v. United States*, 78 F.2d 1 (1st Cir. 1935), *aff'd*, 297 U.S. 1 (1936).

<sup>354</sup> *Id.* at 9 (“We find no definite intelligible standard set up in the act for determining when the Secretary shall pay rental or benefit payments in order to reduce production of any particular commodity except his own judgment as to what will effectuate the purpose of the act.”). The

of the legislation, concluding that the statute as drafted impinged on legislative power.<sup>355</sup>

Two years after the First Circuit decided *Butler*, the Ninth Circuit held in *Edwards v. United States*<sup>356</sup> that the Agriculture Secretary could restrict the shipment of citrus fruits in interstate commerce under Section 8 of the AAA.<sup>357</sup> Although the case involved the source and exercise of the Secretary's power to affect interstate commerce rather than to raise revenue, the court faced the analogous problem of interpreting multiple provisions of the AAA that provided a broad standard governing secretarial decisions, but also conferred substantial discretion.<sup>358</sup> Similarly, in a prewar decision, *Whittenburg v. United States*,<sup>359</sup> the Fifth Circuit rejected a nondelegation challenge to the Agricultural Marketing Agreement Act of 1937,<sup>360</sup> finding that the extent of statutory specificity required for permissible administrative action varied somewhat, at least in principle, depending on "necessity and practice."<sup>361</sup> Nonetheless, delegation-related challenges succeeded before the war, and the relatively restrictive formulation contained in *Schechter* remained the Supreme Court's fundamental statement about the nondelegation doctrine as the *Wermacht* stormed through Europe and prompted President Roosevelt to accelerate plans for mobilization.

Once the war began, a shift ensued in courts' willingness to entertain open-ended grants of statutory authority that reflected an increasing functional concern with the exigencies of national security. As a practical matter, courts began to give Congress more leeway in drafting open-ended legislation, noting that the economic exigencies of

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Supreme Court later took up *Butler*'s case, but it decided the matter on other grounds, noting in a footnote that "[o]ther questions were presented and argued by counsel, but we do not consider or decide them. The respondents insist that the act in numerous respects delegates legislative power to the executive." *United States v. Butler*, 297 U.S. 1, 62 n.8 (1936).

<sup>355</sup> See *Butler*, 78 F.2d at 12 (noting that the authority to determine compensating taxes had no standard in the statute, which prevents "such a delegation of power to an administrative officer").

<sup>356</sup> *Edwards v. United States*, 91 F.2d 767 (9th Cir. 1937).

<sup>357</sup> *Id.* at 768, 785.

<sup>358</sup> *Id.* at 785-86 ("So long as the administrative discretion is confined to effectuating clearly and definitely expressed policies and standards in the act, it does not constitute legislation. . . . In the present case the Secretary is authorized to issue orders to effectuate an equality between agricultural prices today and those prevailing during a 'base' period described in the statute. . . . Not only is the primary standard thus definitely expressed in the statute, but the orders issued by the Secretary are subject to still more precise requirements.").

<sup>359</sup> *Whittenburg v. United States*, 100 F.2d 520 (5th Cir. 1938).

<sup>360</sup> Agricultural Marketing Agreement Act of 1937, Pub. L. No. 75-137, 50 Stat. 246.

<sup>361</sup> *Whittenburg*, 100 F.2d at 522.

war—more so than the economic exigencies of depression—demanded flexibility in statutes empowering administrative agencies.

The EPCA, enacted after the attack on Pearl Harbor, incorporated into a statutory framework the goal that the Administration had been feverishly working to implement.<sup>362</sup> Specifically, the statute “declare[d] it to be necessary to the effective prosecution of the present war and to be the purpose of the act to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents,” among numerous other stated objectives.<sup>363</sup> Note the scope of the statute: despite the overall breadth of the authority conferred, Congress did limit the applicability of rent regulations “to housing accommodations in defense-rental areas in which defense activities shall have resulted or threatened to result in increases in rents for housing accommodations inconsistent with the purposes of the act,” and provided some more defined instructions to the Price Administrator, stating that “[t]he Administrator is authorized to fix maximum rents at the level of April 1, 1941, unless he finds that some other date (not earlier than April 1, 1940) is more appropriate to eliminate increases in rents due to defense activities.”<sup>364</sup>

But on the whole, the legislation was extremely open-ended. Congress mandated that the maximum rents established by the regulations were to be “generally fair and equitable and such as will effectuate the purposes of th[e] Act,”<sup>365</sup> and it noted that the Administrator was required to “make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such [housing] accommodations, including increases or decreases in property taxes and other costs.”<sup>366</sup> Similar language in the AAA prompted the First Circuit to declare Sections 8 and 9 an unconstitutional delegation of legislative authority.<sup>367</sup> As that court noted, “[a]ction by the Secretary is not mandatory, and the act establishes no criterion to govern his course of action.”<sup>368</sup> From the First Circuit’s

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<sup>362</sup> Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23. For a discussion of the law’s core substantive and enforcement provisions, see David Ginsburg, *The Emergency Price Control Act of 1942: Basic Authority and Sanctions*, 9 LAW & CONTEMP. PROBS. 22, 24 (1942) (noting President Roosevelt’s calls for Congress to adopt legislation providing “adequate powers to establish and to enforce” price regulations).

<sup>363</sup> *Taylor v. Brown*, 137 F.2d 654, 658 (Emer. Ct. App. 1943) (internal quotation marks omitted).

<sup>364</sup> *Id.*

<sup>365</sup> Emergency Price Control Act of 1942 § 2(a).

<sup>366</sup> *Id.* § 2(b).

<sup>367</sup> *Butler v. United States*, 78 F.2d 1, 6 (1st Cir. 1935), *aff’d*, 297 U.S. 1 (1936).

<sup>368</sup> *Id.* at 10.

perspective, such a loosely constrained grant of statutory power proved constitutionally fatal.

Not so with the EPCA. When the expected nondelegation challenge materialized in the 1943 case of *Taylor v. Brown*,<sup>369</sup> a special Emergency Court of Appeals found the law to be within the bounds of Congress's power to craft statutes.<sup>370</sup> Where action by the Price Administrator appears not to be mandatory,<sup>371</sup> the Emergency Court of Appeals had "no doubt as to the constitutional sufficiency of these standards for the guidance of the Administrator in the light of the act's recital of the Congressional purpose."<sup>372</sup> The court made explicit reference to the war, noting that the "desperate emergency" helped make a compelling case for a broad legislative delegation.<sup>373</sup>

Elsewhere in the country, courts reached a similar conclusion when reviewing other war-related legislation, such as the Second War Powers Act. In *O'Neal v. United States*,<sup>374</sup> the appellant challenged that Act, as well as the EPCA, on the grounds that "no standards are established to which the President must conform in the exercise of the statutory powers."<sup>375</sup> While noting that sections of Title III of the Act were "terse," the court nevertheless held that they "impose[d] certain definite restrictions."<sup>376</sup> Although the President's powers were far-reaching—given the use of statutory language referring to what the President "deem[s] necessary" in the public interest and to promote defense—the court also emphasized the statutory constraints that con-

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369 *Taylor v. Brown*, 137 F.2d 654 (Emer. Ct. App. 1943).

370 *Id.* at 658–59.

371 That said, in its opinion, the court distinguishes two different types of discretion. The statute contains both "is authorized" language and "is required" language, the latter suggesting less flexibility. The Administrator is still given discretion in deciding which factors are relevant to making adjustments. *Id.* at 658.

372 *Id.*

373 The court stated:

It is obvious that in a desperate emergency of war such as at present confronts the country Congress could not itself appraise all the factors necessary to be considered in fixing maximum rentals in each of the hundreds of diverse defense-rental areas which would be generally fair and reasonable in their local setting and which would carry out the Congressional purpose. In carefully stating its purpose and the standards which the Administrator is to follow in effectuating that purpose in the areas involved, Congress has done all that the Constitution requires of it.

*Id.* at 658–59.

374 *O'Neal v. United States*, 140 F.2d 908 (6th Cir. 1944).

375 *Id.* at 912.

376 *Id.*

ditions triggering an assertion of presidential power simultaneously reflect the “public interest” and “national defense.”<sup>377</sup>

Against the backdrop of the exigencies of war, the court found the statutory language, though similar to the AAA in its lack of specificity, sufficiently detailed to satisfy the demanding incarnation of the doctrine once enshrined in *Schechter*. Congress could address a national problem by enacting a broad delegation because the alternative would impede the “speed and efficiency of action for the national defense.”<sup>378</sup> The Sixth Circuit found the enabling language of the EPCA to be significantly more detailed than that of the Second War Powers Act.<sup>379</sup> Despite the distinctions, the basic premise underlying the decisions in cases like *Taylor* and *O’Neal* was quite consistent: the exigency of war served as a compelling example of why Congress should be understood to retain a measure of flexibility in deciding whether circumstances warranted more open-ended statutory language empowering administrative agencies. The court in *O’Neal*, for example, emphatically avoided the conclusion that the legality of broad legislative delegations depended on the presence of a war-related emergency. The court nonetheless reached its conclusion by offering the war as an example of the need for flexibility in the scope and generality of congressional statutes.<sup>380</sup> Similar decisions—though sometimes without quite as explicit a reference to emergency conditions—were reached with respect to the Selective Training and Service Act of 1940<sup>381</sup> and an Executive order banning the export of platinum without a license, issued pursuant to the National Defense Act Amendment of July 2, 1940.<sup>382</sup> There is of course the argument that earlier

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377 *Id.* (“The President, for instance, is not authorized to exercise this power merely because he deems it necessary or appropriate in the public interest. It must also in his opinion be necessary or appropriate in promotion of the national defense.”).

378 *Id.*

379 *Id.* at 913.

380 *Id.* at 912 (“While the rule against the delegation of legislative power is fixed and unalterable, not depending on the existence of emergency, . . . [i]n the emergency of war, the standards must be flexible . . .”).

381 Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885; *Weightman v. United States*, 142 F.2d 188, 191 (1st Cir. 1944) (“Under the rule we have no doubt that Congress has the power under the Constitution to delegate the duty of determining what is and what is not ‘work of national importance.’ As a practical matter it could do nothing else. It would certainly be ‘impracticable’ for Congress itself to attempt to differentiate between all work which is, and all work which is not, of that nature.”).

382 National Defense Act Amendment, Pub. L. No. 76-703, § 6, 54 Stat. 712, 714 (1940); *United States v. Rosenberg*, 150 F.2d 788, 790 (2d Cir. 1945) (finding that, while in the court’s opinion the statute defined a policy and set definite standards, the statute was passed during “days of fear and stress for us, as well as for our later allies; that Congress, having defined the

courts simply had a different assessment of what constituted a detailed, specific statement of standards and objectives. But there can be little doubt that the realities of war factored into many of the era's nondelegation doctrine decisions.

Also reflecting a functional concern parallel to the focus on war-related circumstances, courts at the time considered the increasing size of the administrative state and the complexities of the modern economy—and modern civilization more generally. In *Guiseppi v. Walling*,<sup>383</sup> the Second Circuit upheld Section Eight of the Fair Labor Standards Act<sup>384</sup> on a challenge of unconstitutional delegation of legislative power.<sup>385</sup> That section empowered the Administrator of the Wage and Hour Division of the Labor Department to investigate industry conditions and recommend minimum wage rates<sup>386</sup>—in this instance in the home-work embroidery industry.<sup>387</sup>

In short, whether the statutes in question involved war-related economic regulation or labor standards, the doctrine governing legislative delegations became more permissive during and after World War II. Although lower courts had sometimes rejected nondelegation challenges before World War II, two things were true about the pre-war period: (1) the Supreme Court's definitive statement before World War II was *Schechter*, which expanded the reach of the doctrine and gave it more teeth, and (2) lower courts had invalidated statutes comparable to the EPCA in their breadth (e.g., the AAA). After World War II, courts stopped seriously entertaining nondelegation challenges. Although the turning point among the nondelegation cases was *Yakus*, with its emphasis on wartime exigencies as a justification for allowing large grants of authority to the executive, the shift in the nondelegation doctrine led to a far broader dilution of the

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policy of prohibiting or curtailing supplies needed for defense, could not leave to the Chief Executive, the Commander in Chief of the Army and Navy, the time and detail of its execution would surely seem a harsh, impractical rule, and one more strict than the precedents support").

<sup>383</sup> *Guiseppi v. Walling*, 144 F.2d 608 (2d Cir. 1944).

<sup>384</sup> Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 8, 52 Stat. 1060, 1064.

<sup>385</sup> *Guiseppi*, 144 F.2d at 615.

<sup>386</sup> Fair Labor Standards Act of 1938 § 8.

<sup>387</sup> *Guiseppi*, 144 F.2d at 612. After referring to *Yakus* (which they spelled *Yackus*) and other cases, and the adequacy of standards test enunciated therein, *Guiseppi*, 144 F.2d at 617 n.19, the Second Circuit noted that "[t]he truth is that much of the regulation of the affairs of citizens which the complexities of our civilization necessitates calls for a very considerable use of the administrative device, and that its use must be accompanied by grants of delegated powers both as to the making of rules and the finding of facts." *Guiseppi*, 144 F.2d at 622 (footnotes omitted).

nondelegation trope in contexts that bore little if any connection to the war-related facts at issue in *Yakus*.

The claim here is not that uncertainty about delegation challenges was so substantial that it had effectively shut down the growth of the federal administrative state. The Roosevelt Administration was not dissuaded from proposing new agencies with expansive authority,<sup>388</sup> and appellate cases such as *Edwards* and *Whittenburg* demonstrate how not all nondelegation challenges around the time of *Schechter* succeeded.<sup>389</sup> Instead, the contention is that a certain friction existed between the vision of administration the President was pursuing and the state of the nondelegation doctrine before *Yakus* was decided in 1944. Such friction did not entirely preclude presidential or legislative choices attempting to empower agencies, but rather imposed various costs, including additional legislative drafting and negotiation to reduce the threat of invalidation, the need to defend administrative action legally and politically from attack on nondelegation grounds, and the risk that the President's preferred course of action would be invalidated. Whereas federal courts generally had been deploying doctrines and ideas that left them open to quite formalist nondelegation challenges before the war, during war-time judges almost entirely accepted the consequentialist arguments advanced by Administration lawyers—a shift that ultimately reflected more a consequentialist acceptance of the reality of modern administrative government than a war-specific, temporary accommodation. Well into the New Deal, similar difficulties arose in another area crucial to domestic administration—enforcement investigations.

#### D. *Routinizing Administrative Subpoenas*

By the late 1930s, most federal administrative agencies were involved in some activities that made use of the federal government's civil and criminal enforcement authority. When an agency investigated compliance with an order setting prices, allocating goods, or requiring a certain safety-related practice, the agency's effectiveness depended on its ability to direct scarce enforcement resources, and therefore to gather information about likely offenders. In doing so, agencies from the FDA to the National Labor Relations Board faced a problem that was also common to conventional criminal law en-

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<sup>388</sup> The OPA, for example, is an agency that was originally established through Executive Order and had significant authority to regulate the economy. See BRINKLEY, *supra* note 38, at 214.

<sup>389</sup> See *supra* notes 356–61 and accompanying text.

forcement agencies: how to ration scarce enforcement resources given a very large pool of potential targets. In the context of federal criminal enforcement, investigators' decisions were subject to constraints under the Fourth and Fifth Amendments of the Federal Constitution<sup>390</sup>—constraints that were eventually applied to state law enforcement as well.<sup>391</sup> Because of their presumed unique coercive authority, for example, conventional police officers were generally strictly limited from forcing people to turn over papers or other evidence without suspicion.<sup>392</sup>

What remained far from settled well into the New Deal, however, was the precise treatment of certain investigative activities of federal administrative agencies. These agencies faced constraints from scarce resources, and in many cases were charged with enforcing laws regulating economic, labor, or health-related activity difficult to pinpoint without the ability to subpoena documentary records or the opportunity to inspect premises where violations might occur. Unlike conventional police officers, agencies needed to establish the presence of regulatory violations more akin to white-collar offenses.<sup>393</sup> These were rarely, if ever, easy to observe without some access to documentary evidence or compelled testimony. Lacking the authority to obtain basic information from regulated parties, it would be difficult for agencies to decide whom to treat as suspicious in the first place.

Yet throughout the early twentieth century, courts were at times inclined to treat administrative agencies engaged in civil enforcement in a manner reminiscent of how federal criminal investigators were treated. Even if the precise legal question involved the interpretation of statutes, courts tended to draw inferences from statutory texts that espoused a particular conception of the administrative subpoena as an aspect of enforcement authority that should be subject to careful policing. In these decisions, courts often required agencies to demonstrate a valid basis for targeting someone with a subpoena request—almost the same type of basis the agency would ultimately need in order to sanction someone.<sup>394</sup> This left agencies with a daunting di-

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390 See *Boyd v. United States*, 116 U.S. 616, 621–22 (1886).

391 See generally William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995).

392 See generally *id.* at 422–28.

393 See Jack W. Campbell IV, Note, *Revoking the "Fishing License:" Recent Decisions Place Unwarranted Restrictions on Administrative Agencies' Power to Subpoena Personal Financial Records*, 49 VAND. L. REV. 395, 398–99 (1996) (noting that prior to World War II, federal agencies were not allowed to subpoena records without "prior evidence of wrongdoing").

394 See, e.g., *Harriman v. Interstate Commerce Comm'n*, 211 U.S. 407, 419–20 (1908).



lemma that would loom particularly large for regulators with scarce resources targeting offenses that were sometimes difficult to observe directly: they needed to gather information in order to substantiate their concerns about a given individual or company, but their ability to gather such information through a subpoena required those concerns to be substantiated before proceeding.<sup>395</sup> At times, agencies sometimes prevailed in making a case for the validity of administrative subpoenas with less explicit information during this period.<sup>396</sup> But agencies nonetheless faced considerable difficulties, as some courts continued to require agencies to establish probable cause or to meet a comparable threshold before inspecting company documents.<sup>397</sup>

The wartime years were significant for the realm of administrative investigations in at least two ways. First, the OPA's legal responsibility encompassed not only the practices of large businesses and public companies, but essentially routine transactions involving the entire industrial economy.<sup>398</sup> The scope of its enforcement mission would thus call for more commonplace issuance of administrative subpoenas in the course of its work. Agency officials carrying out both its price regulation and rationing enforcement functions sometimes dispensed with referrals seeking criminal penalties in favor of the relative simplicity of administrative penalties.<sup>399</sup> Even the issuance of routine administrative penalties would nonetheless sometimes require agencies to gather information. In the case of the OPA, the scope of enforcement was perhaps comparable to modern-day agencies like OSHA or EPA in that information might be sought regarding a vast range of distinct entities (varying in size, location, and line of work), and the universe of potential violations was immense.<sup>400</sup>

Second, between roughly the outset of World War II and the Supreme Court's decision in the war-related case of *Shapiro v. United*

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<sup>395</sup> See *supra* note 393.

<sup>396</sup> See, e.g., *Smith v. Interstate Commerce Comm'n*, 245 U.S. 33, 46 (1917); *In re Int'l Corp.*, 5 F. Supp. 608, 611 (S.D.N.Y. 1934).

<sup>397</sup> See *FTC v. P. Lorillard Co.*, 283 F. 999, 1006–07 (S.D.N.Y. 1922), *aff'd sub nom. FTC v. Am. Tobacco Co.*, 264 U.S. 298 (1924) (requiring probable cause for an agency subpoena). *American Tobacco* was eventually overruled in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), which held that probable cause that a crime had been committed was not required for the issuance of an administrative subpoena.

<sup>398</sup> See THOMPSON, *supra* note 85, at 6.

<sup>399</sup> See *id.* at 7 (discussing statutory authority for injunctions, criminal sanctions, and administrative penalties to enforce OPA orders, but noting that in the rationing context, administrative penalties were most often used by the agency).

<sup>400</sup> See Jacobs, *supra* note 112, at 911.

*States*<sup>401</sup> in 1948, courts issued several decisions further legitimizing the routine use of administrative subpoenas.<sup>402</sup> At the time, challenges thus remained in making subpoenas a routine element of a successful, government-wide administrative enforcement strategy. Federal agencies sometimes encountered difficulties enforcing administrative subpoenas for a variety of reasons, including challenges to the validity of subpoenas on the basis of allegedly narrow statutory authority,<sup>403</sup> because an agency had not “proven” a violation that gave it jurisdiction over a company subject to investigation,<sup>404</sup> or because the target of the subpoena then claimed immunity that made it difficult to use the resulting information.<sup>405</sup> Despite the aforementioned changes in the scope of federal administration and unresolved doctrinal issues involving the validity of certain techniques for administrative investigations, challenges to subpoenas did not become a vehicle to constrain the administrative state. Instead, administrative subpoenas were harmonized with routine investigative practices of the OPA and other agencies, despite the fact that as late as the mid-1930s and early 1940s the federal government still had a mixed record when it came to defending administrative subpoenas from legal attack—including both subpoenas *duces tecum* and *ad testificandum* issued by administrative agencies.<sup>406</sup>

Although government agencies sometimes prevailed in administrative subpoena cases during the 1930s, Supreme Court and appellate decisions often still pivoted on a core principle articulated by Justice Oliver Wendell Holmes two decades earlier. In *Harriman v. Interstate Commerce Commission*,<sup>407</sup> the Court sought to limit administrative subpoenas to “the cases where the sacrifice of privacy is necessary—

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401 *Shapiro v. United States*, 335 U.S. 1 (1948).

402 *See Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 208–09 (1946) (setting three criteria for use of administrative subpoenas); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 510 (1943).

403 *Walling v. Benson*, 137 F.2d 501, 505–06 (8th Cir. 1943) (holding that Department of Labor's subpoena was invalid because of the Department's narrow statutory authority).

404 *Gen. Tobacco & Grocery Co. v. Fleming*, 125 F.2d 596, 601–02 (6th Cir. 1942) (holding that an agency's belief that a company is engaged in interstate commerce activity is insufficient for a subpoena to hold; it must show that the company is engaged in interstate commerce).

405 *United States v. Shapiro*, 159 F.2d 890, 891 (2d Cir. 1947) (noting that compulsory disclosure of private documents creates an immunity from prosecution under the Fifth Amendment), *aff'd*, 335 U.S. 1 (1948).

406 Although the bulk of successful challenges were to subpoenas *duces tecum*, where Fourth Amendment reasonableness arguments could come into play, agencies sometimes faced problems seeking testimonial information as well. *See, e.g., Arndstein v. McCarthy*, 254 U.S. 71, 72–73 (1920).

407 *Harriman v. Interstate Commerce Comm'n*, 211 U.S. 407 (1908).

those where the investigations concern a specific breach of the law.”<sup>408</sup> This approach led many agencies to run afoul when their administrative subpoenas lacked support based on strong agency confidence that a demonstrably high probability existed of a specific violation by a specific party whose information was being sought.<sup>409</sup> This restrictive approach to administrative subpoenas probably reached its apogee in *Jones v. SEC*.<sup>410</sup> The petitioner filed a registration statement for the issuance of trust certificates.<sup>411</sup> The SEC found the statement suspicious and issued a subpoena seeking testimony and documentary evidence.<sup>412</sup> Because Jones had then withdrawn the registration application,<sup>413</sup> the Court decided that the Commission now lacked authority to compel production of any evidence. In unusually sweeping language, the Court claimed that leaving the power to subpoena in such situations with agencies such as the SEC would place the government at risk of “becom[ing] an autocracy.”<sup>414</sup>

Although decisions such as *Jones* were not the norm, a relatively restrictive approach to administrative subpoenas persisted in some quarters even in the early wartime years. Given that typical regulatory statutes limit the scope of an agency’s jurisdiction to a particular class of people or organizations,<sup>415</sup> did it make sense to treat the question of agency jurisdiction over a particular entity as a question about whether full probable cause existed to pursue an enforcement action against that entity? This is precisely what the Eighth Circuit held as late as 1943 in a case involving the Fair Labor Standards Act.<sup>416</sup> As the war progressed, however, courts abated their tendency to equate statutory questions about the scope of agency administrative sub-

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<sup>408</sup> *Id.* at 419–20.

<sup>409</sup> See Katherine Scherb, Comment, *Administrative Subpoenas for Private Financial Records: What Protection for Privacy Does the Fourth Amendment Afford?*, 1996 WIS. L. REV. 1075, 1079 (“Prior to the 1940s, court decisions on the subpoena power of administrative agencies generally interpreted the Fourth and Fifth Amendments broadly, thereby favoring substantial protection for the privacy of corporate and individual records at the expense of agencies’ investigatory effectiveness.”).

<sup>410</sup> *Jones v. SEC*, 298 U.S. 1 (1936).

<sup>411</sup> *Id.* at 12.

<sup>412</sup> *Id.*

<sup>413</sup> *Id.* at 12–13.

<sup>414</sup> *Id.* at 23–24.

<sup>415</sup> See, e.g., *Walling v. Benson*, 137 F.2d 501, 505 (8th Cir. 1943) (noting that the Fair Labor Standards Act limits the agency’s investigatory power to issues dealing with conditions in “industries engaged in interstate commerce”).

<sup>416</sup> *Id.* at 504 (“[W]e believe that the district court is entitled to the assurance that it is not giving judicial sanction and force to unwarranted or arbitrary action, but that reasonable ground exists for making the investigation.”).

poena powers with restrictive tests based on the idea of "probable cause."<sup>417</sup>

In fact, the wartime years brought increasing victories for administrative agencies seeking to enforce subpoenas and otherwise expand the scope of their investigative powers. Whereas some litigants had previously sought to block agency subpoenas by arguing that the documents sought were private, courts increasingly relied on arguments about the public's interest in records necessary for administrative enforcement to sidestep protection of private papers. Some courts drew a more formalistic distinction between records of businesses regulated under a statute pursuant to the Commerce Clause ("quasi-public") and other records that might be sought.<sup>418</sup> In other cases, judges adopted somewhat more functional reasoning resting on the reasonable role such quasi-public records were meant to play in any workable enforcement scheme.<sup>419</sup> In cases taking up the validity of enforcement subpoenas under the AAA<sup>420</sup> and the EPCA,<sup>421</sup> for example, courts relied upon this quasi-public distinction to cast aside constitutional challenges to subpoenas and rule for the agencies. Even when the records in question were "invoices, sales tickets, cash receipts and other written evidences of sales"<sup>422</sup>—records that private entities would have maintained *without* statutory requirements—the fact that the law required their retention rendered them quasi-public records.<sup>423</sup>

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417 See, e.g., *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 216 (1946) ("These [limitations upon the Administrator's investigative function] are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be limited by forecasts of the probable result of the investigation." (internal quotation marks and alterations omitted)).

418 *Bowles v. Beatrice Creamery Co.*, 146 F.2d 774, 779 (10th Cir. 1944) ("To require the keeping of records showing whether there has been compliance with a valid law is an appropriate means to a legitimate end. Such records are quasi-public in character and as to them the privilege against self-incrimination under the Fifth Amendment does not apply." (footnote omitted)).

419 See *Okla. Press Publ'g Co.*, 327 U.S. at 213 (noting importance of records to the Agency and the Administrator's "effective discharge of the duties of investigation and enforcement which Congress has placed upon him").

420 *Rodgers v. United States*, 138 F.2d 992, 996 (6th Cir. 1943) (rejecting challenge to production of records as required by statute because records were not for "private use" but rather were "quasi-public documents . . . open to inspection by such persons and officers as are authorized under the statute").

421 *Bowles v. Glick Bros. Lumber Co.*, 146 F.2d 566, 571 (9th Cir. 1945) ("The records inspected and copied in this instance were of the type required to be kept and to be made available for inspection. They were not private books and papers of the kind involved in *Boyd v. United States* and like cases. They were quasi-public records." (citation omitted)).

422 *Bowles v. Joseph Denunzio Fruit Co.*, 55 F. Supp. 9, 12 (W.D. Ky. 1944).

423 *Id.*

In other cases, such as *Fleming v. Montgomery Ward & Co.*<sup>424</sup> and *Endicott Johnson Corp. v. Perkins*,<sup>425</sup> the courts increasingly adopted permissive approaches to administrative subpoenas.

It is telling how explicitly some courts acknowledged the functional, war-related concerns that played a role in their decisions expanding agency power to engage in routine administrative subpoenas. An example: in *Bowles v. Glick Bros. Lumber Co.*,<sup>426</sup> the Ninth Circuit upheld the Price Administrator's subpoena power under the EPCA, finding that the conditions of war operated to give the benefit of the doubt to the Administrator. In a passage that is reflective of how courts were (on the whole) approaching price regulation issues, the court explained:

It must be remembered that the legislation was passed under emergency conditions closely affecting the general welfare. Upon the Office of Price Administration has been imposed the task of seeing to it that the law is complied with by all dealers in essential commodities, and that evasion be sternly checked. There is a presumption of regularity in respect of the proceedings of administrative bodies. Hence it is to be presumed that the Administrator has not acted oppressively or undertaken to pursue investigations where no need therefor is apparent.<sup>427</sup>

Other jurisdictions reaffirmed this view.<sup>428</sup>

Together, developments in these cases led one commentator in 1945 to observe that “[n]ot so many years ago there was good authority for the proposition that compulsory process could only be used

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<sup>424</sup> *Fleming v. Montgomery Ward & Co.*, 114 F.2d 384, 387–88 (7th Cir. 1940) (noting that Congress vested agency with “broad powers of regulation and supervision” and evinced no intent that the Agency’s investigatory powers be “conditioned upon the existence of reasonable cause”).

<sup>425</sup> *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943) (“Nor was the District Court authorized to decide the question of coverage itself. The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary’s consideration.”).

<sup>426</sup> *Bowles v. Glick Bros. Lumber Co.*, 146 F.2d 566 (9th Cir. 1945).

<sup>427</sup> *Id.* at 571.

<sup>428</sup> The Third Circuit quoted the Ninth Circuit’s language in *Glick Bros.* in upholding the subpoena power of the Price Administrator. See *Bowles v. Insel*, 148 F.2d 91, 93–94 (3d Cir. 1945). In another challenge to the Price Administrator’s subpoena power, the Northern District of California noted that the EPCA was a “statute born of the exigencies of war,” and held that “[v]iewed against such a background, the requirement that records be kept by merchants and be open to inspection has no constitutional inhibitions.” *Bowles v. Chew*, 53 F. Supp. 787, 789 (N.D. Cal. 1944) (internal quotation marks omitted).

against private business (as distinguished from public utilities) when there existed some reason to believe that a violation of the law had been or was being committed."<sup>429</sup> In light of cases such as *Endicott Johnson and Oklahoma Press Publishing Co. v. Walling*,<sup>430</sup> it appeared at the time as though the legitimacy of administrative subpoenas was assured.<sup>431</sup> As long as the subpoena was not excessively broad and called for materials relevant to a legitimate administrative purpose of some kind, the agency was owed a response.<sup>432</sup>

In an important coda to the developments during wartime, a 1948 Supreme Court decision further expanded agencies' ability to use administrative subpoenas. In *Shapiro*, the Court rejected a commonly used defense of immunity as an alternative strategy to undermine administrative subpoenas, particularly when they could give rise to legitimate criminal complaints. The OPA had issued a subpoena to obtain the sales records of a New York merchant, who argued that the records were akin to compelled testimony, thereby requiring that he receive a grant of immunity from prosecution for having produced them.<sup>433</sup> The Supreme Court affirmed the trial court's decision to reject Shapiro's claim of immunity from prosecution, and it upheld the federal government's ability to pursue a criminal prosecution on the basis of such subpoenaed information.<sup>434</sup> Agencies emerging from the wartime period thus found themselves in a different relationship to corporations and individuals: their inspectors, investigators, and lawyers now wielded the legal authority to amass the mid-twentieth century equivalent of "big data," and to pursue civil and criminal enforcement using said information.

### *E. Procedural Constraints and Judicial Review*

Before passage of the Administrative Procedure Act in 1946, the federal government lacked a broad statutory mechanism to standardize agency administrative procedures governing functions such as adjudication and rulemaking.<sup>435</sup> Nonetheless, agencies worked under a variety of processes derived directly from statutes, or, in some cases,

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429 E. Blythe Stason, *Administrative Law—Developments: 1940–1945*, 44 MICH. L. REV. 797, 806 (1946).

430 *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186 (1946).

431 Stason, *supra* note 429, at 806.

432 *Id.*

433 *Shapiro v. United States*, 335 U.S. 1, 4–5 (1948).

434 *Id.* at 34–36.

435 See generally Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986).

forged by agencies to address their particular substantive contexts.<sup>436</sup> The willingness of agency officials to either accept statutory constraints on procedures or fashion their own versions reflects a recognition by some administrators that there was value in limiting their own discretion. Perhaps in some cases relatively unfettered discretion could minimize certain agencies' costs in implementing decisions; but a countervailing price might be paid in the vulnerability of the resulting agency action to due process concerns, early forms of "arbitrariness" review,<sup>437</sup> public attacks on agency practices by organized interests and affected members of the public, and the lack of a means through which an agency could signal the reliability of its own decisions.<sup>438</sup>

Procedural constraints mattered, for instance, even to one of the preeminent new wartime agencies—the OPA.<sup>439</sup> Although litigants often had to contend with administrative procedures that did not provide them with the full range of hearings or remedies they desired, agencies were nonetheless subject to procedural requirements, whether they used adjudicatory hearings or quasi-legislative rules to make policy.<sup>440</sup> The case that perhaps best situates the discussion of agency administrative procedures in the prominent new OPA is *Avant v. Bowles*.<sup>441</sup> The appellant argued that the EPCA "violate[d] the due process clause of the Fifth Amendment in that it fail[ed] to accord to landlords affected by a rent regulation the right to a formal hearing before the issuance of the regulation."<sup>442</sup> Citing Justice Holmes's opinion in *Bi-Metallic Investment Co. v. State Board of Equalization*,<sup>443</sup> and distinguishing the EPCA from the Fair Labor Standards Act, for which "Congress expressly prescribed . . . a hearing before issuing an order prescribing minimum wages," the court held that the Price Administrator's rent regulations under the EPCA were "legisla-

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<sup>436</sup> See generally ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE, FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 25–29 (1941) [hereinafter ATTORNEY GENERAL'S REPORT ON AGENCY PROCEDURES].

<sup>437</sup> See generally Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011).

<sup>438</sup> Cf. Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753 (2006).

<sup>439</sup> See *Avant v. Bowles*, 139 F.2d 702, 707 (Emer. Ct. App. 1943) (noting procedures required before setting maximum rent).

<sup>440</sup> See *Rottenberg v. United States*, 137 F.2d 850, 855 (1st Cir. 1943) (describing procedures for administrative review).

<sup>441</sup> *Avant v. Bowles*, 139 F.2d 702 (Emer. Ct. App. 1943).

<sup>442</sup> *Id.* at 706.

<sup>443</sup> *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

tive in character," and due process did not "impos[e] a requirement that the administrative agency must give notice and hearing to all the landlords in the defense-rental area before issuing a regulation in pursuance of its delegated power."<sup>444</sup> As with findings of proper delegation under the EPCA, the court cited the war as the driver of Congress's decision not to require a full hearing for aggrieved parties.<sup>445</sup>

Although the EPCA specified the procedures to be used in legislative rulemaking, these were open-ended and placed agencies in a position to determine the details through implementation. The OPA rulemaking procedures at issue in *Avant*, for example, reflected statutory provisions mixing explicit acknowledgement of administrative discretion with the proceduralism characteristic of the soon-to-be-written Administrative Procedure Act. As the court explained in *Avant*:

Section 2(b) requires that before proceeding to establish maximum rents in any particular area, (1) the Administrator must form a judgment that it is necessary to stabilize or reduce rents within the particular area in order to effectuate the purposes of the Act; (2) he must issue a declaration setting forth the necessity for, and recommendations with reference to, such stabilization or reduction; (3) he must wait sixty days after the issuance of such declaration to see whether rents have been stabilized or reduced by state or local regulation, or otherwise, in accordance with his recommendations; and (4) he must form a judgment that rents have not been so stabilized or reduced within that period of sixty days. The Administrator may then proceed by regulation or order to establish such maximum rents as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. To the extent that he deems practicable the Administrator is directed to give consideration to recommendations made by state and local officials.<sup>446</sup>

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<sup>444</sup> *Avant*, 139 F.2d at 706-07.

<sup>445</sup> *Id.* at 707 ("In the war emergency facing the country, Congress might well have thought that this measure of deliberation prior to the issuance of a rent regulation was all that was practicable under the circumstances. It might well have thought that the situation would not wait upon the giving of a formal hearing by the Administrator to the thousands of persons affected, and judicial review, before a rent regulation should become legally obligatory. We do not think that the procedure established in the Act for the fixing of maximum rents violates the due process clause of the Fifth Amendment.").

<sup>446</sup> *Id.*



Adjudicatory procedures for administrative review for the OPA were also codified in statutory provisions.<sup>447</sup> In *Rottenberg v. United States*,<sup>448</sup> the court refers to Section 203(a) of the Act, which states, among other things, that “within a period of sixty days after the issuance of any regulation under § 2, any person subject to any provision of such regulation may file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections,” and that the Administrator must grant or deny the protest within thirty days after it is filed.<sup>449</sup> More generally, while courts tended to interpret ambiguous statutory terms such as “hearing” in a relatively permissive manner, thereby lowering agencies’ costs of compliance with statutory rules,<sup>450</sup> in some cases agencies themselves instituted procedures for conducting oral hearings or otherwise obtaining input from the public that went beyond precise statutory requirements.<sup>451</sup>

Beyond the OPA context, procedures structuring administrative action, and the availability of some judicial review, were familiar in the emerging administrative state. Regardless of whether agency procedures followed the strict letter of statutory requirements or went beyond them, litigants and the government increasingly sparred over the underlying reasonableness of agency action by the early 1940s. Even in the absence of a trans-substantive APA-style requirement against “arbitrary and capricious” decisions, Federal Communications Commission (“FCC”) licensing proceedings were one setting in which judicial decisions reflected a concern, at least in principle, with the

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447 See *Rottenberg v. United States*, 137 F.2d 850, 853–55 (1st Cir. 1943); see also Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 203(a), 56 Stat. 23, 31.

448 *Rottenberg v. United States*, 137 F.2d 850 (1st Cir. 1943).

449 *Id.* at 853–54 (internal quotation marks omitted). In *Rottenberg*, the First Circuit affirmed the validity of the Price Administrator’s adjudicatory process, holding that the time required before a final adjudication may be reached does not violate the Due Process Clause.

450 See, e.g., *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209 (E.D. Mo. 1945). In *Bailey*, the plaintiff challenged the AAA and Agricultural Marketing Agreement Act. Pursuant to the Agricultural Marketing Agreement Act, the War Food Administrator implemented a procedure for adjudication granting “a hearing before rulings of the Administrator” and informing plaintiffs of the “rulings of the Administrator, and the findings required by the Act, on which they were based.” *Id.* at 230–31. The court found “no denial to plaintiffs of due process in the various hearings. Before the amended order was issued, plaintiffs filed a brief and written argument in support of their exceptions to it. That they were not permitted also to present ‘oral’ argument, at that time, was not a denial of due process or any procedural action due the plaintiffs as a matter of right.” *Id.* at 231.

451 See, e.g., ATTORNEY GENERAL’S REPORT ON AGENCY PROCEDURES, *supra* note 436, at 107 (noting that the Bituminous Coal Division created an “elaborate hearing procedure” despite unclear statutory procedural requirements).

reasonableness of agency action. In *Sanders Bros. Radio Station v. FCC*,<sup>452</sup> which was later reversed by the Supreme Court, the Commission granted both plaintiff and a competitor broadcast permits in the same geographic area.<sup>453</sup> The D.C. Circuit held for the plaintiff, noting that the FCC had failed to consider the "economic injury" to the plaintiff in granting the competitor's license and that, barring "findings of fact, upon which the decision of the Commission may be rested[,] . . . the Commission's decision was arbitrary and capricious and consequently must be set aside."<sup>454</sup> In other FCC cases decided during the same period, the D.C. Circuit found that the Commission failed to make any meaningful findings of its own after rejecting the findings of an examiner—which the FCC was entitled to do—to support its decision to deny applicants' licenses, which the court deemed an arbitrary and capricious agency action.<sup>455</sup>

The FCC may have been one of the agencies from which courts most explicitly expected reasonableness, but the scrutiny courts levied on the FCC was not entirely unique. Although successful challenges to agency regulatory rules were not as common as they became after the advent of the APA,<sup>456</sup> agencies were nonetheless subject to judicial supervision regarding rulemaking.<sup>457</sup> Two examples give a sense of how these cases could play out even in the absence of the explicit, trans-substantive provisions governing rulemaking found in the APA. In *Heinz v. Bowles*,<sup>458</sup> a group of beef slaughterers challenged a regulation issued by the Price Administrator setting maximum prices on the grounds that the regulation caused these slaughterers to produce

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452 *Sanders Bros. Radio Station v. FCC*, 106 F.2d 321 (D.C. Cir. 1939), *rev'd*, 309 U.S. 470 (1940).

453 *Id.* at 323.

454 *Id.* at 326.

455 See *Courier Post Publ'g Co. v. FCC*, 104 F.2d 213, 217-18 (D.C. Cir. 1939) ("We hold that the appellant has sustained the burden of proof that there is a public need for a local station in Hannibal; that there is no substantial evidence in the record supporting the finding of the Commission that no such public need exists; and, that the finding by the Commission that the public convenience, interest, and necessity would not be served by granting the permit for a local station is in law arbitrary and capricious."); *Heitmeyer v. FCC*, 95 F.2d 91, 96, 100 (D.C. Cir. 1937) ("Under the circumstances, can it be said that the action of the Commission was anything but arbitrary, if not capricious? We think not; especially as its own findings were insufficient to support its conclusions of law and the decision based thereon.").

456 Cf. ATTORNEY GENERAL'S REPORT ON AGENCY PROCEDURES, *supra* note 436, at 116 ("A judgment upon the rational relation of the regulation to the statute has been all that has been sought, and instances of the failure of the judiciary to give due weight to the administrative judgment underlying a regulation are not numerous." (footnote omitted)).

457 See *id.* at 115-20.

458 *Heinz v. Bowles*, 149 F.2d 277 (Emer. Ct. App. 1945).

beef at a loss.<sup>459</sup> The court did not find the entire regulation invalid, but it also did not dismiss the slaughterers' argument, "despite the fact that the regulation [was] . . . generally fair and equitable as applied to the processing slaughterers who constitute[d] the greater part of the industry by volume of business."<sup>460</sup> While the court did not explicitly find the regulation "arbitrary and capricious"—language that would become familiar after its use in the soon-to-be-enacted Administrative Procedure Act—it nonetheless set the rule aside as applied to this group of beef producers.<sup>461</sup>

Successful challenges also occurred elsewhere in the realm of food-related law—in the context of a wartime regulation issued pursuant to the Second War Powers Act. In *United States v. Ashley Bread Co.*,<sup>462</sup> the defendant filed a demurrer to an information, alleging that a particular Food Distribution Order banning the resumed possession of any bakery product bore "no reasonable relationship to the power granted to the President to allocate material and facilities."<sup>463</sup> The court agreed, holding that the bakery corporation's action bore too trivial a relationship to the ultimate war-related rationing purpose underlying the relevant rule and statutory provision.<sup>464</sup> As with administrative law litigation in a post-APA world, the challenge to the agency action did not allege that the entire Act was unconstitutional, but rather that the specific regulatory rule—by allowing enforcement to occur in a situation so patently disconnected from the statutory purpose—lacked a reasonable relationship to the wartime statute.<sup>465</sup>

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<sup>459</sup> *Id.* at 279.

<sup>460</sup> *Id.* at 281. The court reasoned thus:

It is true [that] the [Emergency Price Control] Act does not guarantee a profit to each individual producer. And so, if the maximum prices enabled most of the non-processing slaughterers to operate profitably, the regulation would not be rendered invalid by the fact that an occasional marginal producer in the group could not stay in business under the established ceilings. But it does not follow from this that the Administrator can ignore the disastrous effect of the regulation upon a whole group of producers constituting an important segment of the industry, who, because of the nature of their operations, have a common economic situation that sets them apart from the rest of the industry.

*Id.*

<sup>461</sup> *Id.* at 283.

<sup>462</sup> *United States v. Ashley Bread Co.*, 59 F. Supp. 671 (S.D. W. Va. 1944).

<sup>463</sup> *Id.* at 672–73.

<sup>464</sup> *Id.* at 674.

<sup>465</sup> *Id.* ("[M]ere resumption of possession may be an entirely innocent act, unconnected with any purpose, design, or plan to encourage or induce the retail merchant to order more bakery products than he currently needs to supply his trade. In [the court's] opinion, such a regulation cannot be interpreted as a necessary or appropriate manner, condition, or extent of allocating material or facilities, as contemplated by the Second War Powers Act of 1942.").

Sometimes agencies ran afoul in litigation not because federal courts accepted the argument that agency action was substantively unreasonable, but because an agency failed to follow its own internal interpretations of agency procedures. For example, in a dispute involving the Bituminous Coal Division of the Interior Department,<sup>466</sup> the Agency argued that Associated Industries was not a “person aggrieved” by the Division’s price orders and thus lacked standing to bring a suit against the Division, which had ordered a minimum price increase per ton of bituminous coal under the Bituminous Coal Act of 1937.<sup>467</sup> Section 2(b) of the 1937 Act provides for a public official—the Consumers’ Counsel—and the Division argued that only the Consumers’ Counsel had authority to seek review of the Division’s orders.<sup>468</sup> In response to the Division’s argument, the Second Circuit noted that “the Commission ha[d] itself administratively interpreted the act to mean that Consumers’ Counsel is not the exclusive representative even of private consumers, in a proceeding before the Commission.”<sup>469</sup>

The other side of the coin, however, involves situations where judicial review regarding the “reasonableness” of war-related executive actions in the domestic sphere was quite permissive. And the fact that such deferential review did not arise in every case does not diminish the significance of specific decisions that failed to discern substantial weaknesses in the arguments advanced by federal authorities. From the perspective of the doctrinal and normative standards that had emerged by the late twentieth century, Japanese internment and other aspects of wartime measures raise profound concerns about the wisdom of domestic administration.<sup>470</sup> Still, in some sense the underlying

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<sup>466</sup> *Associated Indus. of N.Y. State v. Ickes*, 134 F.2d 694 (2d Cir.), *vacated*, 320 U.S. 707 (1943).

<sup>467</sup> *Id.* at 697, 699; *see* Bituminous Coal Act of 1937, Pub. L. No. 75-48, 50 Stat. 72. For those trying to clarify their agency history related to bituminous coal, note that the Division was the successor to the National Bituminous Coal Commission, created under that Act, but the court refers to the Division as the “Commission” throughout the opinion. *Ickes*, 134 F.2d at 697.

<sup>468</sup> *Id.* at 708–09.

<sup>469</sup> *Id.* (internal quotation marks omitted); *see also id.* at 709 (“[F]or the Commission . . . permitted the petitioner, as a representative of such consumers, to become a party to the proceeding before it. This permission was granted pursuant to Commission practice rules . . . . The Commission, by allowing petitioner to become a party, must be deemed to have found that petitioner came within the class of ‘interested parties.’” (footnote omitted)).

<sup>470</sup> *Cf. Hirabayashi v. United States*, 828 F.2d 591, 601 (9th Cir. 1987) (“[T]he information now in the public record constitutes objective and irrefutable proof of the racial bias that was the cornerstone of the internment order.”); ERIC L. MULLER, *AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II* (2007) (discussing military agencies’ views towards Japanese-Americans in World War II).

logic of internment constituted a concession *against* administration and a cross-cutting, one-size-fits all response of dubious justification—especially in the context of decisions such as *Korematsu v. United States*<sup>471</sup> and *Hirabayashi v. United States*.<sup>472</sup>

Procedural constraints on agency action could also be quite attenuated with respect to other functions viewed by executive authorities as most directly related to wartime security concerns.<sup>473</sup> That said, it is important to recognize that elsewhere in the administrative state being forged in the 1940s there were different legal arrangements that involved agency compliance with administrative procedures and judicial review. Indeed, rarely did lawmakers or agencies make the case that the exercise of executive power in the context of even a domestic wartime function should be viewed as an entirely discretionary matter.<sup>474</sup> The resulting picture may seem straightforward in reflecting greater concern with the legality of price administration, but it also shows the complexity of the broader relationship between law and war.

Procedures governing individual administrative adjudication and reasonableness-oriented review of agency action were also important in the tax context, where the expansion of mass taxation, fueled largely by American strategic objectives, nonetheless coexisted with the presence of external—both substantive and procedural—scrutiny of bureaucratic decisions. In several cases, taxpayers successfully challenged the assessment of taxes on the grounds that Treasury Department regulations ran counter to unambiguous statutory language.<sup>475</sup> Although it is unclear if the litigants always raised these contentions, because the filings were unavailable in a handful of cases, courts seemed to focus on the plain language of the statute and, by extension, whether the administrative regulation was a legislative or interpretive (interpretative, to use their language) rule.<sup>476</sup> Courts did not always explicitly draw this latter distinction, but the implication is clear.

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471 *Korematsu v. United States*, 323 U.S. 214, 215–16 (1944).

472 *Hirabayashi v. United States*, 828 F.3d 591 (9th Cir. 1987); see MULLER, *supra* note 470, at 15–20 (discussing the government's adoption of a presumption of disloyalty for all Japanese-Americans).

473 See *supra* Part II.A for one example—discussing suspension orders of the WPB.

474 John J. Coughlin, *The History of the Judicial Review of Administrative Power and the Future of Regulatory Governance*, 38 IDAHO L. REV. 89, 106 (2001).

475 See *infra* notes 477–89 and accompanying text.

476 See, e.g., *Maass v. Higgins*, 312 U.S. 443, 447–49 (1941).

In one case, the Supreme Court overturned several lower court decisions affirming the Commissioner of Internal Revenue's decision to include as part of estate tax liability the income earned by the estate after the decedent's death.<sup>477</sup> Although the district court opinion at issue found the Commissioner's regulation to be a reasonable interpretation of the statute, the Supreme Court agreed with the taxpayers, holding that the plain meaning of the statute flatly contradicted the government's argument.<sup>478</sup>

The Sixth Circuit reached a similar conclusion about the lack of support for an agency interpretation of a revenue statute in *Busey v. Deshler Hotel Co.*<sup>479</sup> There, a Collector of Internal Revenue assessed a tax pursuant to Section 500(a)(5) of the Revenue Act of 1926,<sup>480</sup> which imposed a tax on admissions "to any public performance for profit at any roof garden, cabaret, or other similar entertainment."<sup>481</sup> In rejecting the Collector's claim that the defendant's restaurant fell under this category, the court held that, "[t]o become binding, interpretative regulations must be reasonable and in furtherance of the intention of Congress, as evidenced by its Acts. An arbitrary regulation of the Commissioner of Internal Revenue is not enforceable."<sup>482</sup>

Similarly, in *Helvering v. Credit Alliance Corp.*,<sup>483</sup> searching judicial review of agency statutory interpretation was the order of the day. The Supreme Court set aside a regulation involving the denial of dividends credit in certain circumstances, because the Court believed the regulation was plainly at odds with the construction of the definitions within the statute.<sup>484</sup> Rejecting the Treasury Department's contention that the statute was ambiguous enough to support the agency's interpretation, the Court held that "no complexity or confusion is discoverable" in the statute, "and that the regulation not only was contradictory of the plain terms of the subsection but attempted to

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477 *Id.* at 444, 446, 449. Although this is not, strictly speaking, a wartime case, it arose at a time when the executive branch already had substantial concern about its capacity to finance expenditures related to national security.

478 *Id.* at 445, 447.

479 *Busey v. Deshler Hotel Co.*, 130 F.2d 187, 190, 192 (6th Cir. 1942).

480 Revenue Act of 1926, Pub. L. No. 69-20, § 500(a)(5), 44 Stat. 9, 91.

481 *Busey*, 130 F.2d at 188.

482 *Id.* at 190 ("Where the language of a taxing statute is plain and unambiguous, there is no occasion for resort to interpretative promulgations of the Treasury Department. Neither the administrative officers nor the courts may supply omissions or enlarge the scope of the statute.").

483 *Helvering v. Credit Alliance Corp.*, 316 U.S. 107 (1942).

484 *Id.* at 110-11, 113.

add a supplementary legislative provision, which could only have been enacted by Congress.”<sup>485</sup>

And in *Slough v. Commissioner of Internal Revenue*,<sup>486</sup> the Sixth Circuit found for taxpayers who challenged a treasury regulation pertaining to benefits for services rendered, promulgated under the Revenue Act of 1939.<sup>487</sup> The court rejected the Commissioner’s contention that the agency’s interpretation of regulations—adopted only two months after the relevant statute was amended to include the code provision at issue—was “entitled to very great respect” because of its “contemporaneous construction.”<sup>488</sup> Instead, the Sixth Circuit trained attention on whether the rule was consistent with the statutory provision. It held that regulations may become binding only when “in furtherance of the intention of Congress, as evidenced by its Acts; and where the language of a taxing statute is plain and unambiguous, there is no occasion for resort to interpretative regulations of the Treasury Department.”<sup>489</sup> *Busey, Credit Alliance Corp.*, and *Slough* readily illustrate the extent to which the system of mass taxation being built in the midst of the war effort was—like administrative action more generally—subject to a measure of judicial oversight. Such cases included not only factual disputes between tax officials and Americans adjusting to an expanding system of taxation, but also legal disputes regarding the precise meaning of increasingly complicated revenue statutes and the rationality of agency action.

Even in wartime, federal agencies with critical missions faced judicial constraints. Indeed, as the war progressed, the OPA lost an increasing proportion of cases involving disputes over the EPCA. Adjudicated in an Emergency Court of Appeals established under the EPCA, these cases involved the full panoply of matters similar in nature to the tax disputes discussed above—from disputes about the interpretation of substantive EPCA provisions to challenges about the extent of the agency’s factual basis for pursuing administrative enforcement. For example, in 1943, the Emergency Court of Appeals reversed an OPA determination in about eight percent of the twenty-six cases over which it presided. By 1944, about twenty-three percent of

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<sup>485</sup> *Id.* at 113.

<sup>486</sup> *Slough v. Comm’r of Internal Revenue*, 147 F.2d 836 (6th Cir. 1945).

<sup>487</sup> *Id.* at 837, 839; see Revenue Act of 1939, Pub. L. No. 76-155, 53 Stat. 862.

<sup>488</sup> *Slough*, 147 F.2d at 839.

<sup>489</sup> *Id.*

the Emergency Court of Appeals' cases (out of thirty-five) involved a reversal of the OPA.<sup>490</sup>

Given equilibrium effects that could make OPA determinations endogenous to the agency's expected probability of prevailing in court, it is difficult to draw strong inferences from the proportion of cases agencies lost. Yet even in the midst of wartime exigencies facilitating the consolidation of state authority, it is telling that courts were enforcing procedural requirements and scrutinizing statutory interpretations involving price controls, rationing, taxes, and related areas. While in some cases lawmakers had written these requirements directly into statutes governing wartime agencies,<sup>491</sup> key statutes (including the EPCA) left the details of such procedural schemes under the agency's purview (e.g., precisely how, and subject to what submissions from interested parties, the OPA Administrator would consider protests to proposed regulatory rules).<sup>492</sup> In short, well before the advent of the APA, procedural requirements during and before wartime were a reality for agencies, and they indeed could reflect agencies' own choices to bind their performance. Because agencies often had to contend with adverse court decisions as the New Deal period gave way to World War II, agency lawyers would place their agencies at some legal peril if they allowed their organizations to ignore procedural rules and constraints on agency statutory interpretation.

#### *F. Reprise: Resource Acquisition and State Capacity-Building Under Constraints*

The preceding survey reveals some of the nuances associated with wartime administration, capturing both the scale of change underway by the mid-1940s and the extent of presidential reluctance to pursue changes in the structure of American industry.<sup>493</sup> Executive authority over a coterie of wartime agencies expanded, but the work of those agencies was largely subject to procedural and (occasionally imposed) judicial limits.<sup>494</sup> Changes in legal doctrine legitimized broad agency legislative and enforcement power, and domestic agencies (along with

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<sup>490</sup> These figures were obtained by analyzing all cases of the Emergency Court of Appeals.

<sup>491</sup> See, e.g., Emergency Price Control Act of 1942, Pub. L. No. 77-421, §§ 203(a)–204(a), 56 Stat. 23, 31.

<sup>492</sup> *Id.* In the case of the EPCA, moreover, the executive branch played a pivotal role in writing the legislation, emphasizing the extent to which the executive branch was willing to accept at least a measure of procedural constraints affecting the regulation of the domestic economy during wartime.

<sup>493</sup> See *supra* Parts II.A, II.B.

<sup>494</sup> See *supra* Part II.E.



the military) benefited from new tax-generated financial resources and expanding staffs.<sup>495</sup> Belying the idea that federal state-building had largely run its course by the start of World War II, the American experience demonstrates how domestic and external pressures on the state are interdependent. Rather, in crucial respects, the robust administrative state of expansive federal agencies with power to gather routine information did not evolve until World War II.<sup>496</sup> Courts, lawyers, and policymakers frequently cited wartime concerns to explain why laws had to change in order to favor administrative power.<sup>497</sup> Americans accepted not only greater federal administrative power during the war, but also mass taxation.<sup>498</sup> No doubt, the Cold War was part of the rationale for continuing a vigorous role for domestic administration—both in legal arguments made by the executive branch (as in the *Youngstown* case) and in policymakers' explanations of their priorities to the public.<sup>499</sup> By the same token, the administrative state adapted to domestic political and legal constraints. Americans rejected large-scale nationalization of industries—and other means of direct federal control of all aspects of production.<sup>500</sup> Procedural constraints imposed limits on agency power, and executive actions were often legitimated through passage of statutes.<sup>501</sup> Just as external developments can spur stark changes in domestic legal arrangements, so too can states' fates be shaped by the constraints and opportunities created by domestic institutions.

To understand such changes, one might observe that the emergency opened the door to a new equilibrium of accommodation between business, labor, and the federal government, which expanded the resources available to grow federal administrative capacity.<sup>502</sup> That arrangement was not reached immediately. Roosevelt's machinations regarding agency structure, and the sometimes emotionally charged bureaucratic infighting that followed at the WPB,<sup>503</sup> almost certainly reflected the participants' bounded ability to steer a purely rational course at the time. The White House was nonetheless quite

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<sup>495</sup> See *supra* Parts II.B, II.C.

<sup>496</sup> See *supra* Part I.A.

<sup>497</sup> See *supra* Part II.C.

<sup>498</sup> See *supra* Part II.B.

<sup>499</sup> For a discussion of the domestic, as well as external, policy implications of the Cold War for Americans, see MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* 63–94 (2012).

<sup>500</sup> See *infra* Part III.A.

<sup>501</sup> See *supra* Part II.E.

<sup>502</sup> See *supra* Part I.B.

<sup>503</sup> See BRINKLEY, *supra* note 38, at 187–88.

plainly aware that the emergency offered the Administration an unusual opportunity to attempt a more radical restructuring of the United States' political economy.<sup>504</sup> Instead of finding renewed opportunities for reform as war-related changes played out, New Deal stalwarts keen to take on concentrated economic power, like Thurman Arnold, were increasingly sidelined.<sup>505</sup> The Administration did not opt for the more confrontational course; it chose instead to bolster the conventional regulatory role of the administrative state. In doing so, the Administration confronted an environment where the emergency indeed appears to have boosted the probability of success garnering public support, along with the chance of winning cases in court in pressing for an expanded administrative state. Finally, the emergency provided a rationale (and opened a political window) for offering new resources to business and workers (in the form of large production contracts and new wages), increasing the opportunity cost associated with political-economic conflict.<sup>506</sup>

In the short term, the resulting equilibrium meant that there was no complete transformation of the American political economy attempted by the Administration. Business received vast new contracts but accepted greater regulation.<sup>507</sup> Labor gained members as industry expanded but accepted wage freezes.<sup>508</sup> In the longer term, supporters of a more vigorous federal government succeed in gaining greater resources for the administrative state (in terms of both money and legal authority), and business accepted a more capable administrative state, but subject to even more explicit procedural constraints and judicial review.<sup>509</sup> Meanwhile, organized labor benefited from workplace and wage-related protections associated with the administrative state, but also had to live with—and had to learn to benefit from—new proce-

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504 See Durr, *supra* note 120, at 46–50; see also GREGORY HOOKS, FORGING THE MILITARY-INDUSTRIAL COMPLEX: WORLD WAR II'S BATTLE OF THE POTOMAC 1 (1991).

505 Daniel R. Ernst & Victor Jew, *Introduction* to TOTAL WAR AND THE LAW, *supra* note 54, at, 5–6.

506 See O'Brian and Fleischmann, *supra* note 164, at 12–13 (describing how the statutory provisions of the Second War Powers Act gave the federal government the power, for example, to allocate the facilities of a particular business exclusively to meeting military contracts).

507 See generally PAUL A. C. KOISTINEN, THE MILITARY-INDUSTRIAL COMPLEX: A HISTORICAL PERSPECTIVE 9 (1980).

508 See, e.g., SPARROW, *supra* note 37, at 67 (“[U]nion membership [increased] by over four million persons over the course of the war . . .”); see also STEVEN FRASER, LABOR WILL RULE: SIDNEY HILLMAN AND THE RISE OF AMERICAN LABOR 497 (1991).

509 See *supra* Part I.A.

dural constraints on agencies imposed by the APA soon after the war wound down.<sup>510</sup>

In contrast to the accommodation described here, administrative government during the critical wartime period could have taken a different direction—one less consistent with the theory developed in Part II. The White House and its allies could have sought a starker shift in governance for the United States. If the executive branch—concerned as it was about looming war—had chosen to ignore the burden of acquiring resources for the state, or the risks of costly friction relative to legal norms or ideological attitudes, we might have expected to see an attempt at thorough executive dominance in the machinery of mobilization.<sup>511</sup> The White House could have pursued something closer to direct control of industry as it did in the early New Deal era,<sup>512</sup> and would likely have cast aside or explicitly undermined administrative procedures allowing meaningful public participation and challenges to agency action. Administration officials might have also pressed harder to avoid the kind of pluralist accommodation of regional and economic interests readily apparent in wartime arrangements to produce synthetic rubber and support agricultural production. History shows otherwise.

### III. ANALYSIS AND IMPLICATIONS

What broader implications might scholars, lawyers, and policy-makers draw from the trajectory of the American administrative state in World War II? At least three developments merit closer attention given their implications for law, politics, and organization. First, consistent with the inflection thesis regarding the trajectory of administrative government in the United States, the period of World War II and its immediate aftermath was indeed a time of inflection in the history of the American administrative state. It was when law, adaptive organizations, and politics coincided to create the core of the modern American administrative state (creating an alternative account to those emphasizing the New Deal era or more recent periods as more pivotal). This inflection reflected enormous change—but a transformation nonetheless that was carefully managed to make the administrative state relatively consistent with the American political economy

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<sup>510</sup> See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. L., ECON., & ORG. 180 (1999). On organized labor's strategy with respect to regulation, see FRASER, *supra* note 508, at 327–28.

<sup>511</sup> See *supra* notes 128–29 and accompanying text.

<sup>512</sup> See Schiller, *supra* note 53, at 421.

and prevailing legal values at the time (for example, reflecting skepticism of government ownership of industry).<sup>513</sup> Second, the emergence and evolution of routine administrative procedures—in some cases developed by agencies before statutes were in place—reveals their important role.<sup>514</sup> The procedures expose elements of agency strategies to assuage opposition and bolster a measure of autonomy, but also reflect the presence of meaningful constraints on the executive branch, even in wartime.<sup>515</sup> The existence of limits on executive power probably helped federal agencies make credible commitments and assuage opposition from interest groups, the private sector, and even the general public that could have undermined war mobilization goals. Finally, national-level strategic goals linked to international security were pivotal in motivating the rapid expansion and entrenchment of the administrative state, which casts doubt upon the conventional dichotomies between “guns and butter.” I address each of these ideas below.

*A. Inflection and Entrenchment in the Administrative State*

During the period of World War II and its immediate aftermath, the federal government carried out unusually challenging administrative feats while gradually orienting itself towards expanding the regulation of markets and administering public benefits.<sup>516</sup> It was at this time that the major features of the modern American administrative state, with the resources to carry out this vision, came together. The fact that so much of the wartime administrative state persisted is enormously significant in American political development and underscores how state-building problems are deeply tied to the organizational schemes, legal interpretations, and institutional routines that emerge in wartime.<sup>517</sup>

Just as meaningful, though, is the carefully circumscribed nature of reform. To wit, Roosevelt pursued reform in a manner that accommodated American political, ideological, economic, and legal values

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<sup>513</sup> See BRINKLEY, *supra* note 38, at 265–67.

<sup>514</sup> See *supra* Part II.E.

<sup>515</sup> See *supra* Part II.E.

<sup>516</sup> See *supra* Part II.A.

<sup>517</sup> See Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, in *TOTAL WAR AND THE LAW*, *supra* note 54, at 185 (discussing the importance of the postwar period for the development of administrative law, and particularly concepts of rationality in the administrative state); see also CUÉLLAR, *supra* note 123, at 201–04 (exploring the pressures on states to manage concerns about social welfare policy and benefits in the aftermath of war).

and realities. This accommodation helped reduce the risk of friction between the demands placed on administrative government and the kind of political, economic, and ideological resistance that could have led to a far more fraught mobilization. Thus, mobilization occurred in accordance with a specific pattern, reflecting (a) the absence of a move towards government ownership of industry, (b) accommodation of industry, labor, and regional interests in the administration of the OPA and the WPB, and (c) an overall structure short of the corporatist structure implicated in NIRA. Hence, crisis did not fundamentally reshape the political economy or prevailing elite views of the legal system, but created a window of opportunity (and pressure) for change with long-term consequences.

The conventional wisdom about the development of the modern American administrative state nonetheless fails to give sufficient attention to this crucial period, and such neglect has consequences.<sup>518</sup> Scholars have less of an appreciation, for example, of the potentially path-dependent consequences of legal changes arising in the transition from the New Deal era to the war mobilization period to the postwar, APA phase of the American administrative state.<sup>519</sup>

The New Deal experienced a period of constraint on expansion even as the Administration and its congressional allies sought to consolidate the reforms of the 1930s.<sup>520</sup> Even at its height, the New Deal still involved considerable legal and political conflict associated with limits on agency power. The Supreme Court had invalidated NIRA on the ground that it involved an unconstitutional delegation of legislative power, and delegation-related problems continued for the federal government.<sup>521</sup> Agencies in the federal government were subject to limits of uncertain extent in their capacity to gather information without articulable suspicion, when the very premise of administrative agencies depended on the enforcement of laws against entities that had not necessarily furnished authorities a basis for targeted suspicion.<sup>522</sup> Federal agencies faced uncertain limits in the scope of federal power under the Commerce Clause and other provisions.<sup>523</sup> As we have seen, these doctrines changed definitively during and immediately after the wartime years. In contrast, other jurisdictions (includ-

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<sup>518</sup> See *supra* note 24.

<sup>519</sup> See *supra* note 24.

<sup>520</sup> See generally POLENBERG, *supra* note 26, at 73–75.

<sup>521</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935).

<sup>522</sup> See *supra* Part II.D.

<sup>523</sup> See *supra* Part II.C.

ing state-level jurisdictions within the United States, such as California and New York) did not change in a manner comparable to how the federal government did.<sup>524</sup>

In parallel fashion to these doctrinal changes, the domestic, administrative, and regulatory structures of the U.S. government grew dramatically during World War II. In charting a course for the expanding White House staff and the new agencies that were being created, however, neither Roosevelt nor his closest advisers sought to place the federal government in the role of direct owner or controller of industrial activity.<sup>525</sup> Instead, Roosevelt and his aides experimented with arrangements that allowed the federal government to achieve three goals: (1) establishing a coordination mechanism responsive to wartime needs using contracts and occasional administrative orders to shape production priorities and allocation, (2) creating a means for robust consultation with and responsiveness to individuals with ties to business and labor in order to minimize political friction, and (3) to the extent possible (and consistent with the other goals), responding to the consumption-related concerns of the general public, whose support was useful in managing the politics of the war's domestic front.<sup>526</sup>

Although wartime changes in administration were significant, they represented an evolution of the administrative state—and particularly a maturation of an agency regulatory model—rather than a wholesale transformation of the relationship between the public and private sectors.<sup>527</sup> This lowered some of the risks that policymakers would have faced if they attempted to resuscitate the project—associated with some reformers of the early phase of the New Deal—of asserting direct federal managerial, workplace, and policy-oriented control of industrial activity.<sup>528</sup>

More specifically, the *evolutionary* transformation of the administrative state fused sizeable innovation in administrative government

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<sup>524</sup> Specifically, the time and character of the changes in institutional capacity for the administrative state during wartime and in the period immediately following it, as well as the changes in administrative law, had at least a somewhat distinctive character relative to other jurisdictions. For example, the expansion in institutional capacity and the legal changes happened at a different time and in a different fashion.

<sup>525</sup> See Ballam, *supra* note 93, at 625–27 (noting the various approaches Roosevelt and his advisors took establishing new agencies to control different industries while intentionally avoiding direct management of business).

<sup>526</sup> See *id.* at 625–28.

<sup>527</sup> See *id.* at 628–30 (noting that the administrative state established in World War II created a permanent regulatory state without “centralized coordinating” from the federal government).

<sup>528</sup> See BRINKLEY, *supra* note 38, at 265–68.

with an overall approach eschewing direct government control of industry—and otherwise limited the friction that could have arisen relative to the American political economy and prevailing legal ideas about the role of government.<sup>529</sup> This arrangement amounted to an accommodation with political, ideological, and legal constraints that could have created considerable friction for the administrative state rather than allowing it to acquire resources and build capacity. This distinctive combination of accommodation and institutional change fomented the growth of relatively flexible and high-capacity administrative agencies, including both new wartime agencies and longstanding bureaucracies that assumed heightened responsibility. These agencies operated in a fiscal environment that saw the first American experience with high levels of mass taxation.<sup>530</sup> Agencies were supervised by a newly expanded White House organization, and were subject to elaborate procedural constraints that foreshadowed the emergence of a trans-substantive Administrative Procedure Act. In many respects, late twentieth-century American lawyers would have found the structure of federal administrative action in place by the late 1940s to be strikingly familiar.

Driven by the relative success of the World War II era compromises, continuing public demand for goals requiring regulation, and the relative deference to federal action associated with the Cold War, the post-World War II administrative state became a fixture of American life.<sup>531</sup> The postwar period brought a number of important changes, including the APA and the dismantling of many wartime agencies. Just as striking (if not more so) was the degree of persistence in the enlarged administrative state that had been created. It is true that nearly three decades would transpire before the creation of agencies like OSHA and EPA, but federal revenues, taxation, and civilian employment continued at or near wartime levels.<sup>532</sup> Agencies that grew during wartime, like the FSA, kept large budgets and in some cases eventually attained cabinet status in the succeeding decade.<sup>533</sup> Though some wartime agencies were abolished or saw their

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<sup>529</sup> See *id.* at 266 (“[T]he New Deal . . . solved the problems of capitalism without altering the structure of capitalism . . .”).

<sup>530</sup> See *supra* Part II.B.

<sup>531</sup> See Bellam, *supra* note 93, at 630.

<sup>532</sup> See *supra* Part II.B.

<sup>533</sup> *A Common Thread of Service: An Historical Guide to HEW*, DEP’T OF HEALTH & HUM. SERVICES (July 1, 1972), <http://aspe.hhs.gov/info/hewhistory.htm> (noting that the Federal Safety Administration continued to grow after World War II and eventually became a cabinet level department, now the Department of Health and Human Services, in 1953).

authority expire after the wartime years, their functions were sometimes transferred to other bureaus, as with OPA authorities that were moved to the Department of Agriculture<sup>534</sup> and Federal Trade Commission.<sup>535</sup> And legal changes that enabled the growth and legal legitimacy of the administrative state, such as the more permissive nondelegation doctrine and expanded administrative subpoena powers, persisted.

The fact that this transformation was evolutionary does not, by itself, answer the question of why the American administrative state kept its size and scope after World War II but not after World War I. Part of the answer almost certainly lies in the changed legal and political context of the mid-1940s relative to what was occurring at the very outset of the war. By the end of World War II, Roosevelt and his allies had achieved an accommodation with various interests that tended to support the long-term role of the administrative state. Conflict persisted over the role of the federal government in administering social policy and economic relationships, but the stakes for business and a variety of interest groups became more manageable when it came to the role of large administrative agencies operating with extensive grants of legal authority. In contrast to what had developed by the late twentieth century,<sup>536</sup> in the immediate postwar years the idea of government "regulation" was less threatening because it was understood as an alternative to more direct government control of economic activity.<sup>537</sup> In declining to pursue more drastic strategies for expanding direct government control of industry even in wartime, federal policymakers almost certainly signaled a more constrained role for agencies in peacetime. Meanwhile, business groups probably understood that administrative capacity for regulation could be helpful to the private sector, too, in areas such as labor enforcement.

Greater public demand for regulation and administration existed as well, reflecting concern over veterans,<sup>538</sup> economic demobilization

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534 See Exec. Order No. 9841, 12 Fed. Reg. 2645, 2645 (Apr. 25, 1947) (transferring certain subsidy controls from the OPA to the Department of Agriculture).

535 See Exec. Order No. 9809, 11 Fed. Reg. 14,281, 14,282 (Dec. 13, 1946) (transferring the Financial Reporting Division of the OPA to the Federal Trade Commission).

536 See generally STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 42-47 (1993) (discussing the problems with government regulation as agencies further developed through the end of the twentieth century).

537 See Ballam, *supra* note 93, at 630 ("[T]he country was willing to accept piecemeal regulation, but resisted an overall, centralized coordinating role for the federal government.").

538 See SPARROW, *supra* note 72, at 254-55 (discussing postwar demand for federal benefits and administration).



after a great disruption, and the Cold War.<sup>539</sup> Moreover, procedures could constrain agencies and force them to take account of pluralist pressures that would otherwise risk undermining agency action. Procedural constraints could thus ironically empower agencies in the longer term, making Congress and interest groups more likely to be satisfied with the agencies' endeavors. Although these factors do not necessarily explain every aspect of the administrative state's entrenchment, they do help underscore some of the dynamics that made the mid-1940s and early 1950s different from the 1920s.

Moreover, in analyzing these changes, scholars can gain a better appreciation for the relationship between different mechanisms through which the state can exert an influence on its political economy. Debates about the administrative state at the outset of World War II indicate that some policymakers had come to understand a core attribute of the nation-state that is rarely appreciated today<sup>540</sup>: they grasped that the state could use administration to alter the trajectory of society and the economy through multiple mechanisms, and not just through regulation.<sup>541</sup> The war, moreover, created a window for the rapid development of the administrative state—and thus unusual opportunities to deploy different mechanisms for shaping social and economic activity.<sup>542</sup> Some of these mechanisms could substitute and complement each other, including conventional agency regulation, taxation, structured public contracting, and direct control of industry.<sup>543</sup> In the kind of pluralist system that had emerged in the United States by the start of World War II, the larger political and economic context plainly exerted considerable pressures on the state—pressures that constrained even a wartime President and led to an evolution (rather than a starker shift) in the routines of administration.<sup>544</sup>

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<sup>539</sup> See JOHN LEWIS GADDIS, *THE COLD WAR: A NEW HISTORY* 15–17 (2005) (exploring the consequences of the Cold War for the legitimacy and authority of the federal government).

<sup>540</sup> See generally BRINKLEY, *supra* note 38 (discussing the changes in the federal government's role in our economy that occurred during World War II).

<sup>541</sup> See *id.* at 266–67.

<sup>542</sup> See, e.g., *id.* at 177–82 (discussing the various mechanisms that the federal government attempted to use to mobilize for war).

<sup>543</sup> The modern study of administrative law too often segregates the analysis of regulation and related adjudicatory and rulemaking functions from other mechanisms for shaping the political economy, devoting relatively limited attention to the trade-offs among different forms of administration that helped produce the legal machinery governing regulation. See, e.g., Peter Vincent-Jones, *Contractual Governance: Institutional and Organizational Analysis*, 20 OXFORD J. LEGAL STUD. 317 (2000).

<sup>544</sup> See SPARROW, *supra* note 37, at 269–75.

Nonetheless, some elements of the state had by then acquired a degree of autonomy. And autonomy rendered quite meaningful the choice between different mechanisms to respond to that context. Policymakers and lawyers within the administration could have made different—and riskier—choices that would have cut more against the grain of the American political economy and attitudes about legal ideology.<sup>545</sup> Regulation could directly change private actors' valuation of the costs and benefits of particular business practices.<sup>546</sup> Large government contracts, reflecting a mix of new federal largesse but perhaps bargained for against the backdrop of more coercive state control of industry, could (and during the war, did) reshape private industry.<sup>547</sup> Taxation served not only as a means of financing military activity and federal administrative capacity, but also as a vehicle for shaping private behavior.<sup>548</sup> Thus, the inflection point represented by the war not only inaugurated an expanded role for the federal government, but also illustrated a degree of subtle interconnections among domains ranging from taxation to public contracting that allow the state to affect its environment.<sup>549</sup> Yet rarely do modern scholars of the administrative state devote sustained attention to the relationship among these mechanisms for state activity, or their complex relationship to regulatory objectives.

### *B. The Institutional Logic of Administrative Procedure*

Shortly after the war concluded, some official histories and sympathetic observers rushed to paint a relatively flattering portrait of wartime administration. These accounts derided boasts of Hitler and Tojo about the presumed weakness of democracies in wartime.<sup>550</sup> Whether one accepts that democratic institutions can help signal re-

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<sup>545</sup> See BRINKLEY, *supra* note 38, at 266–68 (noting the failure of the antimonopoly movement during the New Deal, and how it would have altered the American economy had it succeeded).

<sup>546</sup> See *id.* at 114–15 (discussing how Depression era politicians believed regulations could deter monopolistic behavior).

<sup>547</sup> See SPARROW, *supra* note 37, at 6.

<sup>548</sup> See *id.* at 104 (discussing Roosevelt's proposal for a profit tax in an effort to keep overall inflation low).

<sup>549</sup> See generally SPARROW, *supra* note 37, at 40 (outlining how the wartime changes in Federal taxation policy, contracting, and involvement in labor management drastically altered the role of the federal government).

<sup>550</sup> See, e.g., GULICK, *supra* note 65, at 126. Writing in 1948, Gulick concluded:

The superior flexibility of the democracies in the face of developments is easy to understand when the record is analyzed. In dictatorships decisions are made by the leadership group. They are enforced with ruthlessness. Neither criticisms nor constructive suggestions are wanted or heeded. "Failures" are hidden and denied be-

solve, build legitimacy, or otherwise enhance a regime's capacity to advance its interests in wartime,<sup>551</sup> administrative procedures governing matters such as notice and publication of regulatory rules are often considered essential to harmonizing democracy and the demands of effective administration.<sup>552</sup> Indeed, it is difficult in retrospect to ignore the continuing relevance of administrative procedures forcing agencies to disclose their rationales for administrative action and rendering them somewhat more subject to democratic oversight.<sup>553</sup> It is not surprising that lawmakers—whether in the 1940s or the early twenty-first century—would find value in imposing procedural requirements on agencies.<sup>554</sup>

The wartime period showcases how procedures used by agencies were not always imposed by statute or required by the White House.<sup>555</sup> Despite President Roosevelt's veto of the Walter-Logan bill in 1940,<sup>556</sup> agencies often implemented procedures to manage their administrative activities during wartime. Sometimes these procedural rules reflected prevailing conceptions of due process, but on some occasions agencies went beyond the minimum requirements explicitly established by law.<sup>557</sup> Even before the APA, procedural constraints were capable of having meaningful consequences, procedural restraints were either written into agency statutes or incorporated into agency practices, and agencies sometimes lost.<sup>558</sup> Because procedural rules had consequences, agencies' immediate goals were not necessarily advanced by these constraints.

But for senior agency administrators, there was always more at stake than the outcome of any individual case. Procedures governing

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hind a wall of censorship and discipline. Even the leaders tend to believe their own propaganda.

*Id.*

<sup>551</sup> See Dan Reiter & Allan C. Stam III, *Democracy, War Initiation, and Victory*, 92 AM. POL. SCI. REV. 377, 377–79 (1998) (noting the advantages of democratic governance during wartime).

<sup>552</sup> See Juli Ponce, *Good Administration and Administrative Procedures*, 12 IND. J. GLOBAL LEGAL STUD. 551, 552–53 (2005) (noting that a democracy requires administrative procedures to ensure legitimacy of administrative processes).

<sup>553</sup> See, e.g., Daniel J. Rohlf, *Avoiding the 'Bare Record': Safeguarding Meaningful Judicial Review of Federal Agency Actions*, 35 OHIO N.U. L. REV. 575, 576 (2009) (discussing the importance of procedural and judicial safeguards in modern agency actions).

<sup>554</sup> See Shepherd, *supra* note 24, at 1680 (noting that politicians in the 1930s and 1940s wanted greater administrative procedural protections to protect rights).

<sup>555</sup> See *supra* notes 450–51 and accompanying text.

<sup>556</sup> See Shepherd, *supra* note 24, at 1593.

<sup>557</sup> See *supra* notes 450–51 and accompanying text.

<sup>558</sup> See *supra* Part II.E.

agency activities probably helped assuage potential conflict with organized groups and legitimize agencies, while giving them a capacity to anticipate (and therefore respond to) public reactions.<sup>559</sup> At a minimum, the existence of administrative procedures governing adjudication and rulemaking—along with the widespread continued availability of judicial review during the war years—appears to have played a role in lowering the costs of an expanding administrative state. Procedural constraints could have lowered risks of political conflict for agency officials who obtained a means of gathering information about public responses. Organized interests gained useful new information about agency performance through court proceedings, agency arguments, and public responses to proposed agency orders. And, at least to a limited extent, members of the public could make use of agency procedures to challenge initial decisions and obtain information useful for litigation or subsequent political challenges.<sup>560</sup> To be sure, federal agency action during World War II reflected some variation in the weight assigned to external procedural constraints, as evidenced in the procedural rules governing OPA orders as compared to the lack of recourse offered to Japanese-Americans relocated to detention centers.<sup>561</sup> Nonetheless, major agencies during wartime—from the Treasury's Internal Revenue operations to the War Production Board—were operating in an elaborate procedural environment that made them far from arbitrary.<sup>562</sup>

Administrative procedures attained even greater prominence as potential instruments of control over agencies in the succeeding years. Although the aforementioned *Yakus* opinion is more familiar as a nondelegation case,<sup>563</sup> it offers a microcosm showcasing the debates that gave rise to the APA. Although the case is indeed plainly concerned with the implications of broadly worded statutory delegations,<sup>564</sup> even Justice Rutledge in the dissent acknowledged that wartime needs and congressional power justified an expansive grant of price regulation authority in the EPCA.<sup>565</sup> Where Rutledge remained

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559 Cf. Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009) (discussing why agencies self-impose procedural limitations on their own processes).

560 See *id.* at 871–72.

561 See *supra* Part II.D.

562 Agency practice during this period reflected flexibility and activities not dissimilar from “management-based” administrative action currently of interest to scholars and policymakers (but well before these terms were coined).

563 *Yakus v. United States*, 321 U.S. 414 (1944).

564 *Id.* at 425–26.

565 *Id.* at 461 (Rutledge, J., dissenting).

deeply concerned—particularly in cases such as the one before him, involving criminal penalties for regulatory violations—was with the truncated procedures available to challenge pricing regulations.<sup>566</sup> In his estimation, someone seeking to challenge an OPA enforcement action either had to take the case to two separate courts, one to challenge the rule and one to challenge the facts as applied to the individual in question, or to one court but forego the ability to challenge the substance of the rules.<sup>567</sup> In effect, the view represented in the dissent reflected a grudging acceptance of expanded federal power, but only in an environment where greater procedural regularity was the norm.

Justice Rutledge was not alone in his concerns about the procedures governing a growing federal administrative state. Certain New Deal progressives were quite disturbed by some of what they saw during World War II.<sup>568</sup> The wartime picture that emerged furnished a cause for them to complain, as never before, about the ills of the administrative state: a proliferation of dollar-a-year men, the relatively unconstrained decisionmaking structure of some of the wartime agencies where these erstwhile businessmen-turned-public-servants were working (especially the WPB), and the willingness of some key administrators to explicitly mix the concerns of pluralist politics with technical goals.<sup>569</sup> Surely such an experience complicated the simple narrative that gained considerable traction among progressives before the war, when agencies were taken to embody the virtues of expertise, political responsiveness, and legal and statutory legitimacy relative to meddlesome courts.<sup>570</sup>

Previous scholarship on the APA rightly points out that these concerns did not fall on deaf ears. The proceduralist objections raised by Rutledge and others seemed to be heeded both by New Deal liberals and skeptics of the administrative state in Congress.<sup>571</sup> In this account, the APA offered a means through which to govern regulatory agencies that gained increasing interest across a large ideological divide separating traditional New Deal supporters and members of the so-called “conservative coalition” of Republicans and Southern Democrats.<sup>572</sup> The procedural changes embodied in the APA locked in the

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<sup>566</sup> *Id.* at 467–68.

<sup>567</sup> *Id.* at 470.

<sup>568</sup> See Schiller, *supra* note 53, at 189–90.

<sup>569</sup> See *id.* at 189–93.

<sup>570</sup> See *id.* at 188–89.

<sup>571</sup> See McNollgast, *supra* note 510, at 181–82; Shepherd, *supra* note 24, at 1663–64.

<sup>572</sup> See Shepherd, *supra* note 24, at 1641–49; see also Schiller, *supra* note 53, at 189–90.

availability of procedures that could be used to trigger attention from lawmakers and the White House, while preserving a measure of judicial review.<sup>573</sup> But previous scholarship does not fully address how the willingness of New Deal supporters to back the APA also almost certainly reflected a postwar sense that the newly attained prominence of the federal administrative state would not soon be diminished. Lawmakers representing constituencies with quite distinct motivations could thus come together to support a bill that few saw as a recipe for large-scale judicial intervention in administrative affairs, but that established greater procedural regularity. The APA's procedural provisions could assuage the concerns of progressives like erstwhile New Deal architect James Landis, who had grown worried about administrative discretion.<sup>574</sup> Supporters of a robust federal administrative state could see in the APA relatively limited constraints on agencies, as well as a chance to head off more draconian procedural limits on agency power.<sup>575</sup> And Republicans and Southern Democrats skeptical of the administrative state could see the bill as a step in the right direction, even if they might have preferred a more drastic change.<sup>576</sup>

In fact, the change wrought by the APA was not exactly drastic. Although the presence of a cross-cutting statute was significant in further stabilizing—and even expanding the scope of—expectations about procedural regularity, it is important to remember that the APA itself also reflected an evolutionary change rather than a sharp break with the past.<sup>577</sup> For many agencies, procedures governing administration and the availability of relatively routine judicial review were already commonplace well before 1946, and even in the midst of wartime.<sup>578</sup> And the APA did not attempt to reform the burgeoning administrative domain of federal contracting that would be entrusted to the successor agencies of the WPB in the Pentagon.<sup>579</sup>

True, the APA's more far-reaching procedural framework facilitated some agencies' adoption of procedural constraints. The APA spawned, over time, constraints on executive power as well as the de-

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<sup>573</sup> See *supra* note 572.

<sup>574</sup> See LANDIS, *supra* note 53, at 114–15.

<sup>575</sup> See generally Shepherd, *supra* note 24 (discussing why liberals supported the APA).

<sup>576</sup> Indeed, without taking into account a wartime experience that entrenched the role of federal agencies, it is at least somewhat odd that supporters of the Walter-Logan bill did not propose a more aggressive change restricting agency discretion and expanding judicial review.

<sup>577</sup> See *supra* Part II.E.

<sup>578</sup> See *supra* Part II.E.

<sup>579</sup> The Administrative Procedure Act, for example, exempts from all procedural requirements rules dealing with military contracting. See 5 U.S.C. § 553(a)(1) (2012).

velopment of regulatory policy techniques.<sup>580</sup> In addition, the APA probably helped facilitate the longer-term entrenchment of the regulatory state by helping to legitimize the federal government's expanded role through a set of standardized procedures that appeared to limit arbitrary applications of power. It is telling, however, that in many respects, the impact of the APA was evolutionary rather than revolutionary. The existence of limits on executive power even in the midst of the war probably helped federal agencies make credible commitments and assuage opposition from interest groups, the private sector, and even the general public that could have undermined war mobilization goals. And contrary to some accounts,<sup>581</sup> national security crises can spur not only pressure for consolidating and expanding state power, but also for meaningful legal constraints on executive action—at least given a pluralist system that requires organizations to build capacity and acquire resources in a competitive environment.

There is no simple answer to the question of how administrative procedure might have evolved in the absence of World War II. It may be telling nonetheless to consider the stark contrast between the post-war legislative debates about administrative procedure and the controversy surrounding the Walter-Logan bill in 1940. Before the war, lawmakers were more polarized about the size and role of the federal administrative apparatus, and Franklin Roosevelt's thinly veiled disdain for the Walter-Logan legislation reflected substantial concern in the Administration about the bill's consequences for the federal administrative state.<sup>582</sup> After the war, lawmakers appeared to recognize that, in a time of demobilization where substantial public demand existed for federal benefits, the existence of powerful federal agencies was less controversial and unlikely to be undone.<sup>583</sup> Even with a potentially promising political opening for more drastic reforms at the outset of war, the President had avoided the changes that business most feared.<sup>584</sup> By the time the APA was forged, a measure of accommodation was the order of the day. The bill standardized procedures, benefiting lawmakers and outside interests seeking to constrain agencies, but it at least initially promised less extensive judicial intervention in the administrative state.<sup>585</sup>

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<sup>580</sup> See *supra* Part II.E.

<sup>581</sup> See, e.g., Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).

<sup>582</sup> See Vanderbilt, *supra* note 25, at 89–91.

<sup>583</sup> See Ballam, *supra* note 93, at 630.

<sup>584</sup> See Shepherd, *supra* note 24, at 1561–64, 1641.

<sup>585</sup> Cf. Gellhorn, *supra* note 435, at 227. The experience of the war helps make further

Had external war not intervened, it is quite possible that the domestic war of sorts, regarding the scope and size of the federal administrative state, would have persisted. Although wartime agencies were certainly subject to some public scorn, their ubiquitous role during the war years made them far more familiar to the public.<sup>586</sup> A familiar public narrative describing the nation's successful war effort reached Americans through radio and newsprint as federal inspectors, regional offices, and district representatives became ever more visible to the public.<sup>587</sup> These developments, along with the continuing public demand for a prominent federal role in veterans' benefits, managing external risks, and promoting economic growth during demobilization, made the war years appear to dilute some of the most pointed arguments against the expansion of the federal administrative state.<sup>588</sup> Finally, Roosevelt and other partisans of the administrative state had signaled during the war years a willingness to compromise about the scope of federal power even in the midst of wartime, almost certainly helping to assuage the concerns about expansive federal administration among some elites in business.<sup>589</sup> Without World War II and the Cold War, eventual disenchantment with the latter part of the New Deal and ascendancy of the so-called "conservative coalition" might have yielded a procedural statute closer to the Walter-Logan bill.<sup>590</sup> As the New Deal coalition further frayed, greater conflict could have ensued over the substance of federal regulation, taxation, and contracting. Instead, multiple factions in 1946 increasingly came to the conclusion that they would need to accept mild procedural constraints

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sense of the compromise that emerged—where procedural constraints were formalized and expanded, but large federal agencies had become familiar to the public, making a direct, substantive assault on federal administrative power less viable.

<sup>586</sup> See, e.g., BLUM, *supra* note 95, at 302. Discussing broad public perceptions at the time of the war's end, he writes:

As the war ended, Americans in and out of public life were trying consciously and positively to assure the nation's safety and prosperity. They were proceeding from sets of premises as varied as had been the sets of assumptions that characterized public debate during the war years. They were engaged, as before, in partisan as well as ideological wrangles. Yet the President and Congress wanted to satisfy the yearnings of the GI's, the two great yearnings of the American people—safety from war and security from depression.

*Id.*

<sup>587</sup> See, e.g., Response to "Fireside Chat" on Defense, *supra* note 82, at 241–48 (a radio broadcast by Roosevelt publicizing the War Production Board through a discussion of its members and duties).

<sup>588</sup> See Shepherd, *supra* note 24, at 1642–47.

<sup>589</sup> See *id.* at 1643–44, 1647.

<sup>590</sup> See *id.* at 1622–30 (noting that the Walter-Logan bill was likely defeated in part because of World War II).



on a federal administrative state that was going to be a long-term fixture of American life.<sup>591</sup>

### C. *Geostrategic Priorities and Domestic Administration*

National-level strategic goals appear to have played a pivotal role in motivating the rapid expansion of the administrative state, as well as its entrenchment. Conversely, domestic legal and practical impediments to the effective functioning of the administrative state posed risks to American strategic priorities—or at least were understood to do so—involving the country's external goals. White House and other federal government officials, for example, were deeply concerned about national-level strategic goals—such as production, mobilization, and managing social pressures through benefits—and believed the administrative state to be a key tool in the “arsenal of democracy.”<sup>592</sup> As the White House considered its options for growing the resources, legal authority, and managerial capacity of the administrative state, it would have been hard-pressed to ignore the risks of a potentially failed mobilization effort.<sup>593</sup> As a result, even in light of growing concern among policymakers about the country's broad strategic priorities, the public's reactions and conventional bargaining dynamics drove many of the day-to-day aspects of legislation and the performance of agencies such as the OPA.<sup>594</sup> Ever sensitive to the implications of precedent in earlier phases of the Administration, Roosevelt and his advisors could also weigh the value of creating a meaningful precedent that would allow the administrative state to expand without engendering too much conflict.

History indeed suggests that mobilization could have gone awry in a variety of ways. Other countries have sometimes faced political resistance and administrative problems, creating strategically meaningful difficulties, when mobilizing (e.g., undertaking effective domestic state responses) for war.<sup>595</sup> In the United States, Roosevelt and

<sup>591</sup> See McNollgast, *supra* note 510, at 182–83.

<sup>592</sup> See BUREAU OF THE BUDGET, *supra* note 45, at 14–16 (noting that Roosevelt strongly believed “effective administration [was crucial] to national defense”); DICKINSON, *supra* note 4, at 110–13; KENNEDY, *supra* note 6, at 619 (noting that Roosevelt's production and technology strategy was “the essence of the ‘arsenal of democracy’”).

<sup>593</sup> See Memorandum from Harold D. Smith, Dir., Bureau of the Budget, to President Harry S. Truman (May 3, 1946) (on file with The George Washington Law Review) (“I fear that failure to do something to tighten the organization of the Executive Office may prove to be as much as a stumbling block to you as it was to him.”).

<sup>594</sup> See Jacobs, *supra* note 112, at 919–21 (noting that the success of the OPA was due, in large part, to public buy-in of the rationing programs).

<sup>595</sup> See KEEGAN, *supra* note 5, at 59–63 (discussing Britain and France); cf. Claudia D.

other policymakers sought to forge—in some cases through trial and error—an administrative apparatus minimizing the risks of failed mobilization.<sup>596</sup> Roosevelt himself recognized the weaknesses of some of the initial efforts to manage mobilization—including the overly decentralized National Defense Advisory Commission and Supply Priorities Allocation Board.<sup>597</sup> However distant the resulting structures were from some abstract ideal response, those structures facilitated staggering increases in production and allowed Americans to harmonize national goals with private interests during the war.<sup>598</sup> It was a sufficient enough workable accommodation that it stuck. To the extent policymakers understood that domestic administrative governance played a role in national and international security, they could appreciate the misleading structure of alleged trade-offs between “guns” and “butter” that neglected the need to maintain domestic support for military activity.

If it is true that World War II was a watershed in the story of how the administrative state and national security affect each other, it is also true that the story continues. The September 11 attacks spurred major changes in administrative government, even if in the end those changes were not on the scale of what occurred in the 1940s. As the nation-state continues to evolve, lawyers, policymakers, and citizens will confront both explicit and more subtle dilemmas about the role of geostrategic interests in securing the legitimacy of the administrative state. A looming war may change the public’s willingness to accept an expansion in the role of government.<sup>599</sup> It is complicated enough to define the scope of war as a matter of legal doctrine, but questions about the concept of war are plainly more far-reaching than the doctrine would suggest. William James reflected on the normative and psychological currency of national imperatives that could be described as the “moral equivalent of war.”<sup>600</sup> Government officials routinely allude to war when explaining the role they envision for the public

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Goldin & Frank D. Lewis, *The Economic Cost of the American Civil War: Estimates and Implications*, 35 J. ECON. HIST. 299 (1975) (discussing the economic challenges faced by the Union in the midst of Civil War mobilization).

<sup>596</sup> See BRINKLEY, *supra* note 38, at 177–86 (noting the trial and error Roosevelt went through in establishing the WPB).

<sup>597</sup> See *id.* at 180–82 (arguing that the National Defense Advisory Commission failed because of “its own undefined authority and divided leadership”).

<sup>598</sup> See Harrison, *supra* note 96, at 15.

<sup>599</sup> Cf. SPARROW, *supra* note 72, at 8 (describing the role of nationalism in legitimating government action in wartime).

<sup>600</sup> WILLIAM JAMES, *THE MORAL EQUIVALENT OF WAR* (1910), *reprinted in* WAR AND MORALITY 4 (Richard A. Wasserstrom ed., 1970).

sector and its private contractors in the management of transnational risks—from drugs and criminal activity to disease. War's concrete role in shaping the history of the American administrative state therefore coexists uneasily with war's more inchoate nature as a concept in law and politics. A lingering question is the extent to which transnational security and safety problems bearing a more tenuous link to conventional war—from food safety and infectious diseases to hard-to-attribute cybersecurity risks—will play a role in enhancing the legitimacy of the administrative state.

### CONCLUSION

For the United States, war on a global scale precipitated major changes in administrative governance. Amidst the frenzied White House meetings, legislative votes, and court proceedings of the early 1940s, policymakers wrought a lasting transformation of the American administrative state. Alongside the changes in the scope of agency power and the expansion in the role of the federal government, however, came a series of friction-reducing accommodations to a set of pervasive features of American political, ideological, and legal life. Politically, for example, one might readily concede that some concern about the broad public interest can shape agendas. Yet the public's responses, coupled with pluralistic bargaining among organized interests, determines the details of legislative or administrative action. Ideologically, the wartime period reaffirmed the willingness of elites and the public to accept a powerful state role in shaping economic affairs through contracting (as undertaken by the WPB),<sup>601</sup> regulation (exemplified by the OPA),<sup>602</sup> and taxation,<sup>603</sup> so long as the government avoided public ownership or direct managerial control of industrial activity.<sup>604</sup> Legally, we have seen how administrative power can take a variety of forms and pursue a broad range of purposes, so long as affected interests are given appropriate participation rights and judicial review in some form remains available.

Because of these accommodations, the changes to administration—though enormously significant—were evolutionary as well. Neither President Roosevelt nor his closest political allies sought to fundamentally remake the American political economy by restructuring the long-term control of American industry. Faced with the need

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<sup>601</sup> See *supra* Part II.A.

<sup>602</sup> See *supra* Part II.A.

<sup>603</sup> See *supra* Part II.B.

<sup>604</sup> See *supra* notes 286–90 and accompanying text.

to work largely through existing legal channels, and to avoid widespread opposition from business, the Roosevelt Administration steadfastly declined to administer the domestic sphere through direct federal ownership or pervasive control of industry. The federal administrative state was already growing, too, by the late 1930s. Its work registered in the public conscience through, for example, the administration of social security benefits, the regulation of securities markets, and the implementation of laws governing fair labor standards.<sup>605</sup> Most wartime agencies operated, as had their peacetime predecessors, in accordance with procedural rules governing administrative action and subject to—at least limited—judicial review.<sup>606</sup> Even more important, wartime administration was evolutionary because of what did *not* occur. The White House decidedly avoided the project of corporatist integration between public and private sectors once attempted through NIRA, or perhaps even more ambitious efforts to institute large-scale, direct federal control of industrial ownership.<sup>607</sup>

Against the backdrop of the political, ideological, and legal constraints that policymakers faced, the federal administrative state nonetheless experienced a transformation and assumed much of its familiar structure. That structure includes a mix of federal agencies with nationwide scope, extensive capacity and flexibility, a legal framework of all but unquestioned validity governing legislative delegations of authority to agencies, more expansive subpoena powers, some White House oversight of the federal administrative apparatus, and mass taxation. This framework, for the most part, became a fixture of American life during and even beyond the Cold War. Portions of this new framework were codified in the Administrative Procedure Act, and the federal government retained its large size and revenues, in contrast to what occurred following World War I.<sup>608</sup>

Since then, the role of the administrative state has been bolstered in no small measure by multiple factors rooted in public reactions and American institutions. Growing public demand arose for a postwar federal role in providing benefits<sup>609</sup> and managing risks.<sup>610</sup> The Cold

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<sup>605</sup> See generally CUÉLLAR, *supra* note 123 (discussing expansion in the scope of the federal government's substantive role and policymaking responsibilities between 1932 and 1939).

<sup>606</sup> See *supra* Part II.E.

<sup>607</sup> See *supra* Part II.F.

<sup>608</sup> See SPARROW, *supra* note 37, at 258–59 (discussing the different trajectory of the federal government in World War II relative to previous episodes); SPARROW, *supra* note 72, at 6 (distinguishing the impact of World War II from the more meager consequences of World War I).

<sup>609</sup> See GADDIS, *supra* note 539, at 146–47 (discussing aspects of the Cold War with implications for domestic administration, particularly the importance of federal investments in higher

War helped assuage concerns about expanded federal taxation, spending, and administration. The status quo bias implicit in American institutions like the presidential veto limited prospects for legislative coalitions to undo many agency activities. The resulting—and familiar—scope of federal administrative power is reflected in the expansive authority of federal regulatory agencies, such as EPA and OSHA, that descended from the OPA, in the mass fiscal citizenship undergirding the modern federal government through income taxation, in laws and procedures constraining federal agencies, and in White House oversight of administrative action. The military contracting system that defined the latter half of the twentieth century echoes, too, the WPB.

At the core of that system is an accommodation that embodies certain contradictions. High-capacity agencies nonetheless face substantial constraints from procedural rules and judicial review. The White House has a prominent role in administration amidst a larger legal context drawing distinctions between routine administrative tasks and domains of policy where executive-level engagement is appropriate.<sup>611</sup> Prevailing ideological norms reject the notion of direct control of industry while still subjecting the economy to a regulatory framework supplementing the common law. These contradictions help explain recurring disputes about the administrative state concerning the nature of rational decisionmaking, the calibration of substantive trade-offs in regulation, the engagement of the mass public, and the definition of the proper scope of work for public organizations relative to markets and the common law—disputes that would almost certainly exist in different form were it not for the experience of World War II. The reasons Americans are able to pursue these questions in earnest is in no small measure because lawyers and policymakers solved the more basic problem of building an administrative state in an unusually large, diverse, and skeptical nation that had become, unmistakably, a world power.<sup>612</sup>

In managing the country's transition, American executive branch officials rejected now familiar distinctions between guns and butter.

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education); SPARROW, *supra* note 72, at 254 (describing broad demand for a federal role involving the administration of veterans' benefits).

610 See generally BREYER, *supra* note 536; SHEILA JASANOFF, *SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA* (1995).

611 See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 314–16 (1981).

612 See generally MASHAW, *supra* note 299 (discussing the persistent public skepticism of, and lack of understanding regarding the history of, administration in the context of the federal government).

Instead, Roosevelt and his advisors made an honest appraisal of how the war effort could be severely imperiled by weak administrative capacity and domestic economic pitfalls. If the White House was even partially right about the links between bombers and bureaucrats, then its approach to the early 1940s helps to underscore a deep tension in a now familiar stance towards law and policy—simultaneously embracing the American national security state but rejecting broad legislative delegations in domestic affairs and a vigorous federal administrative role in regulation. Even today, such regulation underpins much of the modern instrumentality of statecraft, such as targeted economic sanctions, the control of cross-border movements of short-term visitors and longer-term immigrants, and export controls to contain nuclear proliferation.<sup>613</sup>

Yet even with American power and interests growing abroad, Roosevelt only rarely pursued the kind of stratagem the Truman Administration attempted in *Youngstown* seven years after the end of World War II. Such reluctance to assume control of (or refashion) private enterprise has remained a core feature on the American scene since then.<sup>614</sup> Instead, modern administrative agencies make decisions that help structure social and economic relations through rules, adjudication, enforcement, persuasive appeals, and contracts. When the 2008 financial crisis precipitated greater federal entanglement with publicly traded financial institutions and manufacturing companies,<sup>615</sup> policymakers and the public treated this as exceptional, and the President went to great lengths to explain how little control federal officials actually had over the bailed out companies' day-to-day operations.<sup>616</sup>

As the United States confronts a changing strategic context, the future of American public law will continue to reflect decisions about how to adapt administrative government to external pressures. Policy-makers make these decisions across a vast and unwieldy federal exec-

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613 See, e.g., THE WHITE HOUSE, NATIONAL SECURITY STRATEGY (2010), available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf); U.S. DEP'T OF HOMELAND SECURITY, QUADRENNIAL HOMELAND SECURITY REVIEW REPORT: A STRATEGIC FRAMEWORK FOR A SECURE HOMELAND (2010), available at [https://www.dhs.gov/xlibrary/assets/qhsr\\_report.pdf](https://www.dhs.gov/xlibrary/assets/qhsr_report.pdf).

614 Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952). The Truman Administration's action was quite unusual too. In retrospect, *Youngstown's* legacy is defined at least as much by the unusual nature of the fact pattern as it is by its doctrinal implications.

615 See generally Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463 (2009).

616 See *Obama Touts Benefits of Auto Bailout as Debate Looms*, REUTERS, Oct. 13, 2012, available at <http://www.reuters.com/article/2012/10/13/us-usa-obama-autos-idUSBRE89C06920121013>.

utive establishment defined time and again by the intersection between geostrategic objectives and ideas about the proper role of the federal administrative state.<sup>617</sup> The legal and policy questions arising at this fertile intersection between administrative governance and geostrategic goals implicate substantive domains of enormous importance and diversity—from immigration policy,<sup>618</sup> to federal education programs,<sup>619</sup> to cybersecurity priorities,<sup>620</sup> to signals intelligence and surveillance.<sup>621</sup>

Complicating decisions in these domains is another factor foreshadowed by the mid-twentieth century administrative state. Fundamental questions remain unresolved about the relationship between public authority and the private sector. The questions concern not only the ideal relationship between the government and private interests and corporations, but also the existing degree of shared influence among these sectors. The answers are as relevant to legislative design and judicial interpretation as they are to executive decision, particularly given the conspicuous role of contractors in the American national security state.<sup>622</sup> Indeed, complex military contracts remain among the most important vehicles within the American political economy for connecting long-term public sector priorities and industrial activity.<sup>623</sup> It was through such vehicles that the true successors to the WPB and its erstwhile rival, the Army-Navy Munitions Board, crafted vast multi-year pacts between the Defense Department and major defense industrial players.

The regulatory successors of the OPA might be playing on the margins when it comes to controlling business activity by supervising workplace safety for defense workers, or issuing rules for the disposal of industrial waste. But it was in the administration of the immense Cold War defense contracts themselves that the federal government

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617 See *supra* Part III.C.

618 See COUNCIL ON FOREIGN RELATIONS, INDEPENDENT TASK FORCE REPORT NO. 63: U.S. IMMIGRATION POLICY 3 (2009), available at [http://i.cfr.org/content/publications/attachments/Immigration\\_TFR63.pdf](http://i.cfr.org/content/publications/attachments/Immigration_TFR63.pdf).

619 See EQUITY & EXCELLENCE COMM'N, U.S. DEP'T OF EDUC., FOR EACH AND EVERY CHILD: A STRATEGY FOR EQUITY AND EXCELLENCE (2013), available at <http://www2.ed.gov/about/bdscomm/list/eec/equity-excellence-commission-report.pdf>.

620 See ERIC A. FISCHER ET AL., CONG. RESEARCH SERV., R42984, THE 2013 CYBERSECURITY EXECUTIVE ORDER: OVERVIEW AND CONSIDERATIONS FOR CONGRESS (2013).

621 See *generally* THE PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMM'NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD (2013), available at [http://www.whitehouse.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf).

622 See VERKUIL, *supra* note 35, at 5.

623 See *id.* at 6–7.

and industry determined the fate of regional economies, forged agreements that created the Internet, and otherwise spurred technological change in the world's largest economy.

On a cold January day in Washington two decades after Roosevelt began preparing for administrative war, no less an expert on the military than Dwight Eisenhower wondered aloud just who was the principal—and who was the agent—in the national security state.<sup>624</sup> A half-century later, the crux of Eisenhower's question stubbornly persists.

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<sup>624</sup> See Farewell Radio and Television Address to the American People, 1960–61 PUB. PAPERS 1035, 1038 (Jan. 17, 1961) ("This conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence—economic, political, even spiritual—is felt in every city, every State house, [and] every office of the Federal government.").



APPENDIX

FIGURE 1. FEDERAL INCOME AND CORPORATE TAXES AS PERCENTAGE OF GDP<sup>625</sup>

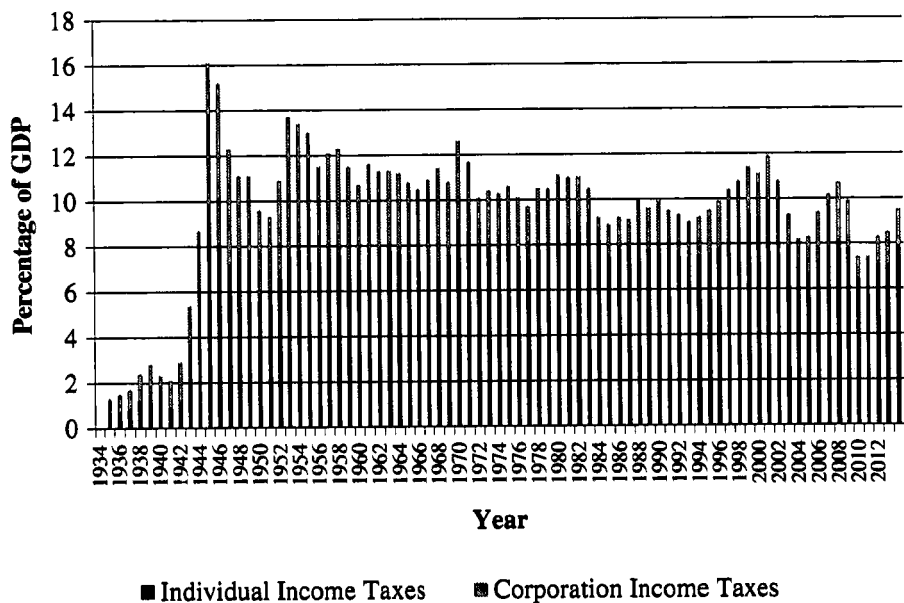
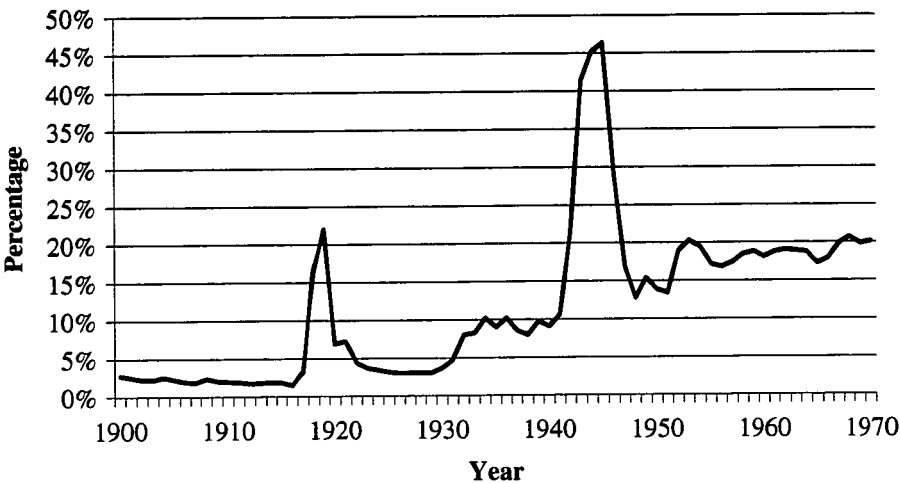


FIGURE 2. UNITED STATES FEDERAL OUTLAYS AS A PERCENTAGE OF THE GROSS NATIONAL PRODUCT<sup>626</sup>



625 Source: Office of Mgmt. & Budget, *Historical Tables*, WHITE HOUSE, <http://www.whitehouse.gov/omb/budget/Historicals> (last visited Oct. 12, 2014) (follow link for "Table 2.3").  
626 Source: SPARROW, *supra* note 72, at 261 app. chart A.2.

FIGURE 3. UNITED STATES FEDERAL DEBT PER CAPITA  
IN 1958 CONSTANT DOLLARS<sup>627</sup>

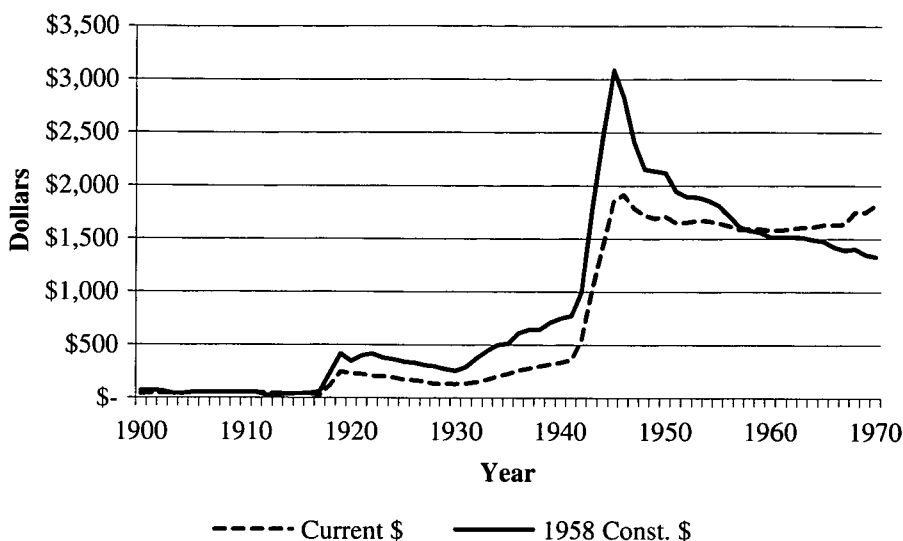
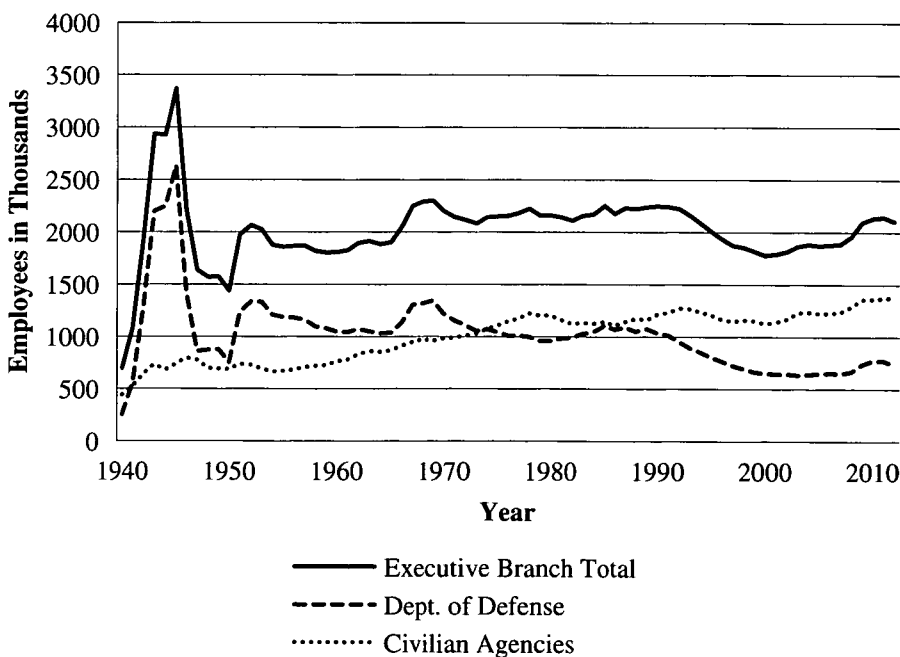


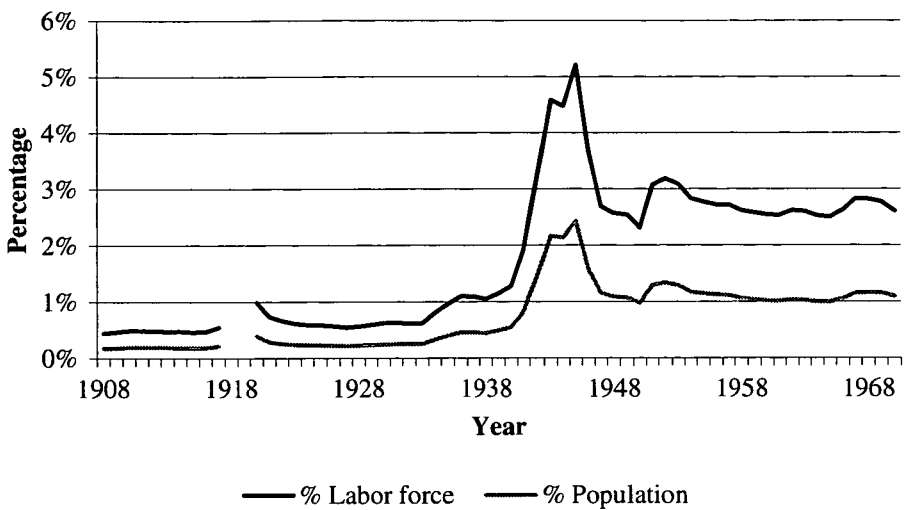
FIGURE 4. UNITED STATES EXECUTIVE BRANCH EMPLOYMENT<sup>628</sup>



<sup>627</sup> Source: *Id.* at 264 app. chart A.7.

<sup>628</sup> Source: U.S. Office of Personnel Mgmt., *Data, Analysis & Documentation: Executive Branch Civilian Employment Since 1940*, OPM.gov, <http://www.opm.gov/policy-data-oversight/>

FIGURE 5. UNITED STATES CIVIL FEDERAL EMPLOYMENT AS A PERCENTAGE OF THE LABOR FORCE AND POPULATION<sup>629</sup>



data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/ (last visited Oct. 12, 2014).

<sup>629</sup> Source: SPARROW, *supra* note 72, at 261 app. chart A.1.