Hiroshi Okayama, *Judicializing the Administrative State: The Rise of the Independent Regulatory Commissions in the United States, 1883-1937*

(London and New York: Routledge, 2019).

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A recurring controversy in the development of the administrative state in America has been the status of the independent regulatory commissions (IRCs). The IRCs occupy a unique place in US constitutional government, and understanding their origins remains deeply relevant to the politics of administration in twenty-first century America. In *Judicializing the Administrative State*, Hiroshi Okayama provides a crucial and timely contribution to this endeavor. Okayama argues that the American state came to be "characterized by judiciality" (6) through the creation and operation of the IRCs, and he shows how the separation of powers spurred the institutional creativity that led to the establishment of IRCs. Ironically, however, in contemporary American politics, formalistic readings of the separation of powers by proponents of executive power now threaten the independent status of the IRCs. Thus, Okayama's work raises broader questions about institutional adaptability in America.[1)]

The importance of IRCs to the development of the American state and to policymaking is hard to overstate. As Okayama observes, these "commissions were, and remain, far from peripheral; for most of the twentieth century they collectively controlled such important policy domains as finance, the securities market, antitrust issues, labor relations, energy, transportation, and telecommunication" (4). The key question for the book is how these "quasi-judicial" agencies developed and came to play such a significant role in American governance. Why did the American state acquire such a judicial quality, which sets its state apart from other industrialized democracies? Okayama explains that there are two components of "agency judiciality." One characteristic is "institutionalized autonomy of agency members from elected public officials, especially the president," while a second aspect is "formal, courtlike procedures usually featuring adversarial settings, cross-examination of witnesses, and the taking of full records" (11).

[1)] On institutional adaptability, see Stephen Skowronek and Karen Orren, "The Adaptability Paradox: Constitutional Resilience and Principles of Good Government in Twenty-First-Century America," *Perspectives on Politics* 18, no. 2 (June 2020): 354-369.

To explain the development of agency judiciality, Okayama looks to the significance of the constitutional separation of powers. Whereas in a parliamentary system the executive and the legislature would be fused and would be controlled by members of the same party, the separate election of the president under the American constitutional system led Congress to be more wary of direct presidential control over administrative agencies. Seeking to keep these agencies "with strong discretionary powers at arm's length from the president," lawmakers found that "judicialization is an ideal institutional template for the purpose" (21). At the same time, Okayama shows that lawmakers and other reformers also turned to judiciality out of concerns for fairness and impartiality. Judicialized IRCs offered a way to balance greater efficiency with fairness. Compared to adjudication by the courts, the IRCs would be more efficient; compared to decisions only by political officials in executive departments, the IRCs would be fairer and more process-oriented. As Okayama states, "It is this tradeoff between efficiency and fairness that makes the judicialist state a meaningful alternative to the Weberian, executivist one" (32). Finally, the book argues that the Interstate Commerce Commission, created in 1887, became the crucial model of judiciality that influenced the design of later agencies.

Each of these claims is demonstrated through a close analysis of legislative histories, the preferences of presidents, and decisions reached by the Supreme Court. In particular, the ideas and proposals in both congressional debates and in the wider political community are thoroughly documented for the establishment of several key independent agencies. In every case, Okayama's principal focus is on what factors led to a particular institutional design for each agency.

The book tracks the development of the IRCs through three phases. The first phase extends from the creation of the Interstate Commerce Commission (ICC) in 1887 to the mid-1910s. Chapter 2 examines how the ICC came to be designed as "a courtlike administrative agency" (42). Okayama argues that the new commission was not simply modeled after state-level railroad commissions. Instead, the ICC was the product of a creative institutional design that addressed the perceived need for greater procedural fairness in regulation (compared to executive departments) *and* the perceived need for greater efficiency in regulation (compared to judicial courts). Thus, the ICC represented a triumph of institutional adaptability in the American state. Okayama demonstrates how members of Congress recognized that they were creating an agency of a new character. Senator Shelby Moore Cullom (R-IL), for example, said the new agency was "about as far as you could go without making it [the ICC] a tribunal in the nature of a court" (51), while Representative Charles O'Neil (R-PA) described the ICC as "almost a court" (53). The ICC would resemble a court in its method of adjudicating cases, and significantly, the Hepburn Act of 1906 would expand its authority and jurisdiction.[2)]

[2)] On the origins and development of the ICC, see also Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (New York: Cambridge University Press, 1982), ch. 5, 8.

The ICC then served as a model for Congress in establishing subsequent independent regulatory commissions. Chapter 3 considers a hard test of Okayama's hypothesis: the Federal Reserve. The Fed would not be an obvious candidate to be modeled after the ICC's judicialized structure. Its primary purpose was economic management rather than adjudication. Yet the Federal Reserve Board (FRB), Okayama argues, was explicitly modeled on the ICC. In fact, the analogy between the FRB and the ICC and the Supreme Court was key to its design and passage: "this feat was achieved by situating the FRB in the central banking system not as coordinator of the reserve banks but as their regulator" (65). As Okayama documents, one member of Congress, Senator James Reed (D-MO), stated that the FRB would be "the supreme court of finance" (86). The link to the ICC was meant to assuage worries that the new FRB would simply be dominated by bankers.[3] Notably, even opponents of the legislation tried to delegitimize the comparison of the FRB with the ICC and the Supreme Court, indicating they felt a need to respond to such analogies.

A second phase in the establishment of the IRCs extends from the mid-1910s through the late-1920s. Notably, this period began to feature the kinds of disputes over political power and administrative insulation that have been endemic to the IRCs. Even as judiciality remained a key characteristic of the American state, Okayama explains, the 1920s demonstrated the precariousness of that achievement and the possibility of reversals. While some new commissions continued to be set up, such as the Federal Trade Commission (FTC) in 1914, Congress grew more skeptical of establishing new commissions. Responding to the prevalent politics of "efficiency" in this period, legislators were wary of creating a new entity for every possible area of domestic policymaking. For example, in creating the Federal Power Commission (FPC), Congress designated that the Secretaries of Interior, War, and Agriculture would compose the commission, rather than separate officers, signaling a shift away from agency autonomy. This shift continued with the passage of the Packers and Stockyards Act of 1921, which gave the Secretary of Agriculture more regulatory authority over livestock rather than creating a new commission for that purpose. At the same time, Congress also indicated greater interest in hierarchical administrative arrangements with the passage of the Budget and Accounting Act of 1921, which established the president more firmly as head of the executive branch. For their part, presidents themselves – including Woodrow Wilson, despite his earlier work on the separation of politics and administration – wanted more direct influence over these agencies and resisted their autonomy. But it was the Supreme Court that made the most significant move. In *Myers v. United States* (1926), the Court – in an opinion written by ex-president and Chief Justice William Howard Taft – held that the president's power of removal was correspondent to the power of appointment. Moreover, Taft argued that this power

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[3] On agrarian legislators and the design of the Federal Reserve, see also Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877-1917* (Chicago: University of Chicago Press, 1999), ch. 7-8.

applied to the independent commissions, and even suggested that the president could remove a commissioner simply over disagreements on the outcomes of particular cases.[4] With this decision, the long-term survival of the IRCs as distinct institutions was called into question.

Yet, as Okayama highlights, the *Myers* decision proved to be an ironic spur to a further proliferation of IRCs. In the third phase covered in the book, from the late-1920s through 1937, more commissions were established. Created in reaction to the Great Depression and as part of the New Deal, these IRCs included agencies such as the Securities and Exchange Commission and the National Labor Relations Board (NLRB). In this period, presidents had fewer reasons to resist such commissions given that their removal power was less in question. But the Supreme Court would once again alter this calculation. In *Humphrey's Executor v. United States* (1935), the Court held that the president could not remove a commissioner from the Federal Trade Commission without cause, focusing on the significance lawmakers had attributed to the fixed terms of office for commissioners.[5] Congress followed up by providing for more insulation, adding a for-cause removal requirement to the NLRB legislation and abolishing ex-officio memberships of cabinet officials on the Federal Reserve Board.

Still, by itself, the *Humphrey's* decision did not preserve the unique status of the IRCs. The IRCs remained vulnerable to formalistic interpretations of the separation of powers and challenges from the president.[6] Okayama recounts the well-chronicled episode in which President Franklin Roosevelt and the President's Committee on Administrative Management (PCAM) responded with a significant attack on the constitutional status of the IRCs as independent entities.[7] The critique was that the IRCs were a "headless 'fourth branch'" of the government (122). Interestingly, however, the PCAM report itself had taken pains to preserve some independence for the adjudicatory functions of the IRCs. It sought to split them into administrative and judicial parts. The policy-determining functions would be placed in a cabinet department, while the adjudication functions would not be subject to direct executive control. In any case, Roosevelt's efforts were defeated. Congress explicitly exempted the IRCs from the presidential reorganization authority it granted in the Reorganization Act of 1939. In doing so, it ensured that the IRCs would remain a distinctive part of the US administrative

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[4] See also J. David Alvis, Jeremy D. Bailey, and F. Flagg Taylor IV, *The Contested Removal Power, 1789-2010* (Lawrence, KS: University Press of Kansas, 2013), ch. 4.

[5] See also Alvis, Bailey, and Taylor, *Contested Removal Power*, ch. 5.

[6] John A. Dearborn, "The Foundations of the Modern Presidency: Presidential Representation, the Unitary Executive Theory, and the Reorganization Act of 1939," *Presidential Studies Quarterly* 49, no. 1 (March 2019): 185-203.

[7] Stephen Skowronek, "Franklin Roosevelt and the Modern Presidency," *Studies in American Political Development* 6, no. 2 (Fall 1992): 322-358; Sidney M. Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal* (New York: Oxford University Press, 1993), ch. 5-6; Peri E. Arnold, *Making the Managerial Presidency: Comprehensive Reorganization Planning, 1905-1996*, 2nd ed. (Lawrence, KS: University Press of Kansas, 1998), ch. 4.

state. The legacy of that judiciality would be further established with the passage of the Administrative Procedure Act (APA) of 1946, which focused on adjudication and fairness in agency rulemaking.[8] While the "American administrative state has taken a decidedly executivist turn since the New Deal," Okayama sums up, "it has not become a Weberian state" (153).

Judicializing the Administrative State makes a critical contribution to several literatures, including American political development, political institutions, public law, and public administration. It also speaks to the relationship between ideas and institutional change by focusing on how concepts such as fairness impacted institutional design in legislation enacted by Congress.[9] But in concluding this review, I turn to another issue raised by this book: institutional adaptability and creativity. With critics of IRCs today attempting to undermine the independence of the administrative state, Okayama's work speaks to questions about the adaptability of the American constitutional system.[10] Indeed, the book's conclusion focuses on the legacy of judiciality and the impact of the IRCs over time, but it could go further in pondering the significance of continued and more strident attacks against agency independence and the push for greater presidentialism in recent decades. As Peri Arnold writes, "With the benefit of hindsight, we can see that the [PCAM's] strong critique of independent regulatory commissions forecasted the expansion of presidential control over regulation, including the secular weakening of commission independence."[11] Indeed, the Trump era has been characterized by significant challenges to administrative insulation, and these have escalated further since this book's publication.

There is a significant irony that the separation of powers proved to be a spur to such creativity, and yet now that same concept is being utilized as the core rationale in attempts to undermine their independence. Today's conservative supporters of the unitary executive theory – the disputed originalist claim that the president possesses "*all* of the executive power"under Article II and thus should be able to remove any executive official without cause – are deeply skeptical of the entire institutional apparatus that Okayama documents in rich detail.[12] And

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[8] Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics since the New Deal* (New York: Cambridge University Press, 2012), ch. 2.

[9] For another work that considers the relationship between ideas and an independent regulatory commission, see Gerald Berk, *Louis D. Brandeis and the Making of Regulated Competition, 1900-1932* (New York: Cambridge University Press, 2009).

[10] Skowronek and Orren, " Adaptability Paradox. "

[11] Peri E. Arnold, " The Brownlow Committee, Regulation, and the Presidency: Seventy Years Later, " *Public Administration Review* 67, no. 6 (November/December 2007): 1030-1031.

[12] On the arguments of unitarians, see Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (New Haven, CT: Yale University Press, 2008). On the emergence of the idea in the 1970s and 1980s, see Stephen Skowronek, " The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive, " *Harvard Law Review* 122, no. 8 (June 2009): 2070-2103.

these unitarians have been on the march during the Trump administration. Early in the book, Okayama points out the significance of administrative law judges (ALJs) under the APA of 1946 as another example of the judicial character of the American state. But under Trump, the method of appointment for these ALJs was challenged and altered. First, in *Lucia v. Securities and Exchange Commission* (2018), the Supreme Court found that ALJs were "inferior officers" under Article II of the Constitution because they exercise "significant" and often final authority in their cases at the SEC. A subsequent executive order issued by President Trump then applied the logic of that ruling more broadly, exempting ALJs from being appointed based on merit. The case was a clear instance of a move toward a more executivist conception of the state. The Supreme Court's subsequent decision in *Seila Law v. Consumer Financial Protection Bureau* (2020) took another step, finding that an agency with a single director could not have that director insulated from removal by the president. To be sure, Chief Justice John Roberts's opinion explicitly contrasted the Consumer Financial Protection Bureau's institutional structure with that of the IRCs, which have a commission format. This might hint at a limit placed by the Court on the ambitions of the unitary executive theory. Yet on the whole, the decision amounted to a ringing endorsement that the president possesses all the executive power, setting a precedent that will be used to challenge other forms of administrative insulation from presidential control.[13] President Trump continued these efforts, issuing a sweeping executive order that sought to strip civil service protections away from any official exercising policy-determining responsibilities.

Unitarians have also gained a major foothold throughout the federal judiciary in the Trump era. As presidents press for more control over administration on one side and a new cadre of unitarian judges increasingly rules on issues of administrative insulation, there are reasons to wonder about the ultimate fate of the independence of the IRCs. With their immense policymaking and regulatory authority, these are a major prize of policymaking power for presidents. While IRC independence remains a significant obstacle to presidential control over administration, such formalistic readings of the separation of powers pose an existential threat to the IRCs and their characteristic judiciality.

So we are left with a question: does Okayama's book recount a passing era? Or will the unique judicialistic character of the IRCs endure and perhaps even be strengthened? The book underscores that the IRCs have faced an underlying risk all along. Formalistic interpretations of the separation of powers hem in institutional creativity and leave these unique institutions more exposed.

But while the IRCs may face a stiff test going forward, in the meantime, Okayama's invaluable book reminds us of several crucial lessons. It offers perspective on a crucial innovation in American political development, providing an account that demonstrates

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[13] Stephen Skowronek, John A. Dearborn, and Desmond King, *Phantoms of a Beleaguered Republic: The Deep State and the Unitary Executive* (New York: Oxford University Press, 2021), ch. 8.

Congress's own ability to exercise its authority, to creatively devise new institutions, and to not be hemmed in by formalism. In short, the book tells a story about the capacity of American government to generate the institutional arrangements that are necessary to address significant challenges. And it provides a clear warning of what is at stake should the independence of the IRCs be threatened.