

The Rapidly Growing Administrative State Must Be Open, Transparent and Held Publicly Accountable, Consistent With Rule of Law

The modern administrative state's legitimacy is based on a presumed *quid pro quo*. In exchange for public deference to federal agency experts on matters of technical substance, the experts have agreed to defer to the public on matters of process and procedure, with the goal of enabling meaningful administrative and judicial review of agency actions.¹ This is a *quid pro quo* of "constitutional dimensions" deemed necessary "to achieve the protections against the arbitrary application of power which the separation of powers...was designed to preserve".²

"The success of our social contract depends first on those entrusted with governmental powers exercising their discretion for the benefit of 'we the people', and second on citizens' acceptance of and obedience to the state's rules for organizing societal functioning and its allocation of public resources. Process plays a fundamental role in reinforcing both obligations".³

"On one hand, if one likes the administrative state, one tends to have less support for transparency. Congress can legitimately delegate to agencies the authority to make law through regulation. As lawmakers, agencies must engage in dealmaking— and that is okay. Transparency can chill discussion and, therefore, decrease collegial decision-making and thwart compromise. On the other hand, if one harbors suspicions of the administrative state, then one would welcome transparency's stymying of agency deal-making. Agencies should simply enforce the law in a manner as faithful to congressional mandates as possible."⁴

"The anti-transparency position needs a bit more unpacking. Why does transparency limit discussion? In legislatures, secrecy allows individuals to make certain comments or take positions that would offend members of their electorate. This freedom, as many legal scholars maintain, leads to compromise and efficient decision-making. Indeed, most legal scholars believe that is the case. Those who have faith in such deliberation, like the civic republicans, would wish to encourage it and, therefore, look askance at transparency. Those who view the democratic process as simply the interplay of special interests, like the public choice theorists, would likely support greater transparency as a tool to limit lawmakers' rent extraction. In the administrative context, those who support the administrative state would see agencies as engaged in legitimate lawmaking, and therefore, transparency would not be an unalloyed good. Agencies must have full freedom to negotiate, compromise, and deliberate."⁵

¹ See Richard A. Epstein, *Why The Modern Administrative State is Inconsistent With the Rule of Law*, 1 NYU Journal of Law & Liberty 491, 505-515 (2008), available at: http://www.law.nyu.edu/sites/default/files/ECM_PRO_060974.pdf.

² *Id.*, at p. 492.

³ See Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 Administrative Law Review 343, 347 (2009), available at: <http://www.law.uh.edu/faculty/jmantel/health-law/MantelProceduralSafeguards.pdf>.

⁴ See Adam Candeub, *Transparency in the Administrative State*, 51 Houston Law Review 385, 409, available at: <http://www.houstonlawreview.org/wp-content/uploads/2013/12/2-Candeub.pdf>.

⁵ *Id.*, at pp. 409-410.

“There is, however, a difference between legislatures and agencies. Legislatures must compromise competing sets of political interests. If they get the compromise wrong, the electorate kicks them out. Arguably, they have the incentive to make compromises that advance the greatest good for the greatest number. On the other hand, bureaucratic incentives are much more obscure. Often operating far removed from the public gaze, bureaucrats with civil service protection operate under very different incentive structures than politicians. Their deals often will maximize their own job security or even the chance for employment with the entities they regulate. Similarly, political appointees who run these agencies often have incentives to serve their own short-term political advancement, not the public good. Thus, by using secrecy against their political sponsors, bureaucratic deal-making undermines legislative compromises, which possess some incentive to maximize the greatest good for the greatest number. Thus, capture, though it plays a role with legislatures, seems more prevalent and more dangerous in agencies.”⁶

⁶ *Id.*, at pp. 410-411.