



Call For Papers

ENSURING DEMOCRATIC ACCOUNTABILITY IN THE ADMINISTRATIVE STATE

Pacific Legal Foundation's Center for the Separation of Powers and *Georgetown Journal of Law & Public Policy* seek papers for a symposium on "Ensuring Democratic Accountability in the Administrative State," to be held in February 2023, in Washington, DC.

The Constitution's Framers understood that the president cannot run the executive branch alone and would need a staff to manage it. Yet they carefully crafted several constitutional provisions to ensure accountability to the people, including the Appointments Clause, which requires all principal or superior officers to be appointed by the president and confirmed by the Senate. All inferior officers must be appointed in the same manner unless Congress, by law, vests the appointment in the president alone, in courts, or in department heads. Moreover, the Supreme Court has held that only officers appointed in this manner may exercise significant authority under the laws of the United States. This significant authority includes the task of filling gaps left by Congress in the laws an agency is charged with administering. Congress' tendency in recent decades to enact laws with broad mandates and few regulatory details has left enormous discretionary gaps for agencies to fill. Such broad congressional delegations have led to an explosion of agency regulations that dwarf the number of statutes passed by Congress each year. That makes democratic accountability of the regulatory decision-makers even more important.

The Supreme Court has held that rulemaking is a power that only officers of the United States may exercise, but it has not specified what level of officer may issue rules. The relevant caselaw strongly supports the conclusion that only principal officers appointed by the president and confirmed by the Senate may issue final rules binding on the public, yet some agencies routinely delegate rulemaking authority to inferior officers and even career bureaucrats.

Another means of ensuring democratic accountability is the president's power to remove those charged with helping him carry out the law. In the past decade, the Supreme Court has increasingly limited Congress' attempts to insulate agency heads from presidential removal and agencies' reliance on administrative judges who are not properly appointed.

We seek papers that address democratic accountability in the administrative state from numerous perspectives, such as:

1. What government powers are so “significant” they must be executed by principal officers? What significant powers may be exercised by other duly appointed officers but not career employees?
2. What are appropriate remedies for Appointments Clause violations? Does ratification by a properly appointed officer always resolve a structural violation? Is severing unconstitutional statutory provisions (such as tenure protection) an appropriate exercise of the judicial power—or should the courts simply refuse to enforce an agency action that results from an unconstitutional agency structure or was taken while an agency is unconstitutionally structured?
3. What is a “department” within the meaning of the Appointments Clause? Must heads of agencies within the executive branch always be appointed as principal officers?
4. Do advisory boards, commissions, federal/state cooperative schemes, and international bodies, among others, that execute federal law violate the Appointments Clause?
5. Is there constitutional significance to the different levels of principal and superior officers (such as ambassadors who are principal/superior officers but who also answer to other principal officers)? What is the line between principal and inferior officers, and officers and employees?
6. A study of Health and Human Services regulations over the course of two decades showed 77% were issued without principal-officer approval. Have other agencies routinely delegated rulemaking authority to career staffers?
7. Does the Federal Vacancies Reform Act comply with the requirements of the Appointments Clause? What reforms should be made to the Act to prevent abuse?
8. Are cooperative federalism schemes, under which non-federal actors may grant federal permits, such as the Clean Water Act’s provision authorizing states to issue permits and prosecute violators of the Act in state courts, unconstitutional under an invigorated Appointments Clause?
9. What was the Founding-era understanding of the Appointments Clause? What are its implications for the unitary executive?

Proposal Submission Detail

Please submit a brief proposal that describes your thesis and how your paper will contribute to the legal issues described above. Proposals should be submitted by August 1, 2022, to Elizabeth Slattery at eslattery@pacifical.org. Early proposal submission is encouraged. Proposals will be reviewed on a rolling basis and approvals will allow authors to begin work early.

Honorarium and Other Support

Authors of accepted papers will receive a \$2,500 honorarium. In addition, papers will be presented at a symposium in early 2023 and published in an issue of the Georgetown Journal of Law & Public Policy. We will cover the cost of hotel accommodations and reasonable travel expenses to the symposium in Washington, DC.

Final Paper Submission Details

Papers should be between 25 and 50 pages. Draft submissions are due January 1, 2023, so that we may circulate them to panelists in advance of the symposium. Authors may revise their papers following the symposium, with final submissions due within two weeks in order to be published in the *Georgetown Journal of Law & Public Policy*.

Timeline

2022	2023			
August 1	January 1	February	Mid to late February 2023	Spring 2023
Submission deadline for paper proposals. Proposals will be reviewed on a rolling basis. Authors are encouraged to apply early.	Deadline for draft papers, to be circulated to symposium participants.	Presentation of the papers at a law symposium in Washington, DC.	Deadline for paper revisions.	Copyedit review and publication of final papers in an issue of the <i>Georgetown Journal of Law & Public Policy</i> .

Contact Information

For questions regarding the call for papers, please contact Elizabeth Slattery at ESlattery@pacificlegal.org.