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A Pinocchio Problem:

Bureaucratic Drift and Constitutional Separation of Powers

Brittanie Edstrom



Political Science Senior Thesis

Arcadia University

April, 2016

Abstract

The U.S. Constitution outlines a three-branch government, with each branch having separate and distinct powers, and a system of checks and balances to maintain accountability. According to these two principles, the federal bureaucracy has the authority to execute legislative action but it must remain accountable to Congress to ensure that congressional statutory intent is reflected in the execution of legislation. When the bureaucracy does not accurately execute the wishes of Congress, these principles are violated. Scholars have labeled this phenomenon bureaucratic drift. This thesis will examine the interplay between Congress and the Bureaucracy and attempt to address the following question: are actions taken by the Federal Bureaucracy producing bureaucratic drift and if so, what does this suggest about the constitutional principles of separation of powers and checks and balances? Applying the theoretical framework of principal-agent theory to the case study of the executive agency the Centers for Disease Control and Prevention (CDC), I argue that bureaucratic drift is occurring and that this presents two challenges for the legislative branch: first, the constitutionally designated powers of the Legislative Branch are being performed in the Executive Branch; and second, Congress lacks a viable check on this overreach of power.

Acknowledgments

Throughout the course of this year my heart, mind, and most of my time has been devoted to this thesis. Now, 241 days after beginning this project, as I reflect back on the journey that this has been, I must take a moment to offer my most heartfelt appreciation to a few individuals, without whom, this thesis would not exist.

First, I would like to say thank you to my professor, mentor, and friend, Amy Widestrom. Thank you for opening my eyes to the incredible world of American politics, inspiring me to engage with the world around me and strive to make a difference, and always pushing me to reach new heights and never accept anything for face value. Thank you for talking me through my confusion and frustration, the many random discussions about everything under the sun, and for teaching me about the proper usage of the word “utilize.” Without you, I never would have pursued an interest in American government. You’ve been more of an influence than I can say.

Thank you to my dad and mom, David and Tracie, for always inspiring me to chase my dreams and reach for the stars, never letting me forget that no matter where this life takes me I will always have two people in my corner cheering me on, for consistently bringing me back to faith and reminding me of God’s love and peace, and for putting up with me as I ranted and rambled incoherently about bureaucracy, Congress, separation of powers, and the Constitution.

Thank you to my boyfriend Brian for tolerating me in my perpetual state of sleep deprivation and stress, supporting me, encouraging me, and grounding me back in reality when I felt completely immersed in the world of thesis.

Thank you to the incredible ladies of Easton- Rebecca, Emily, Sarah, Josephine, Becca, and Sheri- for laughing with me, screaming with me, opening my world to the amazingness that is Hamilton, and going through all the twists, turns, ups, and downs of thesis with me. I will forever treasure the memories of Wawa trips, Hamilton sing-alongs, late nights in Easton, colonialism debates, and territorial stake-outs.

Thank you to my roommate, best friend, and forever soul-sister, Lyss. Without you by my side these last four years, I wouldn’t have made it to this point. You are a constant ray of sunshine and joy. You push me to reach my maximum potential, lift me when I’m down, scream with me when we just need to let it out, dance with me when we can’t sit still any longer, accept me for all the ridiculous that I am, and never fail to be down for whatever outrageous adventure we can get ourselves into. I could never have asked for, been blessed with, or imagined a better friend.

I am grateful for the numerous other people for which I don’t have the space to give the credit that they deserve, but have gotten me to this point, impacted my life, and made these last four years the most incredible adventure of a life time.

Finally, thank you coffee. Thank you for always being there by my side as I work on thesis, fueling my existence, allowing me to operate past the limitations of what is humanly possible, keeping me working late into the night, and reviving me again in the mornings to do it all over again.

All my love and gratitude,

Brittanie

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Introduction

The folktale of Pinocchio is an icon of modern culture and a well-known fable around the world. Pinocchio has become a household name that is recognized for the moral of its story. A woodcarver creates a puppet named Pinocchio who takes on a life of his own and acts independently of the puppeteer. He is prone to telling lies, fabricating stories for various reasons, and causing general mischief. Unlike an ordinary puppet, he has no strings, and thus is uncontrollable by the puppeteer. He behaves as he pleases, and acts without any tangible measure of control. Although not to the extent of the exaggerated children's folktale, there currently exists a Pinocchio problem with the Federal Bureaucracy of the United States government.

The constitutional ordering of the American Federal Government is based on a three branch system of government to establish the principles of separation of powers and checks and balances. Despite this, many scholars have identified an accountability issue between the bureaucracy in the Executive Branch and Congress in the Legislative Branch. Constitutionally, Congress holds the power to create legislation and it is the duty of the Executive Branch to execute said legislation. This is the foundational premise of the American democratic government. The premise is that people elect congressional officials to legislate on their behalf and the executive agencies that comprise the bureaucracy implement the legislation on behalf of Congress and subsequently, the people. Theoretically, the bureaucracy should be accountable to Congress so as to ensure that congressional statutory intent is reflected in the execution of legislation. However, when the executive agencies do not accurately execute the wishes of Congress, the principle of separation of powers and the system of checks and balances breaks

down. Scholars have labeled this phenomenon, bureaucratic drift, defined as: the phenomenon of bureaucratic implementation that allows the bureaucratic agencies to act independent of Congress, and create rules, regulations, and programs that are more to the liking of the bureaucracy and not in accordance with the original legislative wishes of Congress (Lowi et al. 2013; Ginsberg et al. 2012; Tucker 2013).

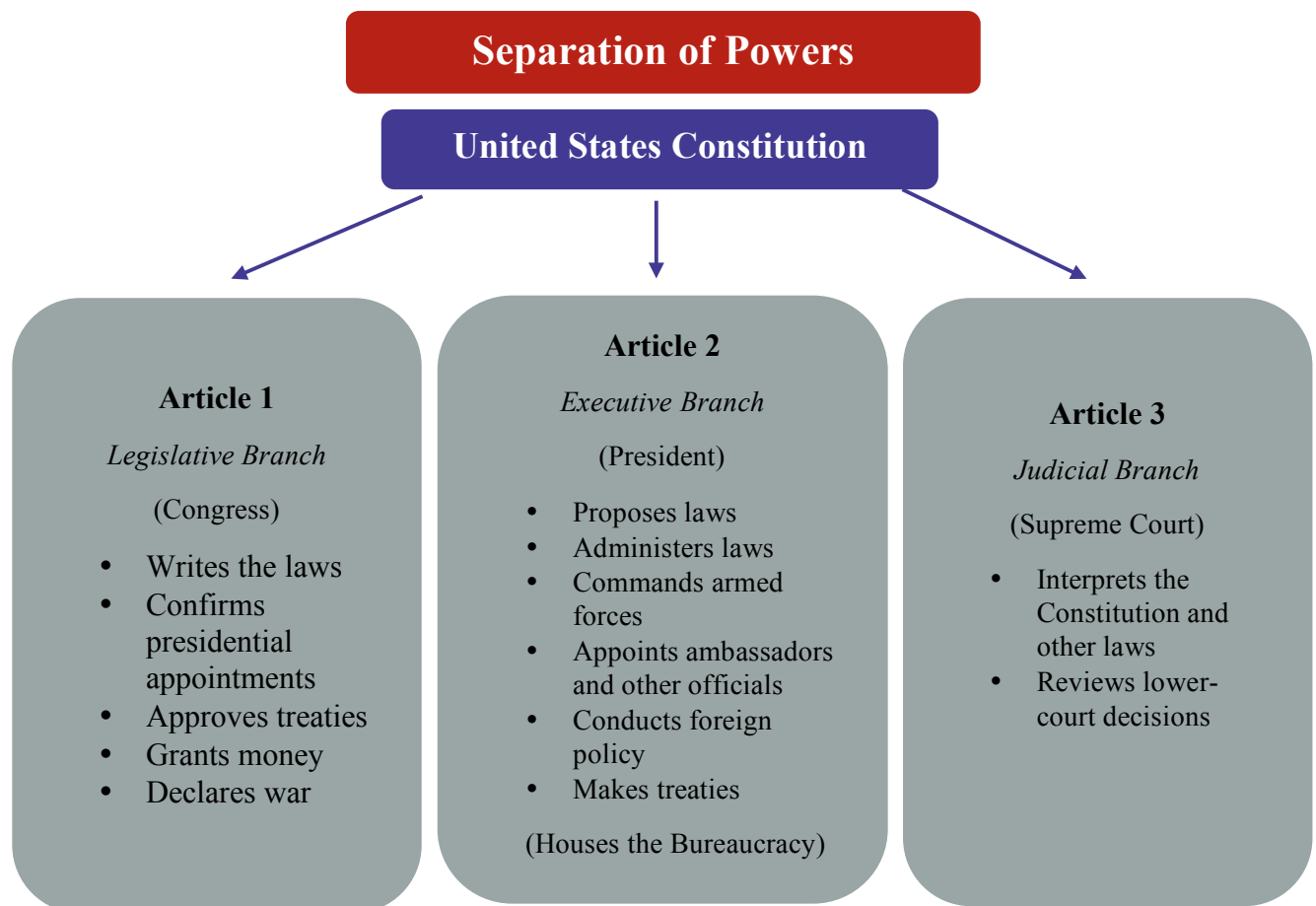
This thesis will examine the interplay between Congress and the Bureaucracy, and attempt to address the following question: are actions taken by the Federal Bureaucracy producing bureaucratic drift and if so, what does this suggest about the constitutional principles of separation of powers and checks and balances? Using the theoretical framework of the principal-agent theory to examine the case study of an executive agency, the Centers for Disease Control and Prevention (CDC), I argue that bureaucratic drift is, indeed, occurring within the United States government, and this presents a twofold challenge to the principle of separation of powers. First, the constitutionally designated powers of the Legislative Branch are being performed in the Executive Branch, and second, Congress lacks a viable check on this overreach of power.

This thesis will proceed as follows. First, I provide a background section that outlines the basic institutional ordering, features, and key principles important to this study. Next, I review various literature surrounding this discussion. I will then discuss the analytical framework and methods of my analysis, followed by an examination of the data. I will conclude with a discussion of my findings and their implications.

Background

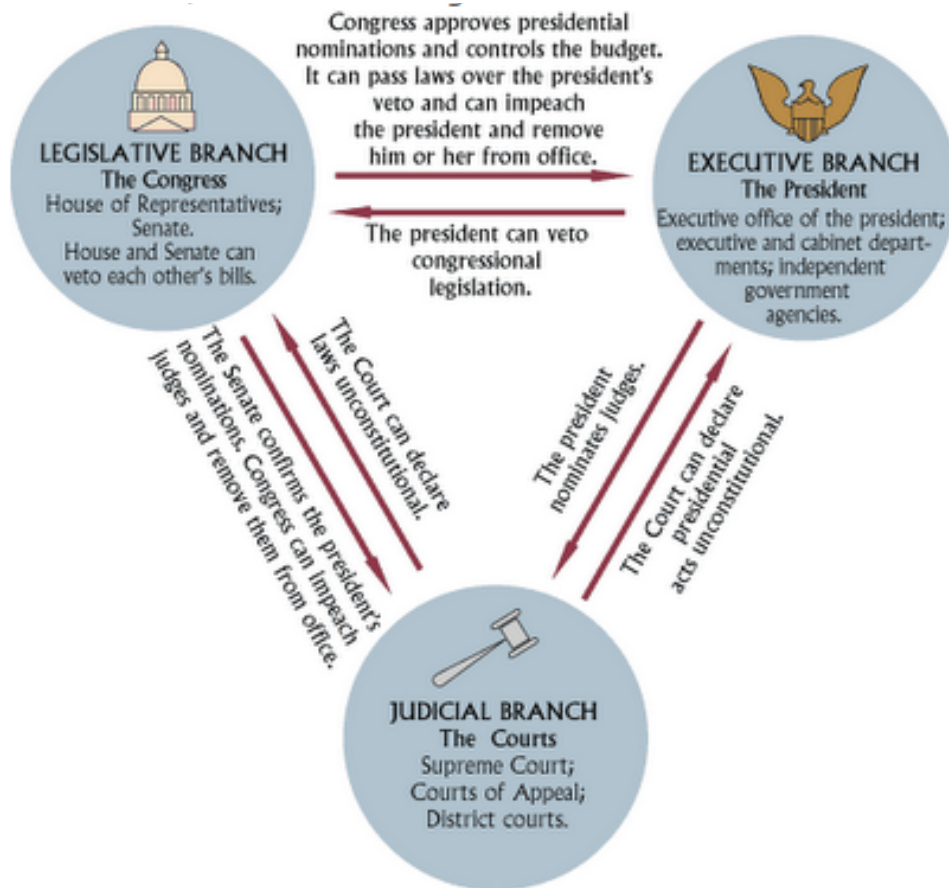
The United States Constitution is the foundational legal document that establishes the institutional ordering of the United States Federal Government. The Constitution divides the federal government into three branches, the Legislative, the Executive, and the Judicial; in order to promote democratic rule and a representative government (“The Constitution of the United States” 1787; Hamilton 1788). Each branch is delegated specific powers and duties so that no one branch or group of people can obtain full governing authority and create a tyrannical government (see Figure 1).

Figure 1: Separation of Powers



In order to maintain this division of power, the Constitution establishes a system of checks and balances between each branch: Congress passes laws that the president can then sign or veto, and the Judiciary can rule on the constitutionality of the legislative and executive actions. These counterbalancing influences regulate the concentration of political control and limits overreach of power (see Figure 2).

However, the Constitution did not account for the necessity of administrative agencies that are essential to the implementation of legislation. As the United States has grown in size and complexity, it has become unfeasible for each elected official to be an expert in every area of public policy as well as handle all the day-to-day tasks of administration. Therefore, administrative or executive agencies were created and federal employees are hired to organize, manage, and specialize in certain areas of public life: for example, national security, transportation, public health, and education to name a few (Ginsberg et al. 2012; Wilson 1975; Aberbach and Rockman 2001). Employees in these agencies are intended to be free from prejudice, biases, patronage, or opinion, and therefore be objective in order to implement legislation fairly and efficiently. This ideal of unbiased expertise is called neutral competence (Rourke 1992).

Figure 2: Checks and Balances

Source: "Checks and Balances." 2016. Accessed April 4.
http://www.socialstudieshelp.com/lesson_13_notes.htm.

These administrative agents are the backbone of the executive agencies that comprise the Federal Bureaucracy. Overall, the Bureaucracy of the United States government can be understood as the complex structure of offices, tasks, rules, and principles of organization that are employed in order to coordinate services and implement legislation (Ginsberg et al. 2012). The Environmental Protection Agency (EPA), the Department of Education (DoE), the Federal Drug and Administration Agency (FDA), the American Postal Service (APS), and the National Recreation and Parks Association (NRPA) are only a few examples of federal bureaucratic agencies. These agencies help to regulate and operate the simple aspects of everyday life to

assist in ensuring a functioning society. Without these agencies, many of the common small scale activities of daily American life would be unreliable, more expensive, or impossible. The primary duty of the Bureaucracy is to implement and manage the legislation passed and programs dictated by Congress and approved by the president. Accordingly, these agencies are housed under the Executive Branch since they are tasked with implementation, a duty designated to the Executive (Hamilton 1788).

Beyond this, however, because it is not within the capacity of elected officials to vote on and discuss every aspect and every detail of every legislative piece, they often outline skeletal frameworks of laws and legislation and delegate rule-making, procedural decision making, and quasi-legislating, to the bureaucrats. This means that they have the ability to create rules, regulations, and programs that facilitate the tangible implementation of these congressional outlines. There is considerable debate over the constitutionality of this delegation of congressional power. However, the Supreme Court has ruled this delegation to be constitutional so long as there are intelligible principles to guide bureaucratic actions and no unfettered discretion is given (*J. W. Hampton, Jr. & Co. v. United States* 276 U.S. 394 (1928) 2016; *Panama Refining Co. v. Ryan* 293 U.S. 388 (1935) 2016; “*A. L. A. Schechter Poultry Corp. v. United States* 295 U.S. 495 (1935)” 2016; *Whitman v. American Trucking Assns., Inc.* 531 U.S. 457 (2001) 2016). These executive agencies create and enforce rules that have the force of law and therefore a binding effect on the general public through this quasi-legislative capacity.

In theory, according to the constitutional system of checks and balances, Congress should be able to exercise a check on the power of the executive agencies so as to insure that they are implementing legislation according to congressional intent and they are not overstepping their constitutional purview (“*The Constitution of the United States*” 1787). However, in actual

practice, the constitutionality of bureaucratic actions has been called into question by both politicians and the general public. In general, people possess sentiments of distrust toward bureaucrats and their agencies because they are not elected to represent the people. Despite this general distrust among the population, however, few scholars directly address how bureaucratic overreach of power and lack of accountability between the branches is a direct challenge to the Constitution and the system of separation of powers.

Literature Review

In order to examine whether this is indeed a problem that is occurring in the Federal government, I will draw on several different bodies of literature that discuss the various aspects of this argument, and demonstrate how they correlate to one another and indicate a constitutional issue. Initially, I will discuss the differences in opinions on how the Constitution is to be interpreted and its intended function in the establishment of the United States Government. Second, I will draw from several different scholars who examine bureaucratic actions, and the governmental duties and tasks that are being performed by the bureaucracy currently. I will outline the debate regarding the legality and acceptability of these actions and compare this with the principle of separation of powers to determine whether or not the bureaucracy prescribes to, or challenges this principle. Finally, I will discuss the scholarship on the various methods of control over the bureaucracy in order to examine whether or not the system of checks and balances is serving to maintain the three branch system of government, or whether the bureaucracy is currently operating without a tangible check. By connecting these separate bodies of literature, I am able to develop a theory and framework to address the main question under

consideration: are actions taken by the Federal Bureaucracy producing bureaucratic drift and if so, what does this suggest about the constitutional principles of separation of powers and checks and balances?

Understanding the Constitution and the Bureaucracy

Although the Constitution is the foundation of the United States Government and serves to provide the foundation premise for how governance is to occur, it is simultaneously incredibly specific and complex while also vague and open ended. This leaves room for interpretation of the laws based upon what one interprets to be the intended purpose behind the Constitution. In general, there are two main theories of interpretation. Barber and Fleming argue for a positivist interpretation of the Constitution. This interpretation states that the Constitution is an instrument for pursuing positive benefits and ends rather than primarily existing to set limitations upon government (Barber and Fleming, 2007). Charles Wise states that “Constitutions are about establishing governments before placing limitations on them” (Wise, 1993). When one adheres to this belief, this interpretation opens up a more positive and legitimate environment within which the bureaucracy can function and therefore capacitates more acceptance of bureaucratic actions. This means that the Constitution establishes the foundation to build a successful government and operates as a spring board that then serves to enable government to be further built from this foundation. This interpretation by various scholars creates a constitutional argument that the bureaucracy is a necessary and welcome agent and its actions are not in violation of constitutionally prescribed checks and balances (Rourke, 1987; Long, 1952; Wise, 1993; Barber and Fleming, 2007; Rohr, 1986). The Federal Bureaucracy is necessary for governing, therefore it is constitutional.

Many of these scholars concede that although the constitutional separation and specification of powers may have permitted cross-purpose action and bureaucratic obstructiveness, the benefit outweighs the cost as Americans have been largely spared swift and unforeseen changes in law and policy and have enjoyed multiple routes of access into their governmental functions, rather than being confined to a consolidated hierarchy. Like many other scholars within this debate, Wise acknowledges a certain degree of unconstitutionality and violation of the principle of separation of powers but also believes that it is a necessity for the overall functioning of American society (Wise, 1993).

In direct contrast, other scholars argue that “public administration cannot be legitimated in terms of the idealized vision of the American founders of the American Constitution in that their conduct and character were in part suspect,” (Spicer and Terry, 1996). They argue that the interpretation of the Constitution must be based on a central logic that the purpose of the American Constitution is to restrain power. With this argument in mind, they assert that the legitimate constitutional role of public administrators is to help limit the discretion of political leaders in imposing costs on citizens, not so much on the bureaucracy itself imposing restrictions on the citizens. This interpretation serves to prevent overreach of governmental power and create a system that controls the various governmental branches. This operates on a basis of distrust, and assumes that people will take power when they can, therefore the Constitution serves to prevent and control the accumulation of power.

However, while both of these interpretations possess a fundamental difference in opinion about what the purpose of the Constitution is, they both have a deep-rooted, core belief in the protection of democracy. As James Madison said in Federalist 51:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. (Cited in Wise, 1993)

The Constitution is as complex and multi-intentional as human nature itself and must therefore reflect both the positive and negative capabilities of society. When scholars focus exclusively on one form of interpretation over the other, they fail to fully engage in a comprehensive understanding of the overall intent of the Constitution. It is intended to establish a government, a reflection of the governed, therefore it serves both to enable, and to control and deter.

Bureaucratic Actions

With this belief in the necessity of both enabling and controlling government, the writers of the Constitution separated the powers of government to diffuse governing power and prevent one governing body from becoming tyrannical over the American people and exercising absolute power. In outlining this separation, the founders stated in Article I Section I of the Constitution, “All legislative powers herein granted shall be vested in a Congress of the United States,” (US Const. Art I Sec I). Therefore, if all legislative power is granted exclusively to Congress, then there arises a paradox between democracy and the bureaucracy when any form of legislation or even “quasi-legislation”- being rules or regulations that possess the force of law without being formal laws- comes out of the executive housed federal bureaucracy. In other words, when the executive agencies perform the duties of the Legislative Branch, they are crossing over their constitutional purview and taking on power that is not delegated to them. Nevertheless, one of their primary jobs is to quasi-legislate. Highlighting this dilemma, Morgenson asks, “Holding

both as values, how can we reconcile the tension between bureaucracy and democracy?”

(Morgeson, III 2005). Scholars identify an issue with the very existence of the bureaucratic body that is housed within the Executive, and declares that the bureaucracy is an assault on the very Constitutional principles of government by consent, the separation of powers, and the rights of individuals that is the foundation of American beliefs (Postell 2012). Postell goes so far as to argue that the very existence of the bureaucracy is itself a constitutional violation and that it is necessary to forge an alternative so that “we preserve our constitutional principles for future generations,” (Postell 2012). He and Morgenson both hold a very radical view of the constitutionality of the intrinsic existence of the bureaucracy. Most scholars do not agree with such a stark black and white view of the constitutional existence of the bureaucracy. The majority of scholars frame their arguments around the constitutionality and legitimacy of the bureaucratic actions and activities rather than the existence of the body itself.

Rourke argues that the bureaucracy is an illegitimate body where the activities and presence in the governmental structures are not altogether in accordance with the American Constitutional Order, however, American society has accepted it as a “necessary evil” (Rourke 1987). He declares that the administrative role in rulemaking frequently violates the constitutional rights of individuals, who are the ones affected by the agency’s decisions, while simultaneously allowing for a greater element of pluralism and intimate involvement by the American people. He presents yet another interesting paradox where the bureaucracy is, “at one and the same time altogether indispensable and somewhat illegitimate.”

Both Rourke and Long argue that the primary existence of the bureaucracy is due to the fact that the “important and vital interests in the United States are unrepresented, underrepresented, or mal-represented in Congress. These interests receive more effective and

more responsible representation through administrative channels than through legislature” (Rourke 1987; Long 1952). This view, according to these scholars is what gives the technically illegitimate and unconstitutional actions of the bureaucratic agencies a certain social legitimacy in the established constitutional order.

Others add further to this debate by arguing that “the administrative state heals a defect in the Constitution” (Rohr 1986), referring to the fact that the Constitution does not open enough avenues for public participation in government decision making. Interestingly enough, Wise argues that there is a certain degree of established legitimacy, but for a different reason. He states that the public administration does exercise all three powers of government, and does indeed go against the Constitution. However, it does so in a subordinate capacity and makes its contribution in conformity with that subordination to the institutions of government created in the first three articles of the Constitution. The Constitution may not have made the bureaucracy a key player in the separation of powers in an explicit sense, but it certainly did so in an operational sense. This inherently confers constitutional legitimacy on public administration, according to Wise (Wise 1993). Therefore these scholars agree that the bureaucracy is unconstitutional in its role and actions but is necessary because it opens up more avenues of representation by the people and has become generally accepted. This echoes the democracy-bureaucracy paradox if representation by the people for the people is accepted as essential to maintaining a democratic constitutional order (Morgeson III 2005).

Ghazala Ulvi-Ahmad applies Rohr’s framework of the administrative state to a more contemporary cause that addresses the constitutional legitimacy of the American public administrative bureaucracy. She specifically examines the agencies created by the USA Patriot Act of 2001 and their compatibility with constitutionality, and addresses the question “does the

USA Patriot Act create and empower executive agencies beyond the pale of separation of powers as developed by Rohr?" The study concluded that selected provisions from the statute are problematic in terms of their compatibility with the Constitutional traditions and regime values as defined by Rohr. Therefore using Rohr's framework in which he establishes that an administrative state is an essential addition to the constitutional order, she concludes that in fact the agencies are not compatible with the US Constitution and the separation of powers (Ulvi-Ahmad 2007).

Methods of Control

The other body of literature that is necessary to examine in order to address the question of bureaucratic constitutionality relates to who exercises control over the bureaucracy within the three branch governmental system established by the Constitution. Some have argued that Congress has a dominant influence on the bureaucracy. Still others debate that the president plays the major role in managing the bureaucracy, yet others argue that the bureaucracy needs legal constraints, and certain scholars assert that the bureaucracy has a substantial amount of its own autonomy from the president, congress, and the courts.

Some scholars focus on how the bureaucracy should be accountable to Congress because of its legislative functions. They draw upon principal-agent theory to illustrate how the bureaucracy is an agent of Congress, and therefore should act responsively and accordingly. I will elaborate on this theory later on, however its basic premise is that one entity- the agent- is enlisted and enabled to make decisions on behalf of another entity- the principal (Wood 1989;

Weingast 1984). The problem happens when the agent is motivated to act in his own best interests rather than those of the principal and fails to respond to the promptings of the principal.

One study examines seven different public bureaucracies for their responsiveness to political tools of control and concludes that there is adequate responsiveness to congressional prompting and disregards the argument that the federal bureaucracy is out of control and has assumed the dominant role in US policy making. Using principal-agent theory, they argue that the agencies respond to the stimuli from their “principals,” i.e. Congress. The agent is theoretically supposed to execute the wishes of the principal and be responsive to the promptings and stimuli from the principal to ensure that their orders are being executed as desired. This argument maintains that the bureaucracy retains constitutionality because it is responsive to and performing the wishes of Congress, the body of which the Constitution prescribes legislative power (Wood and Waterman 1991).

Many scholars have discussed the principal-agent model and analyzed the implications for the political control of the bureaucracy by Congress and come to similar conclusions (Bendor, Taylor, and Gaalen 1987). Wood proceeds to further test his principal-agent theory in relation to the federal bureaucracy and suggests some limitations on bureaucracies’ responsiveness to elected political institutions (Wood 1989). However this is widely debated. Cook, directly challenges features of the design of Wood’s model and argues that a “proper model requires recognition of the multiple principal nature of the US system and advocates for a consideration of the normative foundations of the principal-agent theory” (Cited in Wood 1989). This is perhaps some of the most directly debated scholarship on the matter. These are just a few scholars who directly disagree with each other over the extent to which bureaucracy is

responsive to congressional oversight and, therefore, the degree to which the constitutional separation of powers is kept intact.

Weingast, also using the principal-agent model, agrees that agency problems within the congressional-bureaucratic system are real and substantial, however, he also declares that there is a strong case against the agency dominance hypothesis and the autonomy of the bureaucracy. Weingast directs his attention more to the desires of “reelection minded congressmen” who have incentives to ensure that agencies provide the desired benefits to their constituents. He suggests that Congress should hold supreme importance in monitoring the agencies. This argument is one of the most far out and uncompromising in this debate (Weingast 1984). Weingast and Moran unite to test two opposing ideas about regulatory agency behavior: first, the assumption that agencies operate independently of the legislature and hence exercise discretion, and second that Congress should act to completely control agency decisions (Weingast and Moran 1983).

Using the principal-agent theory in this manner, to argue congressional control and dominance over bureaucratic agencies, has given rise to the concept of bureaucratic drift (McCubbins, Noll, and Weingast 1987). Essentially, the implementation of legislation that is being conducted within the Executive Branch is not in line with the statutory congressional intent of the Legislative Branch. Wilson argues very persuasively about the power of bureaucratic agencies and their accountability, or lack thereof, towards the public and the legislature. He says that power has shifted and control has been taken from “the public” and placed within agencies and private interests which has given rise to “the bureaucratic state” (Wilson 1975). This view contrasts with the views of Rohr, Rourke, and Long who argue that the bureaucratic existence gives more policy making power to the public as aforementioned (Rourke 1987; Rohr 1986; Long 1952). In his argument, Wilson lists three ways which bureaucracies garner political

power with undesirable effects. This, according to Wilson, is the problem: “the growth of an administrative apparatus to be so large as to be immune from popular control”; “placing power over a governmental bureaucracy of any size in private, rather than public, hands”; “and vesting discretionary authority in the hands of a public agency so that the exercise of that power is not responsive to the public good” (Wilson 1975). Wilson purports that the problems created “are not primarily the result of some bureaucratic pathology but of the possession of public power by persons who use it for private purposes.” Private interests are being served by public functions and agencies. By establishing the three branch system, this is what the Constitution sought to avoid. Bureaucratic drift is a breakdown of the principal-agent model, and therefore evidence of a breakdown in responsiveness and checks and balances.

Similarly, William Niskanen argues that bureaucracies and bureaucrats are motivated by concerns for their own salaries and therefore, attempt to maximize their budget shares or allocations from the total budget, as a result, their choices are governed by personal desires and not pleasing the people as is the elected officials’ task (Niskanen 1971). These scholars argue that these institutions go unchallenged and the factional interests which have acquired a supportive public bureaucracy are able to “rule” the agenda without “scrutiny or modification of other interests” (Niskanen, 1971)

Still other scholars addressing the issue of control of the bureaucracy discuss the links between preferences, parties, and outcomes in the bureaucracy. Schnose discusses the issue of bureaucratic drift in regards to policy outcomes and unelected officials affecting policy implementation as well as personal preferences driving the bureaucratic agencies. Again, she convincingly argues that Congress should hold the ultimate authority over the bureaucratic

agencies in theory, yet, in today's American society there is more autonomy than control within the administration (Schnose 2015).

A more moderate argument that bridges the gap between both sides is presented by Hammond and Knott. They introduce a formal model that illuminates several key aspects of the debate and determine that there are certain conditions where an agency has complete autonomy and others that have virtually none. Instead of exclusively saying that all agencies are autonomous or all are under control, they argue for an individualized examination of the various bureaucratic agencies. While their argument is interesting, it is lacking in feasibility and does not directly address the issue of constitutionality (Hammond and Knott 1996). If the ability to drift from congressional intent exists, and one agency is able to function autonomously as a principal rather than an agent, then this proves that there is no tangible check on power and, therefore, the bureaucracy is able to circumvent the checks and balances system. Wood and Waterman suggest that the Executive should leave all policymaking to Congress and simply concentrate on the administration of said policies (Wood and Waterman 1991). In this case, they are advocating that Congress take primary responsibility of the bureaucracy in order to make it more compatible with the American Constitutional Order and, consequently, democracy.

There are a small handful of scholars who seem to unite the constitutionality of the federal bureaucracy and the separation of powers within the United States government. Mason argues that there is now, "an imperial bureaucracy" of federal agencies and maintains that government agencies combine legislative, executive and judicial powers that go largely uncontrolled by Congress, the president, and the courts. "We are governed by the administrators" (Mason 1979). Ironically, Mason argues, the seeds of a large, uncontrolled government bureaucracy lie in the nature of the US Government and were addressed as early as

the Federalist Papers: Congress is a body of many conflicting interests that usually writes laws in vague terms to get enough support for passage. However, that vagueness results in interpretations that often differ from a law's original purpose. That problem is intensified when judicial rulings add still other interpretations. The confusion over the nation's laws has not only fostered litigation that is helping overload the courts, but has helped give birth to administrative agencies with the power to rule on specific issues not clearly addressed in laws (Mason 1979).

After examining both the literature on the constitutionality and legitimacy of bureaucratic agencies and their actions, as well as the debate over who should and who actually does control the bureaucracy, it is clear that few scholars discuss how these two schools of thought intertwine and relate. Once exploring this literature, it is evident that the control of the federal bureaucracy, or lack thereof, needs to be examined as it relates to the constitutionally prescribed principle of separation of powers and system of checks and balances. If one maintains that the Constitution was created to define governmental parameters and prevent individuals from holding too much power, then it appears evident that Article I, Section I of the Constitution functions to restrict legislative powers to Congress and Congress alone (US Const. Art I Sec I). If this is the case, then despite the general consensus of legitimacy, there is still an inherent contradiction and hypocrisy within the American government that needs to be examined. Ghazala Ulvi's examination of the Patriot Act is particularly enlightening as to the overreaching powers that the bureaucracy holds and the inherent incompatibility with the Constitution and, subsequently, the democratic principles of the Constitution under which the bureaucracy exists (Rourke 1987; Long 1952; Ulvi-Ahmad 2007).

Given the literature on control of the bureaucracy, there appears to be a large amount of autonomy that the bureaucracy currently possesses that operates outside of control of the

president, judiciary, or Congress. Since Congress is assigned legislative duties according to the Constitution, it can be assumed that Congress should possess control over the bureaucracy. As Wilson and Schnose discussed, the Federal Bureaucracy appears at this time to possess a fair amount of autonomy outside of congressional oversight and is able to create legislation that challenges that constitutional system of checks and balances (Wilson 1975; Schnose 2015).

However, what is most evident after examining the literature is that there is a need for more analysis as to what, if any, congressional duties are being unconstitutionally performed by the bureaucracy, how the bureaucracy is behaving autonomously and drifting from congressional intent, and if this is due to issues related to controlling the bureaucracy. Aside from theoretical assumptions, there is little in way of empirical study on rulemaking and bureaucratic drift. In order to fully and completely address the question being considered here, more concrete evidence must be examined to discuss this relationship between Congress and the Bureaucracy under the principles of separation of powers, and checks and balances. In the following section, I will outline the framework and methods for analysis that I will use to address the central concern of this thesis.

Analytic Framework

As evidenced above, there is a wealth of scholarly literature on the authority of the Federal Bureaucracy, its actions, and its implications for the principles of separation of powers and checks and balances as outlined by the United States Constitution. Many of the scholars who study this topic draw on theoretical and constitutional arguments, as well as broad historical trends, to argue that the bureaucracy is currently operating as a fourth branch of government.

This is a difficult concept to understand given that most Americans have just a basic understanding of a three branch system of government. However, despite the Constitution's outline of a three branch system and the creating of checks and balances, it does not address a bureaucratic state and the administrative agencies that are essential to enabling the United States to function, creating a paradox between democracy and the bureaucracy. While this paradox is an interesting area of study, it is more of an academic debate and less consequential to actual application. The fact remains, that while the bureaucracy may not exist within the constitutional ordering of government, this body nevertheless does indeed exist and is essential to the operation of the American government on all levels.

Moreover, this body has developed a high degree of autonomy in the post-New Deal era (Wilson 1975). It has grown so dramatically in both size and power that it is now operating separately from the three branch system, working underneath both Congress and the Executive. It is crucial to the day to day operations of the American government, however, as it regularly performs the necessary duties of government, it is operating without a tangible check on its power from the other branches. This unique situation is what has led scholars to accuse the bureaucracy of acting as a fourth branch of government.

What is problematic with these theoretical and scholarly debates is that, while many of these scholars accuse the bureaucracy of overreach despite its constitutional rulings, few suggest key indicators to examine to empirically identify whether or not the bureaucratic agencies have truly attained some degree of authority that challenges the principles of separation of powers and checks and balances. Rather, many scholars have attempted to illustrate an unconstitutional overreach by discussing the theoretical concept of bureaucratic drift. This concept is largely theory based and as a result, it is challenging to know it when one sees it. For the purpose and

scope of this project, bureaucratic drift is the phenomenon of bureaucratic implementation that allows the bureaucratic agencies to act independent of Congress, and create rules, regulations, and programs that are more to the liking of the bureaucracy and not in accordance with the original legislative wishes of Congress. Bureaucratic drift occurs during the legislative process that implements a law into society. When a broad legislative piece is passed by Congress and signed by the president, it is then delegated to a federal agency within the Executive Branch for implementation. That agency then has the responsibility of filling in the details and executing the legislation with rules and regulations that will make the policy work in society and fulfill the goals of Congress. This process of filling in the details is commonly called “quasi-legislation.” This quasi-legislative capacity has given the agencies a significant amount of power to exercise both legislative and executive functions. These rules and regulations have the force of law when finalized in the Federal Register.

However, if an agency begins to implement rules and regulations and act in ways that enforce the legislation in a manner that differs from the original intent of the elected officials in Congress, this is bureaucratic drift. This can be a problem because the actions of executive agencies are extremely difficult to undo and alter. Additionally, it is very challenging to track bureaucratic drift through the numerous levels of delegation and the thousands of rules and regulations that are published in the Federal Register each day. To ensure accountability, at one time, Congress possessed a legislative veto, which allowed them to reserve the ultimate verdict on any policy that was implemented. They had the final say as to whether or not the bureaucratic actions were truly in line with congressional statutory intent. However, that veto was ruled unconstitutional in 1980 by the Supreme Court, thereby removing one of Congress’s significant

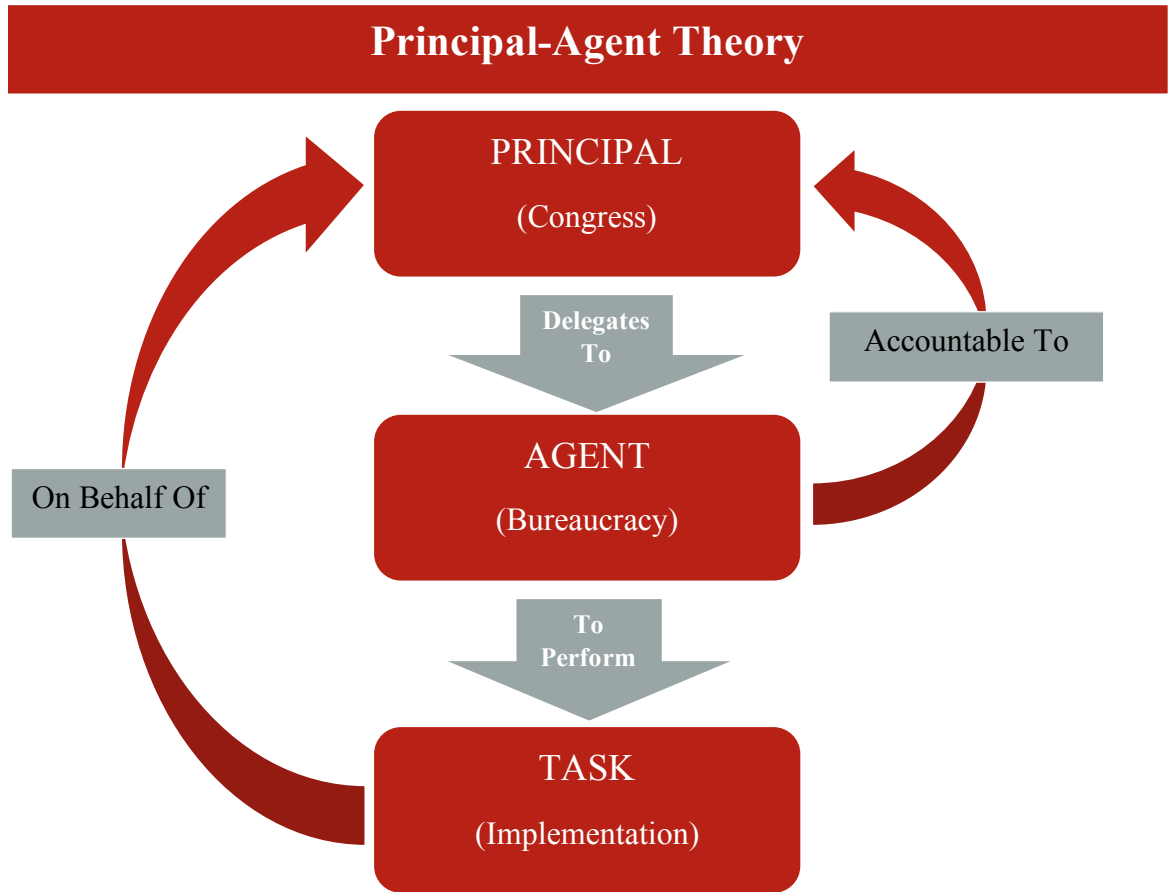
regulatory powers and methods of control over the bureaucracy (INS v. Chadha 462 U.S. 919 (1983) 2016).

Although this theoretical occurrence of drift and the obvious subsequent problems that would be associated with it have been discussed extensively, there have been few recognizable characteristics identified by these scholars that can be used to observe and demonstrate this theory of drift, which would allow for a more complete conclusion about the constitutionality of agency behavior. As aforementioned, it is extremely difficult to trace an initial piece of legislation and connect it to the thousands of rules and regulations that are implemented on its behalf, as well as all of the actions that are undertaken by various agencies with delegated powers. An average piece of legislation is around 15 pages. However, some pieces of legislation can grow to over a thousand pages in length with hundreds of pieces and aspects included (Beam 2009). They are often very abstract, under defined, and skeletal and therefore require numerous rules and regulations to fill in the logistics needed for implementation. As a result, tracking the numerous pieces through various agencies, committees, and programs, presents a serious challenge. However, one of the simplest forms of legislation that are consistently passed from Congress to executive agencies are appropriations bills. On average, these are only 3-4 pages and are significantly more specific. These bills designate how much money certain agencies are given and what programs these funds are to be used for. These bills are some of the most direct pieces of legislation, and therefore they provide more straightforward instructions to executive agencies, less room for interpretation, and consequently less room for bureaucratic drift. Therefore, in order to operationalize and document bureaucratic drift, I will examine an appropriations bill. This provides a simple way to try to document drift by

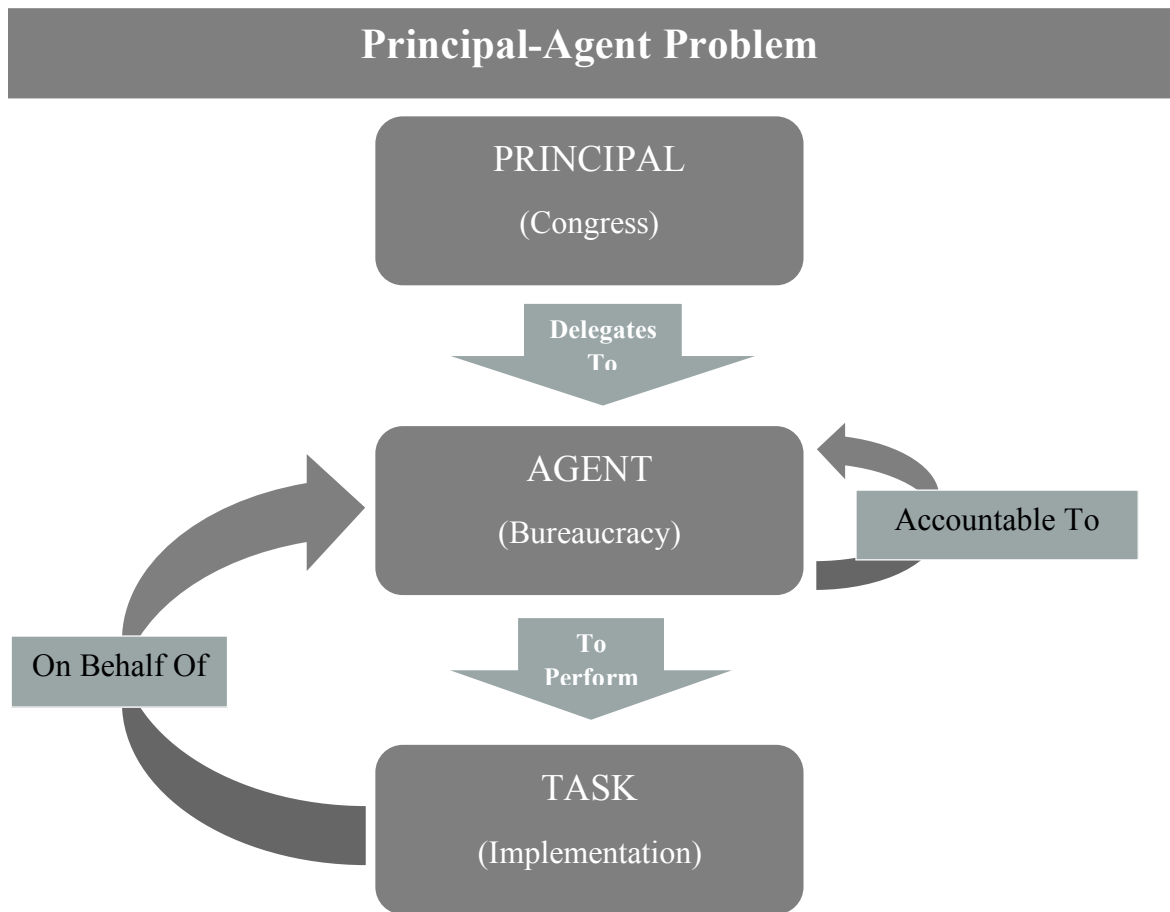
comparing how funds are allotted to be spent on a specific program, and how they are actually spent. I will attempt to do this in the following analysis.

To frame this analysis, I will draw on the principal-agent theory. As previously discussed, this theory states that the principal, in this case Congress, should have control over the agent, the federal bureaucracy. The constitutional and legal understanding of the congressional-bureaucratic relationship within the federal government is a perfect example of the relationship outlined in the principal-agent theory. This relationship functions very much like a puppeteer and a puppet. When the puppeteer pulls on the strings of the puppet, the puppet does as the puppeteer directs. In a proper principal-agent relationship, the agent should be responsive to the promptings, stimuli, and guidance of the principal and should never disrupt this hierarchical relationship. Just like the strings on the puppet. In the case of the Congress-Federal Bureaucracy relationship, these strings come in the form of legislation and oversight. The agent should never act independently or without principal approval and should always strive to enact the wishes of the principal to the best of its ability. In keeping with the puppet metaphor, in a situation like Pinocchio where the puppet comes to life, they are no longer controlled by the puppeteer and begin to run amuck and eventually chaos ensues. The puppet takes on a life of its own and as a result, is no longer acting on behalf of the puppeteer but rather becomes its own agent. Similarly, when the agent receives too much power, it is no longer responsive to the promptings and oversight of the principal and begins to act as its own principal thereby creating a principle-agent problem (see figures 3 and 4 for a representation of the theory and the problem).

Figure 3: Principal-Agent Theory



A Pinocchio Problem:
Bureaucratic Drift and Constitutional Separation of Powers

Figure 4: Principal-Agent Problem

By examining the dynamic between what Congress legislates and how the Bureaucracy acts, and situating our understanding of bureaucratic drift within this framework, I am able to use a method of pattern matching to compare how the congressional-bureaucratic relationship is intended to work, and how it does in actuality. If reality does not match what has been ruled upon to be the constitutional and legal standards for this relationship, then I will have clearly identified a principal-agent problem and subsequently, bureaucratic drift (J. W. Hampton, Jr. & Co. v. United States 276 U.S. 394 (1928) 2016; Whitman v. American Trucking Assns., Inc. 531 U.S. 457 (2001) 2016).

In theory and as deemed constitutional by the Supreme Court, Congress has the implied power to delegate legislative authority so long as they provide intelligible principles to guide the agencies and ensure that they act in accordance with the desires of Congress (*J. W. Hampton, Jr. & Co. v. United States* 276 U.S. 394 (1928) 2016). Therefore, an agency that is properly following the intelligible principles and accurately fulfilling congressional intent is demonstrating the proper interaction of the principal-agent relationship and is a model pattern. The breakdown of this ideal relationship is where we would see a principal-agent problem, and in this congressional-bureaucratic relationship, bureaucratic drift.

Constitutionally speaking, if there is a breakdown between the principal-agent relationship, and bureaucratic drift is found to be occurring in the case of an appropriations bill, then this would be a twofold challenge to the principles of separation of powers and checks and balances as established by the Constitution. As discussed previously (see Figure 1, pg. 3) it is the duty of Congress to write legislation and the duty of the Executive branch and the agencies within it to execute, or implement this legislation as guided by Congress. If the executive agencies drift from the intention of Congress and do not act in accordance with the intelligible principles laid out for them, then they are acting as their own agent and taking on the roles that are constitutionally prescribed to be the powers of Congress. Additionally, one of the checks that Congress possesses over the Executive is the “power of the purse” or the ability to regulate and control the budget (see figure 2, pg. 4). If the executive agencies are not properly heeding the appropriation of funds as allocated by appropriations bills, then this is evidence that the Legislative Branch is unable to exercise a check on the power of the Executive Branch, thereby demonstrating a breakdown within the system of checks and balances that promotes the separation of powers as discussed above in the Literature Review. In other words, if

bureaucratic drift is found in the case of an appropriations bill then this demonstrates that the bureaucracy is taking on the powers of both the Legislative and Executive Branch, and the Legislative Branch is unable to effectively employ its method of control and check the power of the Bureaucracy.

Method

As previously discussed, there are thousands of rules and regulations dictating bureaucratic action that are put forth by executive agencies each and every day. The congressional bills motivating each of these rules are often incredibly detailed and complex with numerous facets and components. Of all the various types of legislation passed by Congress, appropriations bills are some of the simplest to implement. They allot a certain number of funds to specific programs and it is at the discretion of the agency, under which the program lies, to use the funds as they deem necessary, as long as they are used for the program or purpose for which they are intended. The agency must report back to Congress on the amount of funds used, and for what purposes (Circular No. A-127--Revised 2014). It is illegal for them to report back false information or fail to report back on the use of funds. Therefore, in order to determine in a clear manner whether bureaucratic drift is occurring within the United States government, and to draw some basic conclusions about the operations of the principle of separation of powers, I will examine the case study of the Centers for Disease Control and Prevention (CDC) and their use of funds allocated to the Hantavirus program and the Chronic Fatigue Syndrome (CFS) program.

I chose this particular case study because the legislation passed down from Congress in this instance was expressly clear about the statutory intent, unlike so many other pieces of

legislation, so there should be no evidence of any bureaucratic drift in this situation. There were specific funds appropriated with clear guidelines as to how the funds should be spent, unlike a broader piece of legislation where initial congressional intent can be disputed (“Hantavirus Pulmonary Syndrome (HPS)/Immunology Cooperative Agreement” 1994). If I do observe bureaucratic drift in this particular situation, then it is evidence that drift can and does indeed occur between Congress and the executive agencies and this suggests a challenge to the principle of separation of powers. Moreover, if bureaucratic drift is happening when directives about funding are so clear, it is highly likely that bureaucratic drift happens when directives are more skeletal and bureaucratic drift is harder to detect.

In my analysis, I will begin by telling the legislative story of the Hantavirus and CFS. I will examine the causes that led to the appropriations of funds, the pressures on Congress from the people that prompted this response, the particular legislation commanding of the CDC to address the problem, and the subsequent actions and explanations of the CDC. If the CDC did follow through with the orders of Congress, then there should have been \$7.5 million dollars spent annually on Hantavirus research and \$22.7 million spent on CFS research. If this money was not spent on the programs for which it was intended and redirected for other purposes determined by the CDC, this demonstrates drift from congressional statutory intent. I will then discuss how this demonstrates a breakdown of the principles of separation of powers and a lack of control through checks and balances.

If this drift is occurring, and funds are being misdirected, then this demonstrates a principal-agent problem between Congress and the bureaucracy where the agent is acting autonomously, as its own principal and is not responding to the promptings of Congress. This demonstrates a challenge to the principle of separation of powers because each branch is

designated the responsibility of fulfilling different governmental tasks. If Congress is no longer able to place a check on the power of the Executive Branch through its control of the budget, then there is a challenge to the system of checks and balances that contributes to the principle of separation of powers.

Using quantitative and qualitative data found in the Federal Register I will track and analyze the initial appropriations bills passed down by Congress to the executive agency, congressional oversight hearings, the statements submitted by the CDC on its actions, and committee meetings. By examining these, I will be able to determine whether or not the agencies are responsive to the promptings and wishes of the principal, or Congress, and whether or not actions of the executive agency align with congressional intent.

Data Analysis

The CDC, Hantavirus, and Chronic Fatigue Syndrome

In May 1993, a physically fit, long-distance runner from New Mexico caught a cold. Her lungs rapidly filled with fluid and she suddenly and unexpectedly died. Her fiancé, another very active, healthy, young adult was rushed to the hospital five days later due to shortness of breath and died almost immediately after arriving in the emergency room. The death of these two individuals was then followed by more than two dozen other confirmed deaths in the American Southwest region, all attributed to the same unknown disease (Stephens and Strauss 2000; CDC 2012). After extensive review and study, the CDC identified the disease as a previously unknown strain of Hantavirus. This disease, transmitted by common deer mice, resulted in forty-eight confirmed illnesses in 1993, with twenty-seven of these cases proving fatal (CDC 2016). At a

56% mortality rate in 1993 alone, this disease raised an alarm within the medical community (CDC 2016). As a result, on July 12, 1994 Congress announced the launch of a CDC program to conduct Hantavirus investigations. They allotted the CDC up to \$7.5 million annually in order to fight this disease (“Hantavirus Pulmonary Syndrome (HPS)/Immunology Cooperative Agreement” 1994). From 1994 to 1999 the CDC continued to annually report to Congress that they spent the entirety of the \$7.5 million on Hantavirus research and prevention (Stephens and Strauss 2000).

However, on February 2, 2000, Washington Post writers Joe Stephens and Valerie Strauss published a front page article, accusing the CDC of misdirecting the Hantavirus funds, and using them in unknown and unapproved ways (Stephens and Strauss 2000). This revelation caused a stir within Congress and the General Accounting Office was called to investigate. The next day, the Center acknowledged that several million dollars of the congressionally allocated Hantavirus funds were indeed spent on other diseases, and CDC Director Jeffrey Koplan issued a public apology (Hilts 2000; Associated Press 2000; Rovner 2000). He further stated that the CDC had hired a private firm, PriceWaterhouseCoopers, to further investigate the charges and ensure a change in proper financial management (Committee on Commerce 2001).

Were this an isolated incident, this misallocation of funds could perhaps be attributed to poor book-keeping practices, or even the actions of a few rogue agents. However, two years prior to the media break of the Hantavirus scandal, the CDC was accused of similar misdirection of funds which resulted in criminal investigations. On July 22, 1998, Dr. William C. Reeves, a veteran scientist and head of the CDC’s Chronic Fatigue Research Program, presented a three-page statement to the U.S. Inspector General, members of Congress, and the Department of Health and Human Services (Reeves 1998). In this statement he filed for protection under the

Whistleblowers Act as he outlined how he believed that the CDC and Dr. Brian Mahy were providing false information about laboratory research and funds that were allocated from Congress to Chronic Fatigue Syndrome (CFS) research. In his statement he outlined the intentional misrepresentation of monies that was allocated to CFS research in the years 1996, 1997, and 1998. In his report, Dr. Reeves said that the CDC reported that in Fiscal Year (FY) 1996 "\$1.2 million was used to support CFS laboratory studies in 1996....[claiming] 1996 costs were significantly higher because CDC were investigating the potential role of infectious agents in the etiology of CFS... This information is not true" (Reeves 1998). This was for the FY 1996 alone. Additionally, he stated that Dr. Mahy's Division:

Appears to have used an additional \$1.4 million of monies they reported as supporting CFS research for unrelated activities. These monies encompassed [approximately] \$600,000 to support staff elsewhere in the Division (this was in addition to overhead staff shown in the materials given to Congress) and [approximately] \$900,000 for various contracts (\$200,000 measles program agreements with other agencies, \$200,00 to the respiratory & Enterovirus Branch for management and professional services; \$228,000 epidemiology and laboratory fellowships, \$315,000 printing services contracts) (Reeves 1998)

He also claimed that he witnessed CDC reporting that they spent \$3.4 million on CFS research in FY 1997 where as he can only account for \$2.8 million, and in FY 1998 they again reported that \$3.4 million was devoted to CFS while Dr. Reeves was only given \$2.5. In summary, he concluded that:

CDC has intentionally misrepresented monies ... The misrepresentations involve systematically charging between \$400,000 and \$2 million incurred by unrelated activities to CFS between 1995–97 and reporting to DHHS, Congress and patients that the monies were used for CFS research. The misrepresentations also involve charging inappropriate Division overheads to CFS. The misrepresentations have been compounded by intentionally ignoring technical information from Program concerning expenses and knowingly transmitting inaccurate figures and information (Reeves 1998)

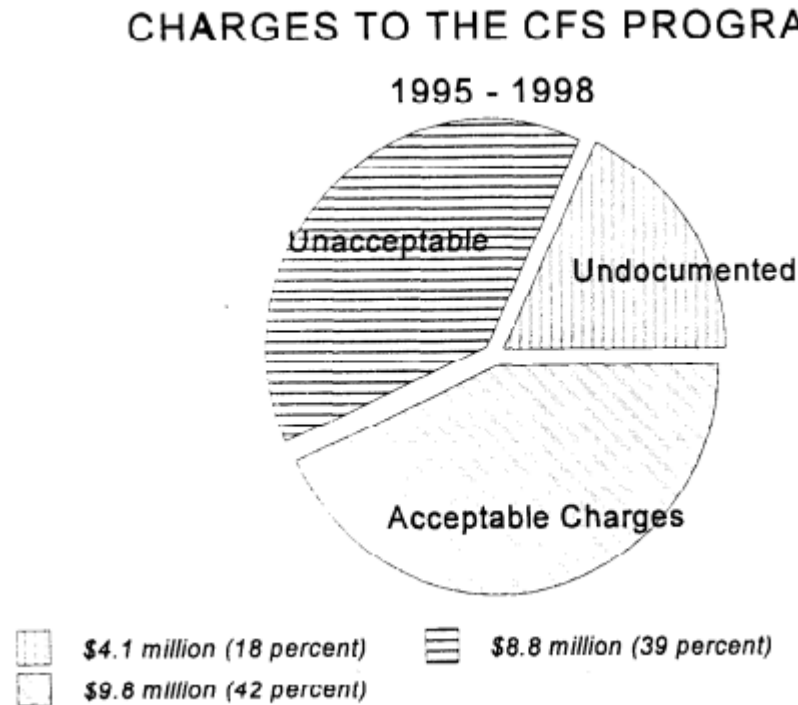
From FY 1995 through FY 1997, some \$5.8 million that the CDC told Congress had been spent on CFS research actually went to other activities, Reeves stated. He specifically accused Dr.

Claire Broome, acting director of the Atlanta-based CDC, of providing false information to Congress when she testified that part of the money reported by the CDC in 1996 for CFS research went to establish a new laboratory in the branch headed by Reeves.

After this accusation, the Department of Health and Human Services (DHHS) was commissioned to conduct an audit on the “Costs Charged to the Chronic Fatigue Syndrome Program at the Centers for Disease Control and Prevention” to validate Dr. Reeves’ accusations (Department of Health and Human Services Office of Inspector General 1999). After careful and thorough investigation, the Office of the Inspector General of the DHHS concluded that, “during FYs 1995 through 1998, CDC spent significant portions of CFS funds on the costs of other programs and activities unrelated to CFS and failed to adequately document the relevance of other costs charged to the CFS program” (Department of Health and Human Services Office of Inspector General 1999). After extensive investigation into accounting records, congressional and CDC statements, appropriation acts and congressional reports and budgeting and accounting operations, they concluded that of the almost \$22.7 million that was said to have been used for the CFS program, only \$9.8 million was actually incurred for program purposes. The audit stated that:

We accepted \$9.8 million (43 percent) as actually incurred for program purposes; we could not accept \$8.8 million (39 percent) because it was incurred for non CFS-related activities; and we could not determine the applicability of \$4.1 million (18 percent) of indirect costs to the CFS program because it was not documented in sufficient detail...(Department of Health and Human Services Office of Inspector General 1999)

Over 57 percent of the funds that were charged to the CDC’s CFS program were deemed to be unacceptable or undocumented charges (see Figure 4).

Figure 5: DHHS Audit Breakdown of CDC Spending

Source: Department of Health and Human Services Office of Inspector General. 1999. "Audit of Costs Charged to the Chronic Fatigue Syndrome Program at the Centers for Disease Control and Prevention." Audit. <http://oig.hhs.gov/oas/reports/region4/49804226.pdf>.

In addition to this, not only did the audit find that over half of the funds were used for programs other than the CFS program, it also declared that the CDC had directly misinformed Congress of their use of these funds:

These questionable charges resulted from deficiencies in CDC's internal control system regarding the handling of direct and indirect costs. As a result of these inappropriate charges, CDC officials provided inaccurate information to Congress regarding the use of CFS funds and have not supported the CFS program to the extent recommended and encouraged by Congress. (Department of Health and Human Services Office of Inspector General 1999)

Instead of accurately reporting back that they had chosen to spend the CFS funds on alternative programs, they continued to declare the allocated funds as being used on CFS research. At the

conclusion of the investigation, the CDC admitted to all accusations and accepted that everything presented in the audit was factual and accurate. Not only did they disregard congressional appropriations, but they intentionally withheld the information from Congress. As stated in the Audit, the Acting Director of the CDC provided testimony and data on March 5, 1998, before the House Appropriations Committee regarding the budget request for FY 1999, in which they presented data summarizing the use of CFS funds for FYs 1996 through 1998. The DHHS's audit found that this "testimony and the data presented was inaccurate and potentially misleading about the nature, scope, and cost of the CFS program" (Department of Health and Human Services Office of Inspector General 1999). Koplan again issued a public apology and promised to employ unprecedented changes to the financial management, structuring, and reporting practices of the CDC (Rovner 2000). However, despite these promises, less than two years later, the CDC was once again accused of appropriation misdirection of Hantavirus funds.

Bureaucratic Drift, Separation of Powers, and Checks and Balances

If bureaucratic drift is, the phenomenon of bureaucratic implementation that allows the bureaucratic agencies to act independent of Congress, and create rules, regulations, and programs that are more to the liking of the bureaucracy and not in accordance with the original legislative wishes of Congress, then this case is a clear example of bureaucratic drift. Congress passed an appropriations bill that provided the CDC with a definitive amount of funds that were expressly designated to be used for Hantavirus and CFS research. Despite the specifications of this legislation, the CDC was still granted a certain degree of flexibility and discretionary power on how they used the funds within the programs to combat the illnesses. They had the freedom to decide what organizations and research agencies would receive the funds, how the funds would

be delegated amongst affected citizens, how best to scientifically and medically use the funds so as to ensure effective research and analysis, etc.

Importantly, federal employees working in executive agencies are hired because they are the experts in their fields. They specialize in their area of expertise, therefore they are most knowledgeable about how to effectively implement programs. However, despite this freedom and recognized expertise, they are still supposed to be accountable to Congress and are legally required to accurately report back on their actions to ensure they are in line with legislative intent (Circular No. A-127--Revised 2014). In this particular instance, the only stipulations that Congress required was that the allocated funds be spent on Hantavirus and CFS research. The funds given were not used for that purpose and this was the result of drift within the agency without support from Congress, therefore the bureaucracy drifted from the statutory congressional intent and acted independently instead of as the agent of Congress.

This evidence of drift suggests important implications for the overall constitutional ordering of the United States government, chiefly because it is a clear demonstration of a principal-agent problem. Like Pinocchio, the bureaucratic agency, the CDC, has taken on a life of its own and is acting as its own principal rather than a responsive agent to Congress and the democratically elected officials therein. These autonomous actions regarding spending are demonstrative of a twofold challenge to the principles of separation of powers and checks and balances.

First, this demonstrates a separation of powers challenge because the Executive is performing the roles of the Legislative. Congress is tasked with writing legislation and the Executive is tasked with implementing this legislation (“The Constitution of the United States” 1787). In this instance, Congress wrote appropriations bills that provided \$7.5 million annually

to the Hantavirus program and over \$22.3 million to the CFS program. This legislation was passed in Congress, approved by the president, and then given to the executive agency, the CDC, to implement and execute. The CDC drifted from the legislative wishes of Congress and failed to follow the intelligible principles that were laid out. To do this, they independently identified a separate set of priorities and strategies to achieve these priorities. These are actions typically done by the Legislative Branch that set priorities through a democratic and deliberative process. By circumventing this process, they acted as their own principal and exercised the legislative duties that are constitutionally prescribed to Congress, violating both the principles of separation of powers and checks and balances as well as representative democracy.

Second, the congressional power over budgetary spending and the authority of congressional oversight is a check that Congress is able to employ over the Executive branch to ensure that they are properly following legislative directing. The CDC completely disregarded Congress's power of budgetary discretion and oversight, using the money allotted for their own purposes and willfully misrepresenting their actions in reports and oversight hearings. This bureaucratic drift, abuse of budgetary allocations, and clear disregard for the mechanisms of oversight, is evidence that drift can present serious obstacles to congressional check on executive power.

Perhaps the most important piece of evidence that drift occurred is the fact the CDC not only drifted from congressional intent, but they did so with full knowledge of the illegality of their actions and a belief in their justification. When interviewed for the DHHS Audit, researcher Phil Pellett made a statement wherein he declared that he does not condone the misleading of the public, however, he believes that sometimes it would be a "bigger crime" to follow Congress's direction rather than spend the money where science dictates. According to

the notes taken by the auditor, Pellet demanded, “How can some congressman know better than we, what the important public health issues are?” (Department of Health and Human Services Office of Inspector General 1999; Stephens and Strauss 2000). The DHHS audit concluded that these funds were spent “unacceptably” and furthermore, that the CDC knowingly misdirected Congress and blatantly lied about their actions and financial practices (Department of Health and Human Services Office of Inspector General 1999). To be sure, Pellet may be correct, but the proper cause of action would have been to raise this concern at an oversight hearing and work with Congress to adjust and alter the courses of action.

David Obey (D-WI7) made this clear in his comment at a House Committee hearing on February 10, 2000. He stated: To the agency I would simply say I hope that you will find your way clear to in most instances follow the direction that Congress lays out. If the agency feels that that is not in the public health interest of the citizens of the United States, then the agency has an obligation to simply have guts enough to come up here and explain to the Congress why you think we are wrong and why you think there is a better use of that money, and if you make a good case, we shouldn't squawk about it. (US House 2000, 64-152)

Thus, I have demonstrated that the CDC intentionally provided incorrect information and therefore illegally spent government funding, thereby undermining ability of Congress to check executive power and violating the principle of separation of powers as outlined in the American Constitution.

The CDC was legally obliged to report to Congress and follow statute, thereby allowing the government to work as intended. This did not happen because of intentional decisions made by federal employees in the CDC operating under their own unconstitutional authority. This is the definition of bureaucratic drift. If they feel that the funds should be spent elsewhere, it is their duty and responsibility to report this information to Congress. This diversion of funds occurred not only once, but twice, and despite the promises to correct the issues, in January

2001, the CDC was again audited and placed under investigation for continued Hantavirus funding misdirection (Committee on Commerce 2001).

Conclusion

While comparing bureaucratic drift to the well-known fable of Pinocchio, the lying and mischievous puppet, may add a lighter note to this topic, this evidence of drift actually presents a significant challenge to the overall institutional ordering and functioning of the United States government. The Constitution states that power should be divided between three different branches with distinct roles and duties assigned to each branch. The Legislative Branch is intended to write legislation, the Executive Branch is to execute it, and the Judicial Branch is to rule on its constitutionality and legality. The Bureaucracy, housed under the Executive Branch, is intended to assist in the implementation of legislation according to the direction provided by the Legislative Branch. Scholars have alleged that, in recent years, bureaucratic agencies have acted independently of Congress and implemented legislation that is more to the liking of the bureaucracy rather than in accordance with the original legislative wishes of Congress. Scholars have labeled this phenomenon bureaucratic drift. Bureaucratic drift presents a challenge to the constitutional principles of separation of powers and checks and balances by shifting the capacity to create legislation to the Executive Branch. Furthermore, Congress lacks a viable check on this overreach of power.

The examination of multiple executive agencies is beyond the scope of this project, however, the case of the Hantavirus program and the CFS program in the CDC demonstrates a clear example of bureaucratic drift, an overall systematic problem within the Federal

Government, and consequently a violation of the principles of separation of powers and checks and balances. If it is possible for the CDC to drift from congressional statutory intent on a bill that is so clearly outlined and structured, it is much easier for other agencies to do so on legislation that is much more complicated and less clear, and there is little that can be done to prevent this.

This undermining of the institutional ordering of the United States Federal Government indicates that there is a need for further and more expansive studies and examinations of the methods of control and oversight in order to develop theories and practices that could address this problem. Without more specific and in-depth documentation of how this is occurring and to what extent, it will not be possible to fix this problem.

Bibliography

Aberbach, Joel D., and Bert A. Rockman. 2001. *In the Web of Politics: Three Decades of the U.S. Federal Executive*. Brookings Institution Press.

“A. L. A. Schechter Poultry Corp. v. United States 295 U.S. 495 (1935).” 2016. Accessed April 4. <https://supreme.justia.com/cases/federal/us/295/495/case.html>.

Associated Press. 2000. “CDC Director Sorry about Misspending,” February 3. <http://www.deseretnews.com/article/741724/CDC-director-sorry-about-misspending.html?pg=all>.

Barber, Sotirios A., and James E. Fleming. 2007. *Constitutional Interpretation: The Basic Questions*. Oxford University Press, USA.

Beam, Christopher. 2009. “Is 1,000 Pages Long for a Piece of Legislation?” August 20. http://www.slate.com/articles/news_and_politics/explainer/2009/08/paper_weight.html.

Bendor, Jonathan, Serge Taylor, and Roland Van Gaalen. 1987. “Stacking the Deck: Bureaucratic Missions and Policy Design.” *The American Political Science Review* 81

CDC. 2012. “CDC - History of Hantavirus Pulmonary Syndrome (HPS) - Hantavirus.” August 29. <http://www.cdc.gov/hantavirus/hps/history.html>.

CDC. 2016. “CDC - Annual U.S. HPS Cases and Case-Fatality - Hantavirus.” January. <http://www.cdc.gov/hantavirus/surveillance/annual-cases.html>.

Circular No. A-127--Revised. 2014. <https://www.whitehouse.gov/embeds/footer>.

Committee on Commerce. 2001. “Report on the Activity of the Committee on Commerce for the 106th Congress.” 106-1047. <https://www.gpo.gov/fdsys/pkg/CRPT-106hrpt1047/pdf/CRPT-106hrpt1047.pdf>.

Department of Health and Human Services Office of Inspector General. 1999. “Audit of Costs Charged to the Chronic Fatigue Syndrome Program at the Centers for Disease Control and Prevention.” Audit. <http://oig.hhs.gov/oas/reports/region4/49804226.pdf>.

Ginsberg, Benjamin, Theodore J. Lowi, Margaret Weir, Caroline J. Tolbert, and Robert J. Spitzer. 2012. *We the People: An Introduction to American Politics*. 9 edition. New York: W. W. Norton & Company.

- Hamilton, Alexander. 1788. "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments." *New York Packet*, February 8. http://thomas.loc.gov/home/histdox/fed_51.html.
- Hammond, T. H., and J. H. Knott. 1996. "Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making." *Journal of Law, Economics, and Organization* 12
- "Hantavirus Pulmonary Syndrome (HPS)/Immunology Cooperative Agreement." 1994. Federal Register Issue 132. Volume 59. <https://www.gpo.gov/fdsys/pkg/FR-1994-07-12/html/94-16808.htm>.
- Hilts, Philip J. 2000. "Health Agency Admits Shifting Funds From Study of Deadly Virus." *The New York Times*, February 3, sec. U.S. <http://www.nytimes.com/2000/02/03/us/health-agency-admits-shifting-funds-from-study-of-deadly-virus.html>.
- INS v. Chadha 462 U.S. 919 (1983). 2016. Accessed April 4.
- J. W. Hampton, Jr. & Co. v. United States 276 U.S. 394 (1928). 2016. Accessed April 4.
- Long, Norton E. 1952. "Bureaucracy and Constitutionalism." *The American Political Science Review* 46 (3): 808.
- Lowi, Theodore J., Benjamin Ginsberg, Kenneth A. Shepsle, and Stephen Ansolabehere. 2013. *American Government: Power & Purpose*. W. W. Norton.
- Mason, Alpheus Thomas. 1979. "'Imperial Bureaucracy' Scored by Mason." *American Bar Association Journal* 65 (10): 1462.
- McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast. 1987. "Administrative Procedures as Instruments of Political Control." *Journal of Law, Economics, & Organization* 3 (2): 243–77.
- Morgeson III, Forrest Vern. 2005. "Reconciling Democracy and Bureaucracy: Towards a Deliberative-Democratic Model of Bureaucratic Accountability." University of Pittsburgh. <http://d-scholarship.pitt.edu/6681/>.
- Niskanen, William A. 1971. *Bureaucracy and Representative Government*. Transaction Publishers.

- Panama Refining Co. v. Ryan 293 U.S. 388 (1935). 2016. Accessed April 4.
- Postell, Joseph. 2012. "From Administrative State to Constitutional Government." *The Heritage Foundation*. December 14. <http://www.heritage.org/research/reports/2012/12/from-administrative-state-to-constitutional-government>.
- Reeves, William C. 1998. *Report of Erroneous Information from CDC on CFS Research Allocations 1996–98*. Washington DC.
<https://graham.main.nc.us/~bhammel/INS/jm19.html>.
- Rohr, John A. 1986. *To Run a Constitution: The Legitimacy of the Administrative State*. Lawrence, Kan: University Press of Kansas.
- Rourke, Francis E. 1987. "Bureaucracy in the American Constitutional Order." *Political Science Quarterly* 102 (2): 217.
- Rourke, Francis E. 1992. "Responsiveness and Neutral Competence in American Bureaucracy." *Public Administration Review* 52 (6): 539.
- Rovner, Julie. 2000. "CDC Head Apologizes Again for Misuse of Funds." *The Lancet* 355 (9205): 734.
- Schnose, Viktoryia. 2015. "Who Is in Charge Here? Legislators, Bureaucrats and the Policy Making Process." *Party Politics*, August, 1354068815597896.
- Spicer, Michael W., and Larry D. Terry. 1996. "Administrative Interpretation of Statutes: A Constitutional View on the 'New World Order' of Public Administration." *Public Administration Review* 56 (1): 38.
- Stephens, Joe, and Valerie Strauss. 2000. "CDC Misled Congress on Hantavirus." February 2. <http://www.washingtonpost.com/wp-srv/WPcap/2000-02/02/013r-020200-idx.html>.
- "The Constitution of the United States." 1787.
http://www.archives.gov/exhibits/charters/constitution_transcript.html.
- Tucker, Rich. 2013. "Washington Bureaucrats Unconstitutionally Making Public Policy." *Washington Bureaucrats Unconstitutionally Making Public Policy*. June 1.

<http://dailysignal.com/2013/06/01/washington-bureaucrats-unconstitutionally-making-public-policy/>.

Ulvi-Ahmad, Ghazala H. 2007. "The Administrative State and Its Constitutional Legitimacy: An Analysis of the USA Patriot Act of 2001 in the Context of Rohr's Constitutional Framework of the Administrative State." Cleveland State University.
https://etd.ohiolink.edu/!etd.send_file?accession=csu1199824023&disposition=inline.

Weingast, Barry R. 1984. "The Congressional-Bureaucratic System: A Principal Agent Perspective (with Applications to the SEC)." *Public Choice* 44 (1): 147–91.

Weingast, Barry R., and Mark J. Moran. 1983. "Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission." *The Journal of Political Economy*, 765–800.

Whitman v. American Trucking Assns., Inc. 531 U.S. 457 (2001). 2016. Accessed April 4.

Wilson, James. 1975. "The Rise of the Bureaucratic State." *National Affairs* 41: 77–103.

Wise, Charles R. 1993. "Public Administration Is Constitutional and Legitimate." *Public Administration Review* 53 (3): 257.

Wood, B. Dan. 1989. "Principal-Agent Models of Political Control of Bureaucracy." *The American Political Science Review* 83 (3): 965.

Wood, B. Dan, and Richard W. Waterman. 1991. "The Dynamics of Political Control of the Bureaucracy." *The American Political Science Review* 85 (3): 801.