

The World War II Roots of the Modern American Administrative State

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Mariano-Florentino Cuéllar, *Administrative War*, 82 *Geo. Wash. L. Rev.* 1343–1445 (2014), available at [SSRN](#).

The study of administration is thriving – so much so that even people outside the field are taking note. A [recent review essay in the Boston Review](#) (and a [cautionary response by Karen Tani](#)) demonstrate the breadth of this scholarship, which includes studies that push the origins of the administrative state back to the early republic and studies that examine (in a term coined by [Sophia Lee](#)) administrative constitutionalism throughout the federal government. The New Deal continues to loom large, however, in research into the expansion and entrenchment of the modern administrative state; according to [Mariano-Florentino Cuéllar](#), this account is incorrect. As he argues, “during the 1930s the federal administrative state remained a pale shadow of its future self.” (P. 1354.) Instead, much as [James T. Sparrow](#) argues that World War II made the modern American state, Cuéllar argues that World War II made the modern American administrative state.

Cuéllar describes how pre-World War II agencies were hamstrung by limited powers and limited resources, limits which soon became impractical. World War II changed the political and economic context in which agencies operated, opening the door to legal changes that strengthened the agencies. Mobilization for war required greater administrative capacity, which in turn required more money to pay for agency operations. In response, federal courts expanded agencies’ subpoena powers, which markedly improved agencies’ ability to investigate. Courts also moved from a formalist understanding of the non-delegation doctrine (*Schechter*) to a functionalist one (*Yakus*) that legitimated broad congressional delegations of authority to agencies. And Congress enabled mass taxation to pay for expanded administration. (Funding is key to any discussion of administrative capacity; a chart in Cuéllar’s appendix showing the increase in federal employees during the war make this clear.) By giving agencies the tools they needed to endure, Cuéllar argues, wartime actors embedded administrative governance in American political life.

How did such an expansion of the administrative state occur, given the contentious nature of debates over administrative authority only a few years earlier? The wartime context made the legislative and judicial branches more willing to empower the agencies, Cuéllar argues, and the nature of total war meant that existing domestic agencies (like the National Labor Relations Board and the U.S. Department of Agriculture) were as important to the war effort as the Office of Price Administration and the War Production Board. At the same time, however, the Roosevelt White House had learned important lessons from its earlier political battles. Recognizing that the federal government needed both “organizational capacity and legal legitimacy” (P. 1352.) to fight the war, Roosevelt pushed for changes that were “evolutionary instead of revolutionary.” (P. 1387.) He declined to use the war crisis to refight New Deal battles, refusing to seek either government control of industry or full administrative autonomy. And expanding administrative capacity was less controversial than it could have been, given the existing proceduralism of the administrative state. Cuéllar argues – as Dan Ernst has [here](#), and I have [here](#) – that even before the [Administrative Procedure Act of 1946](#), agencies were bound by procedural limits, imposed by reviewing courts and by agencies themselves.

The result was a legitimation of the administrative state going forward. Americans found it hard to oppose administrative power, Cuéllar argues, when that power had been central to winning the war. It was particularly hard to oppose administrative power that shied away from the most extreme models and built in participation for business, labor, and consumer interests. Thus, he argues: “However distant the resulting structures were from some abstract ideal response, those structures facilitated staggering increases in production and allowed Americans to harmonize national goals with private interests during the war. It was a sufficient enough workable accommodation that it stuck.” (P. 1436.)

While much of his discussion of wartime dynamics comes from historical monographs, Cuéllar grounds his doctrinal analysis in a broad survey of relevant case law. However, his discussion of the political constraints and ideological concerns that shaped the decision making of the Roosevelt White House is glancing at best. Cuéllar argues that Roosevelt's approach "accommodated American political, ideological, economic, and legal values and realities"; this is a plausible but bloodless account, since those values and realities are never fleshed out. (P. 1422–23.) Cuéllar also invokes "business," "labor," and "Americans" without much explanation of who was in those categories or how their interests were at odds. These criticisms aside, however, Cuéllar does the field a service in reframing the discussion of administrative capacity around World War II and examining wartime's doctrinal changes across the administrative state.

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