

Conservatives are on a campaign to reduce agency discretion. They don't seem to realize that in today's world, that really amounts to an attack on presidential power. These days, it's generally not bureaucrats or even cabinet officers who make the real decisions about regulation. It's the White House. So the campaign against the administrative state really amounts to an effort to neuter the President's authority over domestic policy.

This conservative effort takes several forms. One is an attack on the *Chevron* doctrine. Under *Chevron*, if a statute is ambiguous, courts will defer to a reasonable agency interpretation of the law. In reality, on any controversial or economically significant issues, the interpretation will be decided by the White House. In fact, one of the justifications for *Chevron* is that the President is more politically accountable than the courts. If you get rid of *Chevron*, a new Administration will have less leeway to reinterpret the law to fit its domestic policy agenda.

Another current conservative campaign is strike down laws that give agencies significant policymaking discretion. There are now five Justices who seem prepared to take this tack, though it remains unclear how far they will go. The effect will be to declare some current regulatory statutes unconstitutional and require that Congress rewrite them to give more specific directives to the executive branch. Again, the effect is to limit the power of the President to make domestic policy, shifting control back to Congress.

In part, these conservative campaigns are really aimed at deregulation rather than reforming the administrative state. But in part they seem to reflect genuine confusion about how our government currently functions. The main reason, I think, is that conservatives are stuck in narratives that go back to the New Deal era.

During the New Deal, independent agencies loomed much larger in the scheme of things, meaning agencies whose heads were not subservient to the President. But today, those agencies are really niche players who are relevant only to specific industries — most of the real regulatory action takes place in agencies like EPA whose heads serve at the President's pleasure. Even the so-called independent agencies like the SEC have less actual autonomy than they used to, partly because Presidents have gotten better in picking appointees who will carry out their agendas.

In addition, in the New Deal era, Presidents had trouble exercising control even over cabinet departments and other agencies whose heads they could fire at will. But presidents have continually gained greater control, centralizing authority over budgets and regulations. They have also become more effective in vetting the top levels of agency personnel for loyalty to the president's agenda. Today, the top five thousand people in the

executive branch are all White House picks. The White House nitpicks any significant regulatory effort. The result is that an agency like EPA has little ability to act independently of the White House. Ironically, much of this is due to the efforts of conservative presidents like Reagan. Still, conservatives seem caught in a storyline where faceless bureaucrats hiding behind Civil Service laws call the shots while Presidents sit helplessly on the sidelines.

Of course, not all of these attacks on the administrative process are in good faith. The real complaint of many conservatives is not that federal domestic policy is made in the wrong ways. They really don't think there should be such a thing as federal domestic policy in an ideal world — no Social Security, no Medicare, no environmental laws, no civil rights laws. What they are really afraid of is not that policy might be made by bureaucrats; it is that policy might be made by Democratic presidents.