

“SECURING” THE NATION: LAW, POLITICS, AND ORGANIZATION AT THE FEDERAL SECURITY AGENCY, 1939-1953

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American public law is affected by two important dynamics impacting the relationship between citizens and their government: how the executive branch defines national security, and how politicians compete to secure control of the vast public organizations through which governments implement the law. This article analyzes the intersection of these dynamics by investigating the now-forgotten history of the U.S. Federal Security Agency (FSA) and drawing perspectives from separation of powers, organization theory, and the study of American political development.

In 1939 the Roosevelt White House overcame strong political opposition to centralize vast legal responsibilities within the FSA. Soon after its creation, the agency had acquired responsibility for social security, education, drug regulation, protection of the food supply, civil defense preparedness, supplying employees to war-related industries, facilitating the relocation of Japanese-Americans, anti-prostitution enforcement, and biological weapons research. By 1953, the FSA engendered one of the most important American bureaucracies of the 20th century: the Department of Health, Education, and Welfare. Yet little is known about precisely how or why the White House fought to create the FSA, why the agency pervasively mixed domestic regulatory and national defense functions both before and after World War II, or what its creation wrought for the legal mandates entrusted to the agency.

The analysis reveals how, on the eve of World War II, the White House sought to use the restructuring to achieve greater control over the agency’s multiple domains of legal jurisdiction by building oversight capacity in an organizational environment more congenial to the bureaus’ functions. It then used that control to publicly promote a broader conception of the “security” issue that held the prospect of more thoroughly protecting domestic programs important to the Administration. And by rendering ambiguous the distinction between domestic and international security functions, the Administration enlarged support for some of its signature programs at a time when the New Deal legislative coalition was eroding. In effect, the agency’s amalgam of legal functions epitomized the Administration’s ambitious conception of “security,” which became sufficiently elastic to encompass legal responsibilities now routinely segregated into domains involving social services, economic security, health regulation, and geostrategic national defense. The creation of the FSA also appears to have fomented more subtle (intended and unintended) impacts on matters such as the organization of congressional committees overseeing the agency’s legal functions, and the prospects for bureaucratic autonomy among the agency and its bureaus.

These dynamics illustrate limitations in prevailing theories of law and organization emphasizing deliberately engineered bureaucratic failure or purely symbolic position-taking. They also showcase the connection between the design of public agencies, separation of powers, and the ambiguities inherent in the definition of “security” as a category of government responsibility. History reveals how presidential administrations and bureaucratic actors once used that ambiguity to bolster political coalitions supporting social welfare and regulatory mandates. The recent spike of interest in homeland security is furnishing similar opportunities to reshape the domestic regulatory state.

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[T]here is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to handle, than to initiate a new order of things. For the reformer has enemies in all those who profit by the old order, and only lukewarm defenders in all those who would profit from the new order, this lukewarmness arising partly from fear of their adversaries, who have the laws in their favour; and partly from the incredulity of mankind, who do not... believe in anything new until they have had actual experience of it.¹

In a modern state the actual ruler is necessarily and unavoidably the bureaucracy, since power is exercised neither through parliamentary speeches nor monarchical enunciations but through the routines of administration.²

INTRODUCTION: TWO SECURITY PROBLEMS

Consider the following irony. During the 1930s the Roosevelt Administration spurred major growth in the federal state by stressing government’s role as guarantor of the nation’s security.³ With security as a lodestar, Administration priorities led to now-familiar statutory changes catalyzing financial regulation, retirement and unemployment

¹ Niccolo Machiavelli, *The Prince*, trans. Luigi Ricci, ch. 6, *quoted in* STEPHAN HAGGARD, *PATHWAYS FROM THE PERIPHERY* (1990).

² MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (1914-1929) 1393 (Guenther Roth and Claus Wittich, eds. 1978). Whether and when a distinction can be drawn between “the bureaucracy” and presidential “enunciations” is, of course, a more complicated question in light of the Roosevelt Administration’s decisions about the FSA.

³ *See generally* DAVID KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945* (1999).

benefits, food safety polices, and energy rules. As the New Deal matured, security-related rationales taking subtly distinct forms – emphasizing international, geostrategic concerns – also bolstered the case for expansive federal power as the nation geared up for World War II, and even blended with the more expansive domestic risk-reduction ideas. In 1939, for example, the Administration wove together multiple strands of its security trope while using a sliver of legal authority for executive reorganization to forge an enormous new Federal Security Agency (FSA).⁴ It then proceeded to justify the executive branch’s new legal architecture by arguing that the ability to face international threats depended on the strengthened domestic capacity the FSA provided to implement the law effectively in domains involving health and education.⁵

But for all its success reshaping the national agenda around an expansive conception of security, by the late 1930s the Administration was losing capacity to secure its own control of the outsized federal state it had created.⁶ In *Humphrey’s Executor v. United States*,⁷ the Supreme Court refused to let the President fire a Federal Trade Commission official whose term had been fixed by Congress, thereby eviscerating presidential power over an ever-multiplying empire of independent commissions and opening the door to even greater congressionally-imposed limits on presidential power. In the process, the Court rejected the view that proper presidential supervision of the executive branch under Article II depended on power to fire senior officials, an idea central to the Court’s conception of executive power in *Myers v. United States*⁸ decided just a few years earlier. Meanwhile, Congress was increasingly designing the structure of agencies like the Social Security Board to disrupt presidential control,⁹ blocking White House staff expansion, and refusing to grant reorganization authority the Roosevelt Administration considered essential to securing control of a rapidly-growing federal state.¹⁰

This Article illuminates the fertile intersection of both “security” problems: the control politicians seek to secure over agencies with expansive legal powers, and the security that modern nation states promise citizens when justifying why public bureaucracies must be given such powers in the first place. Time and again, whether the subject is the Roosevelt-era FSA or the Bush-era Department of Homeland Security (DHS), these two security problems turn out to be deeply enmeshed within the web of federal regulatory power. Bureaucratic control helps executive branch officials and their lawyers promote a particular definition of security through legal interpretations, public communications, legislative initiatives, and discretionary decisions. Security concerns, meanwhile, shore up public justifications for organizational changes affecting political

⁴ See *infra* Part I.b, Part III.

⁵ See *infra* note 81 and accompanying text (describing Roosevelt’s justification for creating the FSA).

⁶ See *infra* Part III.b.

⁷ 295 U.S. 602 (1935).

⁸ 272 U.S. 52 (1926).

⁹ See generally MARTHA DERTHICK, AGENCY UNDER STRESS: THE SOCIAL SECURITY ADMINISTRATION IN AMERICAN GOVERNMENT 20-21 (“Congress chose to make the [new Social Security Board] independent of any executive department”)(1990).

¹⁰ See, e.g., Harvey C. Mansfield, *Federal Executive Reorganization: Thirty Years of Experience*, 29 PUB. ADMIN. REV. 332 (1969)(describing Roosevelt’s frustration); KENNETH S. DAVIS, FDR: INTO THE STORM, 1937-1940: A HISTORY 19 (noting that, after Roosevelt’s election to a second term, “the subject uppermost in his mind on this third morning of the new year was... governmental reorganization”).

control over law's implementation. By understanding how these two problems intersect, we can grasp underappreciated tensions coursing through public law – such as how agencies shape public perceptions about the laws they implement, how the definition of “security” has changed as the architecture of the executive branch has evolved, and how to understand the consequences of forging a modern-day DHS.

Linking these themes is an extended case study on the legal history of the FSA. Placing this agency in the larger context of its bureaucratic brethren, the argument shows how politicians exploit reorganizations, particularly during or in anticipation of national security emergencies, to reshape agencies' legal mandates by controlling their bureaucratic power.¹¹ It shows how changes in the organization of political officials, civil servants, and government bureaus can enhance presidential control. Simultaneously, such changes can repackage regulatory activities in relation to the concept of national security, bolstering the political coalitions supporting those functions. These dynamics have typically escaped scholarly attention among academics specializing in bureaucracy, whose work in recent years tends to focus on elucidating how politicians reorganize government to satisfy a preexisting public demand or to deliberately sabotage agency activities.¹² Nor have scholars in the developing field of national security law fully investigated questions about the scope of national security rather than the surveillance, detention, emergency, or foreign affairs powers deployed in the name of security.

Although the FSA has been all but forgotten, even cursory scrutiny reveals it to be among the more important bureaucracies created in 20th century America. The FSA was the gangly and occasionally brash adolescent – equal parts wartime soldier and audacious dreamer – that matured into the federal government's sprawling health, welfare, and civil defense apparatus. The agency was born amidst a tangle of administrative changes enshrined in statute as the New Deal morphed into the American response to World War II. Its litany of statutory responsibilities at once confirms what has today become a familiar picture of federal functions, encompassing medical research, civil defense, social security, federal education assistance, weapons development, and food and drug regulation. But the list also scrambles modern sensibilities about the line dividing conventional national security functions from domestic regulatory activities.

President Roosevelt began blurring that line nearly two and a half years before the Pearl Harbor attacks.¹³ On April 25, 1939, he delivered a long-expected announcement

¹¹ The term “legal mandate,” used interchangeably with “legal responsibility,” refers to legal rules or standards implemented by an agency (e.g., through particular regulations, enforcement strategies, or allocation of responsibilities among bureaucracies).

¹² For prominent work focusing the near-inevitable production of ineffectiveness and failure through changes in formal organization, see Terry M. Moe, *Politics and the Theory of Organization*, 7 J. LAW, ECON., & ORG. 106 (1991). For examples of scholarship focusing on the considerable extent to which legislative and bureaucratic changes may be explained by focusing on position-taking benefits, see DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974). For work emphasizing the spontaneous development of routines and the diffusion of ideas as an explanation for bureaucratic organization, see David Strang and John W. Meyer, *Institutional Conditions for Diffusion*, 22 THEORY & SOC. 487 (1993). See also *infra* Part II.

¹³ The most extensive existing scholarly commentary on the FSA appears to be in Rufus Miles' history of the Department of Health, Education, and Welfare, and is about five pages long, and contains virtually no

about his plans to reshape the architecture of the executive branch. The change in architecture had been on the President's agenda for over twenty-four months, but the specific changes he had in mind had only become possible after Congress grudgingly gave the President limited reorganization powers three weeks earlier. Thwarted in an ambitious effort to create a cabinet-level Department of Public Welfare the previous year, the Roosevelt White House nonetheless announced that April that it would use its more modest reorganization power to unify a half-dozen bureaus involved in health regulation, economic security, and education in a new sub-cabinet Federal Security Agency. From then on the FSA expanded steadily. By 1943, the FSA's bureaus included the Public Health Service, the Social Security Board, the Office of Education, the Food and Drug Administration, the Office of Community War Services, a War Research Service, and nearly a dozen other organizations. By 1953, the agency became the Department of Health, Education, and Welfare (HEW). And by the 1970s, HEW's budget accounted for nearly half of federal non-defense expenditures, dwarfing the national budget of any country on Earth except Soviet Russia.¹⁴

To observers situated in the early 21st century, however, the name of the Federal Security Agency foreshadows the DHS more than a welfare agency. Legal history readily demonstrates how the meaning of "security" is versatile, with the term eliciting concepts of economic risk reduction more easily in the 1930s than today. As will become clear, however, some aspects of the FSA's work nonetheless fit readily with more modern applications of the term, presaging its subsequent evolution. It was the FSA that facilitated the resettlement of Japanese Americans. It was the FSA that laundered White House funds and funneled them into secret biological weapons research even when the United States had signed a treaty outlawing such activity. FSA officials presided over the rapid growth of a national system to train workers for war-related occupations. They set up recordkeeping systems to assist a national military draft. The agency's inspectors prevented food contamination while insisting their mission was essential to the performance of the military, and sought to limit the spread of sexually-transmitted diseases among military personnel. And the agency performed these tasks while it continued – and expanded – its role of paying social security benefit checks, providing

analysis of White House motives for the reorganization, bureaus' budgets, or news coverage of the department. *See* RUFUS MILES, *THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE 19-24* (1974). Perhaps influenced by the putative scope of his project's focus on HEW as opposed to its predecessor agency, Miles stresses the expectations of those who participated in the FSA's elevation to cabinet status, rather than those who forged the FSA. *See, e.g., id.* ("When HEW first came into being as a Cabinet department in 1953, it did not occur to any of its many midwives that it would grow so rapidly..."). A leading history of the U.S. Public Health Service (PHS) dismisses the significance of the FSA by citing Miles, and then proceeds to explain the important changes the PHS experienced during the war period without considering how the bureau would have fared if it had remained at the U.S. Department of the Treasury. *See* FITZHUGH MULLAN, *PLAGUES AND POLITICS* 111 (1989). Mullan also furnishes reason to question his contention about the relative insignificance of the merger by noting that it changed the PHS' relationship to the Social Security Board. *See id.* at 110.

¹⁴ *See infra* Part I on the origins of, and components, of the FSA. For the text of the President's announcement, *see infra* note 81. *See also* BUDGET OF THE UNITED STATES, FY 1980 (1979); Miles, *supra* note 13, at 3 (discussing HEW's budget in relation to that of other countries).

medical services to underserved American communities, screening new drugs, and printing books for the blind.¹⁵

As the FSA's origins recede into history, however, scholars too have remained blind to certain puzzles about its birth also reflected in the story of DHS.¹⁶ *Why*, for instance, did President Roosevelt create the FSA at all, particularly when doing so involved such an expenditure of scarce political capital, and when doing so resulted in the removal of some bureaus from agencies where they were already supervised by trusted political lieutenants? The meager scholarly literature on the subject, much of it written at the time of the merger or shortly thereafter, speculates that the President's interest was in more "efficient" government without defining the concept or considering the more directly political implications of the White House move. *Why* did the agency so pervasively mix social welfare, regulatory, and national security functions, years before World War embroiled the United States? Indeed, *what* was meant by the reference to "security" used to justify expansive legal powers in the early years of the FSA? And given the paucity of work on the existence of the FSA and aftermath, as well as the ambiguous findings of research on reorganizations, *how* did the FSA's creation impact the work of its bureaus?¹⁷ In one of the few scholarly references that are relevant to the

¹⁵ See *infra* Parts III and IV; U.S. GOVERNMENT MANUAL 1941; FEDERAL SECURITY AGENCY, SERVICES OF THE FEDERAL SECURITY AGENCY (1944). The treaty the U.S. had signed outlawing such work was the The Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacterial Methods of Warfare, [June 17, 1925, 26 U.S.T. 571](#) [hereinafter Geneva Protocol], reprinted in United States: Ratification of the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacterial Methods of Warfare, 14 INT'L LEG. MAT. 49, 49 (1975). Although the United States had not ratified the treaty at the time, its signature would have presumably been understood to be a commitment not to frustrate the purposes of the treaty. See Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2003).

¹⁶ Surprisingly, the massive body of literature on the history of the American state during and after the New Deal all but ignores the FSA. The same is true for the somewhat smaller yet still substantial literature on regulatory governance before the 1946 passage of the Administrative Procedure Act. But the FSA's trajectory can be reconstructed from White House records, legislative documents, budget reports, and the agency's own files.

¹⁷ The Brownlow Committee provided a prescriptive, public administration justification but does not explain why the President would expend the resources he did to implement parts of that vision. With respect to the supervision of transferred bureaus by political supporters, bureaus such as Education and Public Health were not – in contrast to the Social Security Board – independent commissions that might have triggered obvious concerns about political control. They were instead bureaus in departments overseen by White House loyalists such as Ickes and Morgenthau. It is also unusual for a president to transfer agencies from traditional executive departments – generally considered to be more tightly under presidential control – to an independent agency such as the early FSA. See DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997 144 (2003)(suggesting that presidents tend to prefer placing bureaus under *more* hierarchy in cabinet departments, rather than under less hierarchy in independent agencies, making the moves of Education and the Public Health Service somewhat more puzzling). Regarding the efficiency-focused rationales for reorganization, see RICHARD POLENBERG, REORGANIZING ROOSEVELT'S GOVERNMENT: THE CONTROVERSY OVER EXECUTIVE REORGANIZATION, 1936-1939 3-5 (1966). Interestingly enough, Polenberg also reports that Roosevelt privately disparaged efficiency rationales for reorganization (even as he was willing to publicly espouse them). See *id.* at 8, 33-34. The efficiency-focused explanations that so heavily draw on prescriptive scholarship in a "public administration" tradition suffer from limitations. (1) They are provided with little or no empirical support. (2) They do not consider the full scope of the FSA's legal powers, or the President's special concern for these functions. They don't

subject, political scientist James Q. Wilson downplays the importance of the creation of the Department of Health, Education, and Welfare for the behavior of its component bureaus. But he does nothing to investigate the potential significance of the time those bureaus spent within the FSA, or the broader legacy of that agency.¹⁸

The answers to these puzzles implicate not only separation of powers and national security law, but also organization theory and the history of the administrative state. *First*, organizational changes can exert powerful, underappreciated influence on law's implementation.¹⁹ Public health bureaucrats work differently when buried in a Treasury Department dominated by fiscal concerns than when operating in an agency prioritizing health and economic security. Because organization is not neutral, the re-distribution of authority within the executive branch can shape the law by facilitating a symbiotic burst of agency capacity-building coupled with presidential power to control that new capacity. Roosevelt's creation of the FSA had major practical effects, and those effects went far beyond political symbolism. The agency created a layer of bureaucratic appointees allowing the President to have more control over important administrative agencies at a time when its staff was meager and the agencies were previously either independent (as was the Social Security Board) or stuck in departments unsympathetic to their missions (as was the Public Health Service under the Treasury). The new layer of political appointees and lawyers allowed the Administration to wring the maximum benefit out of broad legal authorities, to monitor developments in the bureaus, to harness the bureaus' analytical capacity in the service of further legislative changes, and to ensure they spoke with a more consistent voice to promote favorable public perceptions. In short, reorganization gave the White House more *control*, and *more* to control.

Second, agency architecture can help reshape public perceptions of the government's legal responsibilities.²⁰ Aware of the looming possibility of war, Roosevelt used his new degree of control over bureaucratic functions to frame discussion about the concept of "security" – defining it broadly enough to blur the distinctions between social services, economic security, health regulation, and geostrategic national security. Doing so served a political goal by giving moderate legislators skeptical of social programs but supportive of defense a new reason to support the FSA bureaus, and by reinforcing associations among many voters between national security goals and regulatory and social programs. With its new political and legal staff, its two-edged "security" mandate, and its relentless efforts to explain the essential importance of its work to the public, the FSA seemed to prosper during and after the war. It was able to keep and even grow its budgets during a wartime period when other domestic agencies

place the discussion in the political context of the times, including the battle over Roosevelt's reorganization plans and the emerging war-related rhetoric of the Administration at time.

¹⁸ Wilson dismisses the significance of the creation of HEW in 1953. See JAMES Q. WILSON, BUREAUCRACY 267-268 (1990) ("[A]ssembling a variety of agencies together into a Department of Health, Education, and Welfare made little difference: the component bureaus, each with its distinctive culture, professional outlook, and congressional supporters, continued for the most part to operate independently of each other and of HEW's central leadership"). But he fails to address the potential significance of the creation of the FSA a decade and a half before (and even his account of the relative insignificance of HEW's creation is difficult to reconcile with the degree of conflict over this change and the internal administrative implications of elevating the FSA to cabinet status).

¹⁹ See *infra* Part II.c.i., Part III.b.

²⁰ See *infra* Part II.c.ii, Part III.c.

faced cuts in their budgets, it achieved expansions in its responsibilities (particularly in social security and health research) at a time when Congress was often hostile to the Administration, and the public increasingly supported the transformation of the organization into a cabinet agency.

Third, the story of the FSA shows the malleability of the “security” concept in relation to law.²¹ Parallel to the aforementioned developments, the Roosevelt Administration’s melding of functions within the FSA proved a harbinger for a conception of security that became increasingly identified with the military and national defense, to the point where that powerful association swallowed up the more flexible conception that Roosevelt first championed. In effect, Roosevelt’s reorganization set in motion a process showcasing the connections between three dynamics: public debates about “security” as a metaphor for the responsibilities of the modern nation state, changes in organizational structure to bolster a particular understanding of “security,” and political strategies to control the law’s implementation. Such contestation belies the idea of security as an unambiguous prescriptive rationale for legal changes, raising often-neglected questions about the scope of national security law. As presidents, lawmakers, courts, and the public struggle with those questions, the fight over “federal” security in the Truman years provides a provocative reminder that the notion of security – in part because of its deep connections to the underlying origins of the nation-state itself – should be subject to as much contestation as conceptions of democracy or citizenship. Yet despite the legal stakes of defining security in contexts ranging from application of the Homeland Security Act to the scope of deference to the executive, scholars of national security law rarely address or even recognize the fundamental question of how to define security in the modern nation-state.

Fourth, the problem of regulating organizational structure permeates – and perhaps inevitably defines – modern separation of powers.²² Presidential control of agency architecture – including who runs the agency, what bureaus are within it, how the public views those bureaus, or who (other than the president) runs them – can substitute for direct presidential power to command subordinate officials. The consequences of structural innovation, moreover, show robust “presidential administration” to be in fact a longstanding phenomenon, one that courts should regulate when policing the border between legislative and executive authority.

Laying the groundwork for these observations, Part I retraces the now-forgotten evolution of the FSA. It describes the political and economic context in which it was created, its mix of domestic administrative and national security responsibilities, and its path towards eventual cabinet status. Given the complexity of the situational context, the analysis uses primary sources, legal materials, budget data, and comparisons with other agencies to reveal a composite, though necessarily partial, image of reorganization’s intricacies.²³ Part II begins the process of interpreting the FSA’s trajectory. The

²¹ See *infra* Part IV.d.

²² See *infra* Parts I.a, IV.b.

²³ More specifically, the article uses three techniques to shed light on the trajectory of the FSA: (1) It investigates how participants in the drama viewed the situation at the time of the FSA’s creation and during its subsequent history. (2) It contrasts, where possible, the FSA to other agencies during its existence and to the situation present with regard to execution of relevant legal mandates before and after the agency was

discussion emphasizes how organization changes can enhance executive control by building bureaucratic capacity, and bolster political coalitions supporting the execution of legal mandates. Part III applies the new perspective to the history of the FSA and finds considerable empirical support for it. Part IV addresses larger implications, such as the ambiguities inherent in how presidential administrations have used the concept of “security” to bolster political coalitions.

Ultimately, these precedents hint at how the recent spike of interest in “homeland security” is furnishing similar opportunities to remake the domestic regulatory state. Today’s world of elaborate infrastructure problems, global non-state actors, and mature regulatory agencies renders the historical context different. The Bush Administration’s narrow substantive definition of security, with implications that tend to cut against expansive regulatory activity in domains such as environmental protection or federal involvement in providing health services, is also different.²⁴ But the cycle epitomizing fundamental conflicts over the architecture of law is not: policymakers mold law by defining security, and then seek to command law’s implementation by securing control over bureaucracies.

PART I: THE EVOLUTION OF THE FSA

Even the singularly optimistic Franklin Delano Roosevelt could have a bad turn. By late 1938, the disappointed President would have been hard-pressed to deny that he was having one. Gone were the heady days of the early New Deal coalition, when Roosevelt had enacted the massive National Recovery Administration, the Agricultural Adjustment Act, dozens of the agencies, and major banking reform. The Administration had drawn down its reservoirs of political capital. Roosevelt’s infamous judicial reorganization plan, already tarred as a “court-packing plan,” had been defeated. And the legislature had also dealt him a blow by rejecting his executive reorganization plan.²⁵

created. (3) It uses theoretical insights grounded in existing empirical and analytical literatures to interpret the significance of particular events associated with the creation of the FSA, such as the formation of a cadre of political appointees to run the new agency. Together these approaches provide a richer picture than what could be obtained from a purely historical narrative or from large-n studies of bureaucratic structure.

²⁴ See Dara K. Cohen, Mariano-Florentino Cuéllar, and Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 681 n.24 (2006)(discussing the Bush Administration’s narrow definition of “security” and the resulting domestic policy implications). See also P.J. Crowley, *Homeland Security and the Upcoming Transition: What the Next Administration Should Do to Make Us Safe at Home*, 2 HARV. L. & POL’Y REV. 289, 293 (2008)(quoting the 2007 White House Homeland Security Strategy defining homeland security as “a concerted national effort to prevent terrorist attacks within the United States, reduce America’s vulnerability to terrorism, and minimize the damage and recover from attacks that do occur.”).

²⁵ Regarding Roosevelt’s political difficulties by the end of the 1930s, see Warren B. Francis, *President’s Influence is Slipping as Solons Labor*, L.A. TIMES A5, May 21, 1939. Published at precisely the time Roosevelt was contemplating his reorganization plans, the article notes that:

In the last month particularly rebuffs for Mr. Roosevelt have been frequent and irritating. The sprit of revolt is spreading steadily. Aware they can defy the administration with impunity, increasing numbers of Democrats are balking at New Deal proposals. Such a tendency was responsible for defeat of the Florida ship canal bill and of the plan to subsidize cotton exports; it

The Administration's plan to give the President control over where bureaus would fit in government had been soundly defeated along with his plan to create a new Department of Public Welfare around the nascent Social Security Board.²⁶ His party controlled the legislature, to be sure, but the increasing prominence of an alliance between conservative Southern Democrats and Republicans had greatly complicated his efforts to reshape the structure of government.²⁷ The government was growing, the President explained to legislators. No one could be expected to administer it efficiently with such a vast number of regulatory commissions and independent agencies. The New Deal's legislative opponents even made the point themselves often enough; where they differed with the President was in recommending a thorough pruning of government agencies – eliminating regulatory and administrative bodies instead of consolidating their powers. After all, scores of administrative agencies were initially described as temporary, and there were other pressing matters besides domestic social welfare and regulation – such as the deteriorating international security picture in Asia and Europe – that seemed to command the nation's attention.²⁸

And it was not only legislators that Roosevelt had to worry about, as the torrential arguments over reorganization had flooded from legislative debates into the public sphere. Civic organizations opposed to the New Deal had made the President's quest for executive reorganization a centerpiece of their campaign against him.²⁹ "Dictatorial" was increasingly the label given to the President's aspirations, and the drive for reorganization was allegedly the quintessential evidence.³⁰ So successful had these associations been in drumming up opposition to reorganization that it seemed unlikely to imagine the President's legislative agenda recovering from this low ebb.

Two years later, President Roosevelt had confounded his opponents. Not only did he have much (though not all) of the reorganization authority he craved, but he had first

was a factor behind the boost in flood-control funds and the rebellion against the Wage-Hour Act amendments.

This perception was widely shared among press observers and politicians at the time, as well as subsequent scholarly observers. WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940* 252 (1963). These difficulties are probably better explained by the Administration's strategic decisions to obtain greater policy successes by shedding marginal coalition members than by secular declines in Roosevelt's popularity or political acuity. See JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM* (1973)(discussing evidence that Roosevelt traded off a smaller coalition in exchange for more substantial policy change). With respect to the first puzzle, it's worth noting that the Brownlow committee provided a prescriptive, public administration justification but doesn't explain why the President would expend the resources he did to implement parts of that vision.

²⁶ See Polenberg, *supra* note 17, at 146-155.

²⁷ See *infra* Part III.b.ii.

²⁸ See Leuchtenburg, *supra* note 25, at 231-240.

²⁹ See Polenberg, *supra* note 17, at 55 (discussing growing efforts by anti-New Deal organizations to capitalize on the Administration's political vulnerability and perceived presidential overreaching during the reorganization fight):

On a Sunday morning in March 1938 a farmer in Muscatine, Iowa, received several special delivery letters. Sent by Frank Gannett's national Committee to Uphold Constitutional Government, they contained broadsides blasting the Reorganization bill as a 'colossal snatch... for Presidential power,' as a scheme to clamp 'one man rule upon a free people.'

³⁰ *Id.* at 55-56.

used it to create an agency focused on health and social welfare that was – in some respects – even more ambitious than the one he first proposed. The new Federal Security Agency lacked cabinet status and was short of funds in 1940. But within its bureaus lay the seed of an elaborate legal machinery that would become a quintessential 20th century bureaucratic institution.³¹

A. The Case, Some Puzzles, and Its Context.

Public law in modern nation states is largely about what those bureaucratic institutions do. And because law is nearly always administered through such massive public bureaucracies, the history of the federal government is in some measure the story of how its bureaucracies grew in statutory power, budget, and administrative scope. Nearly all of the major agencies in the federal government have interesting stories, capable of revealing subtleties about the emerging American state. But the Federal Security Agency merits special attention, even when considered alongside the panoply of “unorthodox” administrative formulas that Roosevelt’s minions routinely deployed to control the law’s execution during the New Deal.

First, it eventually spawned the massive Department of Health, Education, and Welfare. Even at the time of its creation, the FSA was among the largest agencies both in terms of appropriations and employees, despite the fact that at the time of its creation it lacked cabinet status. By understanding developments in that important context, we may learn something more about how presidents control bureaucratic functions amidst legal constraints imposed by congressional enactments as well as substantive statutory mandates.

Second, efforts to create an agency to centralize health, welfare, and security activities were shrouded in controversy in this country. Theda Skocpol discusses failed efforts to create such an agency in the 19th century.³² Roosevelt, dragged down by the court-packing fight, failed at his first attempt to create such an agency while giving it cabinet-level status, in 1938. In effect, Roosevelt’s predecessors failed, and even the politically-dexterous President was rebuffed when he attempted to do so directly. Afterwards he tried to do the next-best thing – by creating an independent, noncabinet agency, the evolving bureaucracy eventually came to encompass even more than what Roosevelt himself had initially sought to include within it. Nor did the fighting over it

³¹ Cf. Miles, *supra* note 13, at 20 (“Even though HEW’s official birth did not occur until 1952, when FSA’s name was changed and its head became a Cabinet officer, this [formation of the FSA] was the real beginning of the Department of Health, Education, and Welfare”).

³² Regarding previous fights to centralize functions in a health and welfare ministry, see THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL WELFARE POLICY IN THE UNITED STATES* 304 (1992):

In the end, various bills... to establish a new national Department of Public Health, were deflected or defeated in Congress between 1908 and World War I. The nation was left with a consolidated Public Health Service, but without an omnibus health agency. Since the reformers had hoped that a new federal agency would stimulate and coordinate state and local health efforts and lay the evidentiary basis for new programs, the failure of the statebuilding effort certainly weakened the plausibility of the... campaign during 1916-1920 for public health insurance in the United States.”).

stop during the Roosevelt Administration. Later, once the FSA made the idea of a unified health, welfare, and security agency a reality, Truman marshaled the agency's resources to promote his national health insurance plan yet, in part for that reason, failed to obtain support for cabinet-level status from a Republican Congress. Truman tried and failed to elevate it to cabinet status, a change that Eisenhower eventually succeeded in achieving in 1953 as the first major legislative achievement of his presidency.

By contrast, the British forged a Ministry of Health by 1919 in the heels of a costly victory during World War I. Through it, the British radically reshaped local control of social services and promptly began advocating for expanded health benefits.³³ But beyond changing the lines of authority for *existing* functions, creation of a new ministry was understood by some observers to change the government's capacity to reshape the legal determinants of health policy. Wasting little time in displaying his ambitions for the new ministry, Dr. Addison (the new health minister) explained that: "The object of the new ministry is, of course, to provide better health services throughout the country, and we are now working on our health programme; and various proposals will be submitted to the consultative councils at no distant date."³⁴ The presence of these controversies and the trajectory of health, security, and welfare policy in comparative perspective suggest that it is important to understand the story of the FSA and its progeny in order to explain important legal and policy developments involving health, welfare, and security.³⁵

Third, the story of the FSA illuminates the elusive content of the term "security," a now ubiquitous concept defining a major category of government responsibility. As the analysis below suggests, the use of the term "security" to anchor the agency's name and so many of its functions was no accident. It a mere reference to an established social security bureaucracy; "security" had often been deployed to describe the goal of economic relief programs, but it had also been deployed in connection with defense-related activities. The concept itself remained ambiguous, waiting for policy entrepreneurs to fill in the blanks. Fights about how to fill in those blanks have had been central in the creation of other major federal agencies, such as the modern Departments of Energy and Homeland Security. By tracing the progression that took the FSA from a scattered cluster of bureaus into the preeminent domestic policy agency of 20th century America, we can learn something about how the content of "security" was written by political actors, and how it may yet again be rewritten.³⁶

These puzzles reveal deeper gaps in our knowledge about the effect of bureaucratic structure on law's evolution. Lawsuits sometimes turn on how legal authority is divided across public bureaus.³⁷ Lawmakers struggle to control that allocation.³⁸ Lines of organizational jurisdiction over legal mandates may determine who

³³ See William S. Carpenter, *England's New Health Ministry*, 13 Am. Pol. Sci. Rev. 662 (1919).

³⁴ *Id.*

³⁵ See *infra* Parts I.c., I.d.

³⁶ See *infra* Part I.d.

³⁷ See *v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (resolving whether the had jurisdiction over tobacco); *Isbrandtsen-Moller Co. v. United States*, 14 F. Supp. 407 (S.D.N.Y. 1936), *avv'd*, 300 U.S. 139 (1937)(assessing whether the Commerce Department had authority over the responsibilities initially entrusted to a shipping board).

³⁸ See Cohen et al., *supra* note 24, at 699 (discussing the lack of congressional reorganization).

has power to interpret and implement the law as much as lines of geographic jurisdiction defining the boundaries of nation-states or localities.³⁹ Yet we know little about precisely how changes in bureaucratic structure affect the implementation of legal mandates, how presidents control the immense powers of a sprawling executive branch, and how the competition to shape the meaning of concepts such as “security” among the public and legislators may play out in the intricate boundaries that are created by politicians to allocate bureaucratic jurisdiction over the legal powers of the federal government. Closing some of these gaps depends in part on closely scrutinizing the institutional choices consolidating power in agencies such as the FSA.

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The first few pages of the FSA’s own history were written in what was, from President Roosevelt’s perspective, a political context that was becoming increasingly difficult to control.⁴⁰ During the first six or seven years of his presidency, Franklin Roosevelt’s Administration unleashed major changes in the federal government.⁴¹ The precise extent to which these changes represented a radical break with the past is a matter of some debate among scholars, but the fact that he created a massive number of new administrative agencies with far-reaching legal powers is not.⁴² It is this latter fact that becomes immediately important to our account, since it gave rise to three interrelated political debates that culminated in the latter part of Roosevelt’s second term. The first was whether the amalgam of new agencies – often initially justified as temporary and allowed to function independently in part (according to the White House itself) as a means of getting them off the ground quickly – should ultimately be abolished. The second was whether the president should have executive authority to reorganize the functions of the executive branch – including independent agencies and departmental sub-units. Eventually he gained that authority, and he used it to create a sprawling new agency called the Federal Security Agency. The third was whether the president could fire commissioners appointed to fixed terms, such as those who served in the Federal Trade Commission, the Securities and Exchange Commission, and the Social Security Board. President Roosevelt craved such firing authority. But the Supreme Court proved hostile to this move.⁴³ This gave the White House even greater reason to concoct new

³⁹ See *infra* Part II, discussing gaps in our knowledge of how organizational structure affects the implementation of legal mandates.

⁴⁰ See Parts I.a, and I.d for a discussion of this historical trajectory.

⁴¹ See Leuchtenburg, *supra* note 25, at 335 (“By the end of the Roosevelt years, few questioned the right of the government to pay the farmer millions in subsidies not to grow crops, to enter plants to conduct union elections, to regulate business enterprises from utility companies to airlines, or even to compete directly with business by generating and distributing hydroelectric power.”); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 L. LAW, ECON. & ORG. 180 (1999) (analyzing how expansion in federal power exacerbated efforts to control the bureaucracy).

⁴² For different perspectives on the extent to which the New Deal represented a “sharp break” from the previously-prevailing legal regime, compare Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989) with Michele L. Landis, *Fate, Responsibility, and “Natural” Disaster Relief*, 33 LAW & SOC’Y REV. 257 (1999).

⁴³ President Roosevelt’s efforts to fire independent commissioners spawned *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935)(restricting presidential removal powers where an agency has mixed legislative-executive functions and Congress has conditioned presidential appointment powers to the agency by fixing a set term and precluding removal except for cause).

strategies, perhaps involving reorganization, to gain power over the independent agencies.

And that power often seemed well within the President's grasp. The President's popularity had attained commanding heights between 1933 and 1937. But he was not immune from conventional political pressures. During the early phase of his presidency, when the banking crisis and uncertainty about Roosevelt's own intentions were most pronounced, the new president analogized the nation's economic problems to a foreign invasion.⁴⁴ As a consequence, he reasoned, the president would need to deploy powers associated with a national security emergency to address the problems afflicting the nation. By framing the emergency in these terms, the President seemed to be achieving two separate goals. He was emphasizing his Administration's contrast to the previous one in recognizing the severity of the crisis. Simultaneously, he was promoting a favorable background political context for his legally-questionable decision to invoke wartime statutory powers, such as those contained in the 1917 Trading With the Enemy Act, to respond to the economic emergency.⁴⁵ The President's strategic efforts to blur the distinction between domestic and national security crises served as important political precursors to his subsequent decisions about how organize the government's policy functions.⁴⁶ Those efforts would not be forgotten.

By mid-1938 the Administration faced new political challenges. It had achieved major legislative changes, including passage of the Social Security Act and the Food, Drug, and Cosmetic Act. But the cohesiveness of the New Deal coalition was affected by lingering economic weakness and increasingly shrill public attacks from political opponents. At first, some of its apparent loss of political support in Congress probably reflected the Administration's boldness – fueled by the size of its victories in the 1936 elections -- in seeking legislative proposals that might have been controversial even among moderate supporters of the New Deal. Such a pattern is consistent with passage of the Wagner Act and the Food, Drug, and Cosmetic Act of 1938, for example. Nonetheless, whether because of deliberate Administration choices to press its political advantage, secular trends, or economic problems, the Administration's public standing was deteriorating by 1938. There was a recession on which began around mid-1937 at the latest. The court-packing fight saturated the country with charges that Roosevelt was an aspiring dictator, and polarized otherwise progressive civil libertarians against him. It was perceived and reported on as a political failure in the President's relationship with Congress, and an example of alleged presidential lust for power lending credence to critics who painted the president as an aspiring dictator. By the time the first executive reorganization bill was voted on, even non-marginal Democratic legislators who voted

⁴⁴ See JONATHAN ALTER, *THE DEFINING MOMENT: FDR'S HUNDRED DAYS AND THE TRIUMPH OF HOPE* (2006).

⁴⁵ See Kenneth W. Dam, *From the Gold Cases to the Gold Commission: A Half-Century of American Monetary Law*, 50 U. CHI. L. REV. 504 (1983)(discussing Roosevelt's early use of the Trading With the Enemy Act).

⁴⁶ See generally WILLIAM E. LEUCHTENBURG, *THE FDR YEARS: ON ROOSEVELT AND HIS LEGACY* (1995); Gallup Organization, Public Opinion Data File (1935-1940s).

for the Wagner Act were ignoring Roosevelt's entreaties and voting against the White House on reorganization.⁴⁷

Political realities were reflected in Roosevelt's mixed record of success and failure. By the middle of his second term, the President had plainly succeeded in the broad outlines of his policy goals – creating transformative new policy and regulatory programs such as the Social Security Board, the Securities and Exchange Commission, the Tennessee Valley Authority, and the Works Progress Administration. Congress had just approved a potentially sweeping Food, Drug, and Cosmetic Act expanding the government's power to regulate growing industries.⁴⁸ But as the cycle of the Roosevelt presidency unfolded, organized interests disagreeing with the administration over economic policy increasingly asserted themselves. Opposition also grew among the public and elites in the South who frowned on the sharp expansion in federal power underway. The disaffected Southern Democrats, in turn, were joined in growing numbers by many wealthy Americans throughout the country opposed to Roosevelt's regulatory and social welfare policies.⁴⁹

The political trends in public opinion and media coverage tend to affect legislators' willingness to support the president in swing districts. As public and media support weakened during the President's second term, he lost support in Congress. Changes in the composition of the legislature in absolute terms also weakened the extent of support the President had previously achieved in Congress. The result of these changes was increasing frustration of the President's political agenda on Capitol Hill, most obviously demonstrated in terms of the fate of the "court-packing" plan but also evident in the delay the White House faced in achieving broad powers to reorganize government agencies.⁵⁰

Adding to White House concerns was the evolving direction of legal doctrine governing the president's relationship with the national government that he'd vigorously fought to create. Since the 1920s, courts had increasingly taken up questions about the

⁴⁷ See Polenberg, *supra* note 17, at vii (“[M]ore than one hundred Democratic congressmen deserted President Roosevelt to defeat the [first] Executive Reorganization bill by a vote of 204 to 196 in April 1938). Regarding Roosevelt's declining political fortunes, see Leuchtenburg, *FDR and the New Deal*, *supra* note 25, at 271 (discussing GOP gains); Gallup File, *supra* note 46; Francis, *supra* note 13, at ___. See Sundquist, *supra* note ___, at ___ (discussing the shedding of marginal coalition members). For a theoretical perspective on when leaders such as Roosevelt might prefer to shed marginal coalition members and when they might opt to maintain the largest possible winning coalition, see Barry R. Weingast, *Reflections on Distributive Politics*, 47 POL. RES. Q. 319 (1994).

⁴⁸ See generally David F. Cavers, *The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and its Substantive Provisions*, 6 LAW & CONTEMP. PROBS. 1 (1939).

⁴⁹ See Polenberg, *supra* note 17, at 56-57 (discussing wealthy supporters, including newspaper publisher Frank Gannett and New York lawyer Amos Pinchot, of civil society movements opposing the New Deal); *id.* at 64 (discussing Southern Democrats' opposition to Roosevelt's plans). Regarding the significance of the Food, Drug, and Cosmetic Act, see JANICE DEE GILBERT, *THE UNITED STATES FOOD AND DRUG ADMINISTRATION: PURPOSE, HISTORY, AND FUNCTION* (1982).

⁵⁰ Regarding the impact of presidential popularity on legislative behavior, see Douglas Rivers and Nancy L. Rose, *Passing the President's Program: Public Opinion and Presidential Influence in Congress*, 29 AM. J. POLI. SCI. 183 (1985). With respect to how this played out in the New Deal context, see Polenberg, *supra* note 17, at 146-162; Francis, *supra* note 25; Floyd M. Riddick, *American Government and Politics: Third Session of the Seventy-Sixth Congress, January 3, 1940 to January 3, 1941*, 35 AM. POLI. SCI. REV. 284 (1941).

scope of executive power, complicating the prospects for full presidential control of the machinery of national policymaking.⁵¹ In *Myers*,⁵² the Supreme Court acknowledged the importance of recognizing presidential primacy in controlling senior officials with core executive functions, by invalidating limitations on presidential firing powers and prohibiting other forms of excessive congressional encroachment. But this decision also acknowledged congressional power to protect inferior officials through civil service protections and – beyond appearing to outlaw schemes requiring congressional assent to fire federal officials – gave little guidance on how to define core executive functions.⁵³

Given such ambiguity and the enormous congressional efforts to protect new agencies from direct presidential control, the subsequent legal showdown over executive power in *Humphrey's Executor*⁵⁴ should have been entirely predictable. There the Court upheld congressional power to prevent commissioners of independent agencies such as the FTC with fixed terms from being forced to leave their jobs before their terms were up. Without explicitly overruling *Myers*, the *Humphrey's Executor* Court sought to distinguish the present case on the basis of the FTC's status as an agency of mixed (executive and legislative) functions.⁵⁵ If *Myers* bequeathed a legacy of uncertainty about precisely what counted as core executive functions undertaken by senior officials, at a conceptual level *Humphrey's Executor* left unresolved the matter of what exactly counted as sufficient mixing of functions. At a practical level, however, *Humphrey's Executor* left unchallenged congressional efforts to greatly complicate presidential control of the executive branch. And it was little consolation, surely, that lower court case at the time were accepting fairly broad readings of presidential statutory power to reorganize agencies. In *Istbrandsen-Moller v. United States*⁵⁶ for example, a District Court found that statutory presidential reorganization authority extended not only to traditional executive bureaus but to boards and commissions such as the U.S. Shipping Board that straddled the divide between legislative and executive power. But that power was subject to some congressional control and had in fact expired by the end of 1935.⁵⁷ Which left the President facing an environment where a growing proportion of a swelling federal government involved difficult-to-control independent commissions, yet his own statutory power to shape the operation of that government through reorganization had expired at a time when his political fortunes were becoming more complicated.

The effect of the President's more difficult political and legal position was plainly apparent in the fight over executive reorganization. Previous law created limited reorganization authority, in effect during the early 1930s.⁵⁸ That law undoubtedly whet

⁵¹ See, e.g., Reuben Oppenheimer, *The Supreme Court and Administrative Law*, 37 COLUM. L. REV. 1 (1937)(acknowledging increases in how contentious the issue became in litigation between the 1920s and the 1930s).

⁵² 272 U.S. 52 (1926).

⁵³ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2322 (2001)(discussing the extent to which *Myers* left unresolved matters that were taken up in *Humphrey's Executor*).

⁵⁴ 295 U.S. 602 (1935).

⁵⁵ 295 U.S. at 629.

⁵⁶ 14 F.Supp. 407 (S.D.N.Y. 1936), *aff'd*, 300 U.S. 139 (1937).

⁵⁷ See Polenber, *supra* note 17, at 8 (discussing expiration of reorganization authority in the mid-1930s).

⁵⁸ Executive Department Reorganization Act of June 30, 1932, Act of June 30, 1932, ch. 34, 47 Stat. 413-15 (1932), *amended by* 47 Stat. 1517-20 (1933). The Act allowed to the president to transfer agencies and their legal responsibilities to different departments, subject to a one-House legislative veto in most

Roosevelt's appetite for broader powers to reshape the architecture of an executive branch that had grown piecemeal, through executive compromise with Congress. In 1938, the White House introduced a sprawling original bill modeled on the recommendations of the Brownlow Committee on Executive Reorganization. This body of scholars had conveniently elided distinctions between "efficiency" and presidential control. The bill called for the creation of two cabinet departments – including a Department of Welfare that would have included all or much of what ended up in the FSA – and would have made no provision for a congressional veto (e.g., some action from both houses would have been required to stop a reorganization plan). Nor did the original plan exempt independent regulatory agencies. The resulting bill had two-house veto provisions for reorganization plans, exempted the independent agencies, and had authority that was set to expire after several years.⁵⁹

Roosevelt intensely supported the plan. His introduction of the reorganization bill generated considerable fanfare among supporters in the House and Senate. One academic observer later described the introduction of the reorganization bill as a study in masterful presidential strategy. Highlighting the fact that Congress itself had chartered the commission that recommended the sweeping reorganization reforms, the President introduced a package that would have allowed him to reorganize executive branch agencies without the two-house veto provision that appeared in the watered-down 1939 bill. The bill called for the creation of two cabinet departments – including a Department of Public Health Welfare that would include responsibility for federal pensions, social security, rural relief activities, and public health. Despite the concerns of some lawmakers, the bill made no provision for a congressional veto. Nor did it exempt independent regulatory agencies from being subjected to reorganization.⁶⁰

Two further details about the reorganization fight are worth noting. First, after the introduction of the President's original bill (which was essentially the Brownlow Committee proposal), the legislative process produced a slew of amendments to the bill. But the White House pushed back, impressing the legislative leadership with the importance of slowing down or blocking votes on changes that could result in a substantially weaker bill. As a result, these amendments did not result in a compromise bill that could have simultaneously commanded support among winning legislative coalitions and the White House. Second, the White House and its top political staffers insisted that the President would not discuss specific reorganization plans, making it easier for opponents to dramatize the potential for "dictatorship" and harder for supporters to point to specific savings or "efficiency" gains that could be achieved through consolidation.⁶¹

circumstances. But soon after passing the law in 1932, congressional leaders passed an amendment limiting the validity of any reorganization plans after two years unless otherwise provided by Congress.

⁵⁹ Compare EXECUTIVE REORGANIZATION ACT, S. 3331, 75TH CONG., 3RD SESS. (1938) with REORGANIZATION ACT OF 1939, 53 STAT. 76TH CONG. 1ST SESS. – CH. 36 (Apr. 3, 1939).

⁶⁰ For a discussion of the principled rationales the President sought to deploy to bolster the case for reorganization, see Lloyd M. Short, *Adjusting the Departmental System*, 41 AM. POL. SCI. REV. 48 (1947). Regarding the president's "masterful" performance, see Polenberg, *supra* note 17, at ____.

⁶¹ See, e.g., Louis Brownlow, *A General View*, 1 PUB. ADMIN. REV., 101 (1941).

But vigorous opposition soon emerged in both houses. The underlying logic of that opposition appears to reflect two mutually-reinforcing dynamics that together contributed to the deteriorating prospects for Roosevelt's reorganization plan. One dynamic is about signaling and symbolism, suggesting that opposition to the reorganization plan swelled because it was simply the best issue for opponents to rally around. Second, there is a more directly political story – rooted in the prospect that reorganization had the potential to bestow upon Roosevelt significant powers that could change the amount and tenor of federal administrative activity. Both almost certainly played a role. The reorganization bill became a rallying point for opponents of the New Deal. A self-styled Committee to Uphold Constitutional Government, fresh from its perceived victory during the court-packing fight flooded the country with letters and surrogate speakers opposing the reorganization plan. After all, the White House had officially billed the court-packing plan as “judicial reorganization” legislation, and the network of businessmen, lawyers, and economic conservatives that had galvanized the fight over court-packing saw an opening to allege that Roosevelt was now continuing his efforts to centralize dictatorial powers in the presidency.⁶²

To complicate matters, the extent of the powers the President was requesting combined with the public attacks to prompt political defections even among legislators who were otherwise supportive of the Administration. Later we will return to the full range of reasons legislators had to limit the president's reorganization authority. At this point it is simply worth emphasizing that the opposition was not merely symbolic. Even when the New Deal coalition had been more prominent in the legislature, some of the Administration's legislative victories had depended on lodging regulatory power in independent multi-member commissions rather than ordinary executive departments. Legislators were plainly concerned about the implications of the reorganization bill for both the recently-created and more longstanding independent regulatory commissions, including the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, and the Securities and Exchange Commission.⁶³

The President eagerly sought to revisit the legislative bargain giving these agencies broad statutory powers but formal independence and a multi-member structure. Roosevelt had by 1938 already made efforts to control these commissions through decisions to fire appointees with fixed terms, but the Supreme Court had thwarted him – finding that Congress could provide for fixed terms that would prevent the President from simply eliminating commissioners who disagreed with him. How else could the White House get power over these agencies? The reorganization bill would do the trick: the SEC's authority could simply be placed under Treasury or Commerce, where loyal political appointees could reign. Congressional compromises creating new regulatory powers but yoking them to cumbersome structures could easily become undone.⁶⁴

Ever sensitive to interest group pressures, legislators were also keenly aware that important constituencies ranging from veterans to unions to doctors believed they had

⁶² See Jeffrey S. Banks and Joel Sobel, *Equilibrium Selection in Signaling Games*, 55 *ECONOMETRICA* 647 (1987) (game theoretic accounts of signaling). For an account of how changes in structure can contribute to presidential power, see Lewis, *supra* note 17, at 7-19; Wilson, *supra* note 18, at __.

⁶³ See Polenberg, *supra* note 17, at __. See also *News Summary*, N.Y. TIMES 10, Jan. 20, 1937.

⁶⁴ See *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

something to lose from reorganization. Veterans were concerned that consolidation of the multi-member Civil Service Commission would erode the preference for hiring veterans into government jobs. Veterans also feared that the Veterans' Administration would be consolidated into the proposed new Department of Welfare, disrupting the clientelistic relationship that had developed between veterans and their bureau. The NAACP had been angling for the appointment of an African American to the Civil Service Commission and feared this project would be thwarted by consolidation. In effect, the opposition to executive reorganization was more than symbolic, and it was dispersed beyond the committed ideological opponents of the New Deal. Doctors sought to continue their dominance of the Public Health Service and – curiously – preferred that it remain lodged deep inside the Treasury Department instead of forming the core of a new cabinet-level Welfare Department. Although senior Treasury officials were unlikely to view the work of the Public Health Service as a priority, the more politically-active doctors saw this as an advantage, since it allowed organized medical professionals to more easily dominate the work of the bureau.⁶⁵

As opposition to the reorganization bill mounted, the White House sought to allay fears that the president would use reorganization to circumvent previous congressional compromises. White House allies supported amendments to the bill excluding some independent regulatory agencies from its coverage, imposing sunsets, and otherwise limiting the scope of the bill. Nonetheless, by 1938, the ill-fated executive reorganization project had too many strikes against it. The most vigorous opponents of the New Deal – working through citizens' committees outside the legislature and through conservative Republicans and Southern Democrats within it – tarred the reorganization bill by associating it with the ill-fated court-packing plan. Moderate New Deal supporters sensitive to interest group concerns were less inclined to be supportive of the President at a time when his public standing was visibly declining and when reorganization could dilute legislators' own power to structure political compromises through independent commissions. Moderates who sought to make the bill more amenable politically by making amendments exempting certain agencies or otherwise weakening the bill had to contend with opposition from the committed foes of the New Deal (who often voted strategically against the amendments) and with uncertain reactions from the White House (which occasionally sought to thwart the amendments hoping to preserve a stronger bill). And even the more vigorous White House supporters were occasionally miffed by the Administration's less-than-adroit responses to criticism, which included sheepish press statements from the president denying an interest in "dictatorial" power combined with copious refusals to discuss the types of reorganization plans the president would pursue.⁶⁶ The bill died.

But the President was undaunted. Choosing to treat the demise of the 1938 bill as a temporary setback, he almost immediately instructed his aides to reopen negotiations on a more limited bill. In sharp contrast to their earlier strategy, White House negotiators

⁶⁵ See Polenberg, *supra* note 17, at ___; Leuchtenburg, *FDR and the New Deal*, *supra* note 17, at ___; Harvey C. Mansfield, *Federal Executive Reorganization: Thirty Years of Experience*, 29 PUB. ADMIN. REV. 332 (1969).

⁶⁶ See Leuchtenburg, *FDR and the New Deal*, *supra* note 25, at ___.

now allowed the congressional leadership to take a major role in crafting the bill.⁶⁷ The civic organizations that had opposed reorganization seemed unconcerned about the lower-profile negotiations still unfolding, having declared victory and perhaps waiting for a different opportunity to weaken the Administration. Meanwhile, some Democratic legislators who scuttled the previous plan now supported it. The White House's nominal supporters in the second iteration may have been swayed by changes in the bill itself, which now included a two-house veto provision governing reorganization plans, exempted many independent agencies, and included sunset provisions. Since most of the President's party still supported the substance of the federal government's new administrative and regulatory functions – even if they differed with the President about the power he should have to reorganize these – some legislators may have also sought to blunt conservative lawmakers' attacks on the allegedly sprawling and disorganized regulatory state that the New Deal had created.⁶⁸

The resulting bill epitomized the exercise in compromise that the late New Deal had become. At long last, Roosevelt had re-acquired executive powers over the very architecture of the federal state. He had gained the power to transfer, abolish, or modify existing agencies to reflect his goals, regardless of whether these involved short-term conflicts with congressional conservatives eager to dismember fragile New Deal bureaus or longer-term concerns about the legacy of his signature programs.⁶⁹ He could even abolish entire agencies without transferring their functions,⁷⁰ thereby exercising a sort of line-item veto power bound to increase presidential bargaining leverage,⁷¹ as long as he returned the unspent appropriations to the Treasury for Congress to control. The bill's design also contemplated reorganization plans that could result in major layoff or functional changes in the work of agency employees,⁷² thereby freeing up already appropriated resources to hire new officials more likely to be loyal to the White House.⁷³

All of these powers came at a price, however. Deft navigation would be necessary for Roosevelt, the onetime Navy sub-cabinet official, to use these powers. Serious constraints were built into the new law.⁷⁴ The White House had to justify reorganization on the basis of financial savings or efficiency.⁷⁵ It had to report to

⁶⁷ See Polenberg, *supra* note 17, at ___ (chronicling a shift in involvement by the congressional leadership, and describing the weaker bill).

⁶⁸ See Alfred B. Teton, *Reorganization Revisited*, 48 YALE L.J. 573 (1939); James N. Rosenberg, *Reorganization Yesterday, Today, Tomorrow*, 25 VA. L. REV. 129 (1938).

⁶⁹ See Reorganization Act of 1939 (53 Stat. 561; 3 U.S.C. 45a; U.S.C. 133-133r; 31 U.S.C. 2; 5 U.S.C. 133t (note)).

⁷⁰ See *id.*

⁷¹ Cf. *Clinton v. New York*, 524 U.S. 417 (1998) (concluding that the line-item veto unduly and problematically enhanced executive power).

⁷² See Reorganization Act, *supra* note ___, at ___.

⁷³ See *id.*, at ___. The White House would have to argue that the funds for new employees were being expended for the same broad purpose that Congress had already approved through the appropriations process. But the bill's creation of presidential authority to allocate legal powers across bureaucratic entities (including new ones), coupled with its clear authority to lay off employees, implied some ability to reallocate funds to pay for new officials overseeing the work of newly-reorganized bureaus.

⁷⁴ See generally Polenberg, *supra* note ___, at ___; John D. Millett, *The Legislative Veto and the Reorganization Act of 1939*, 1 PUB. ADMIN. REV. 176, 177 (1941).

⁷⁵ See Reorganization Plan, *supra* ___, at ___.

Congress how much would be saved by each reorganization plan.⁷⁶ Virtually all independent agencies except the Social Security Board were off limits, leaving in place statutory deals that had been blessed by the Supreme Court in *Humphrey's Executor* and frustrated presidential efforts to control agencies directly.⁷⁷ Roosevelt was explicitly barred from creating new cabinet agencies or abolishing existing ones.⁷⁸ No reorganization plan could explicitly change the purpose of appropriations (though who *controlled* the interpretation of that purpose within agencies could obviously change), shield agencies from existing litigation, preserve agencies that had already been legally subject to termination through statutory action, or create legal authority out of whole cloth for entirely novel government functions not vested in any existing agency (though existing legal authority could be transferred to new entities).⁷⁹ And there was the two-house veto: reorganization plans had no effect until after 60 days had elapsed (during which Congress had to be in session). Before the 60 day clock had run its course, a simply majority vote in both houses disapproving the reorganization plan invalidated its legal effect.⁸⁰ In short, despite Roosevelt's best efforts to avoid these limitations, the more incremental reorganization authority left him room to operate as both legal and political architect at an intricate juncture. He would soon use it.

a. The Creation of the Federal Security Agency: "To Strengthen the Arms of Democracy"⁸¹

Once passage of the 1939 Reorganization Act appeared imminent, the small group of presidential advisers working on the new executive branch architecture shifted their attention from selling the legislature to finalizing what bureaus would move where. The President took a keen interest in the details of this process. Inside the White House, the President worked with a close-knit group of advisers to set reorganization priorities. The FSA was to be among the first agencies created, with the initial transfers of authority affecting the Social Security Board, Office of Education, Public Health Service and a number of smaller and temporary New Deal legacy agencies. "Later," the President decreed (perhaps wanting to dispel his opponents' concern that he was attempting to replicate the features of the defeated 1938 reorganization bill), the FSA would be enlarged with the addition of the Food and Drug Administration.⁸²

On April 25, just three weeks after the executive reorganization legislation passed, the White House issued an elaborate public announcement accompanying the first use of the President's authority from the act. The centerpiece of the announcement was

⁷⁶ *Id.* at ___.

⁷⁷ *Id.* at ___.

⁷⁸ *Id.* at ___.

⁷⁹ *Id.* at ___.

⁸⁰ *Id.* at ___.

⁸¹ Franklin D. Roosevelt, Reorganization Plan No. 1 of 1939, 5 U.S.C. – Appendix ("Reorganization Plan") ("These measures have all had only one supreme purpose – to make democracy work – to strengthen the arms of democracy in peace or war and to ensure the solid blessings of free government to our people in increasing measure.").

⁸² The procession of bureaus and functions added to the agency is described in the organizational charts the Agency prepared for congressional staff. *See* Federal Security Agency, Organizational Charts and Budgets, FY 1952 (1952), avail. at National Archives, Organizational Charts, Federal Security Agency (Entry 9), Box 2.

the creation of a non-cabinet independent agency under a single administrator to manage health, education, and various aspects of “security” policy. Gone were references to welfare. In its stead, a “Federal Security Agency” was announced, centralizing power over the Social Security Board (an independent agency), the Public Health Service (from Treasury), the Office of Education (from Interior), U.S. Employment Service (Labor), and relief programs including the National Youth Administration (from the WPA) and the Civilian Conservation Corps (another independent agency). In keeping with the President’s wishes, the transfer of the Food and Drug Administration (from Agriculture) was *not* announced, but followed in 1940 in accordance with the Administration’s secret plans. To run the FSA, the President recruited the ambitious Paul McNutt, a former law professor and governor of Indiana who was then completing a tour as the American colonial czar in charge of the Philippines.⁸³

It is telling that Roosevelt chose to feature “security” so prominently in the agency’s name. While the term was broadly identified with pensions and unemployment benefits at the time,⁸⁴ “security” was also a fertile domain for legal and policy entrepreneurship. Even a half-decade before the creation of the FSA, Roosevelt was already referring to “security” in relation to the Administration’s crime-control initiatives, a domain of sharp, and not entirely uncontroversial, federal expansion and policy entrepreneurship during the early New Deal.⁸⁵ He underscored “security” as a defining goal for a host of federal regulatory policies.⁸⁶ Early references to “security” policy in the Roosevelt Administration also occasionally encompassed geostrategic national defense. Indeed, a survey of Roosevelt’s public statements during his second term (the presidential term in which the FSA was created) reveal nearly as many references to security that do not concern pensions or unemployment benefits as the as those that do refer to such programs.⁸⁷ The Administration’s description of its goals, moreover, appeared to reflect not only an exercise in public rhetoric but a politically-significant willingness to reshape the federal bureaucracy and yoke bureaus together under a new set of legal parameters.

⁸³ See generally Miles, *supra* note 13, at 19 (discussing use of the term “security” and how it was considered more acceptable to Vice President Garner, and noting that it foreshadowed key structural decisions that affected the trajectory of the agency as a result of its involvement in defense-related pursuits). Regarding the structure of the agency itself, see U.S. GOV’T MANUAL (1942). With respect to the reorganization, see Franklin D. Roosevelt, *Message of the President: Reorganization Plan No. 1 of 1939* (Apr. 25, 1939). Regarding McNutt’s appointment, see I. GEORGE BLAKE, PAUL V. MCNUTT: PORTRAIT OF A HOOSIER STATESMAN (1966).

⁸⁴ See, e.g., Miles, *supra* note 13, at 20-21 (describing references to security primarily in terms of protection from economic risks).

⁸⁵ See Mariano-Florentino Cuéllar, *The Political Economies of Criminal Justice*, 75 U. CHI. L. REV. 941, 960 (2008)(discussing Roosevelt’s – and his Attorney General Homer Cummings’ – determination to forge crime control into a politically-salient issue).

⁸⁶ For example, in 1937 Roosevelt routinely made references to “security of property and the maintenance of order,” “economic security,” and “work security,” as well as “international security,” and the “security of the nation.” Roosevelt discussed security in the ensuing years in the context of economic policy, crime control, and national defense. See FDR Listing of References to Security (December 5, 2007)(on file with author). References reviewed are from the Public Papers section of the American Presidency Project (<http://www.presidency.ucsb.edu/ws/index.php>), using the search term “security,” between 1937 and 1945.

⁸⁷ See *id.*

It is also telling that Roosevelt so vigorously prioritized bureaucratic changes in his lawmaking agenda. Aside from expanding the Executive Office of the President itself, the creation of the FSA was Roosevelt's most immediate political priority. Though in some respects the Administration already appears to have had a plan that resulted in the merger of agencies within FSA, the political and legal context was also beginning to have some effect in how the plan was being crafted. The new reorganization law required a focus on thrift and efficiency, so Roosevelt's aides made at least a symbolic effort to play this up in their justification for the reorganization plan. But the other contextual factor shaping the reorganization foreshadowed one of Roosevelt's distinctive political innovations. In 1939 the possibility of a war that might affect the United States was no longer remote, even if the Administration itself had yet to settle on a course for managing the associated foreign policy problems. Growing public concerns about national defense were also echoed in the legislature, where conservative Democrats and Republicans (even isolationist ones) often tended to support national defense-related activities. In light of this, Roosevelt's plan emphasized the potential benefits to national security of creating a single agency to focus on health and economic security that could be more easily managed, and more easily deployed to strengthen national defense.⁸⁸ As the President's reorganization message emphasized:

In these days of ruthless attempts to destroy democratic government, it is boldly asserted that democracies must always be weak in order to be democratic at all; and that, therefore, it will be easy to crush all free states out of existence.... We are not free if our administration is weak. But we are free if we know, and others know, that we are strong; that we can be tough as well as tender hearted; and that what the American people decide to do can and will be done, capably and effectively, with the best national equipment that modern organizing ability can supply in a country where management and organization is so well-understood in private affairs.⁸⁹

If promoting the national defense in the face of external threats was the goal Roosevelt emphasized in the reorganization message, "efficiency" and accountability were to be the publicly-asserted means of achieving that goal. Indeed, the President's effort to justify and create the Federal Security Agency was inextricably bound up with the fight to pass a reorganization bill. Once the reorganization bill finally passed, it forced the President to submit plans to Congress for approval. As a matter of statutory formalism the primary goal of the plans, moreover, had to be cost. Accordingly, much of Roosevelt's initial justification for the FSA focused on the potential savings and fiscal efficiency that could be achieved by consolidating agencies with conceptually-related functions. This is amply borne out in the President's reorganization statement. Nonetheless, that statement deftly links the "economy" argument with two other ideas that are presented as being intimately connected to cost: the first is an "efficiency" rationale that essentially amounts to a thinly disguised justification for presidential control. The second is an assertion that the national security capacities of the United States depended on an effectively organized government. This latter point in the

⁸⁸ See Heinrichs, *supra* note __, at __ (indicating growing public concern about national defense, and a willingness of at least some otherwise conservative members of the legislature to support defense-related activities). With respect to the use of the term "security," see Miles, *supra* note 13, at 19 (discussing Vice President Garner's support for the use of the term "security").

⁸⁹ Roosevelt, *Reorganization Message*, *supra* note __, at __.

reorganization message is developed by reference to repressive dictatorships (presumably an allusion to Hitler) and resonates with the repeated efforts made almost immediately after the FSA's creation to emphasize its role in the war effort.⁹⁰

The agency's creation received considerable media attention. Although some newspaper coverage in fact emphasized the efficiencies that the agency merger would allegedly create, much of it discussed the merger in the larger context of the previous year's battle over reorganization. This connection highlights how the reorganization process was understood to involve political stakes that would affect the relationship between the president and core regulatory and administrative functions of government. Indeed, at times the newspaper coverage acknowledged – in part because of Roosevelt's own rhetoric about the reorganization – that the changes would enhance the president's ability to control bureaucratic functions more directly.⁹¹ Other observers, including the consistently anti-Roosevelt *Chicago Daily Tribune*, tried to forge rhetorical boomerang by turning the President's own allusions to external threats against his reorganization plan:

A Nazi or Fascist could look at the three new agencies and their component parts and find something very familiar in them. This is the story of a totalitarian state. These authorities, administrations, and corporations now rearranged for more direct control by the chief executive are agencies by which the government pursues its program of mobilizing national activities under what the Germans call the Fuehrer.⁹²

Despite such lingering opposition in some quarters and the previous year's spirited fight over reorganization, the President allayed many of his critics. The centralizing structure of the FSA was decidedly incremental. It did not include the Veterans' Administration, prisons, or responsibility for government employee pensions. Moderate legislators who had earlier opposed the reorganization were more inclined to support it. The agency was not cabinet level, giving those legislators further control over this dimension of reorganization in the future. And by consolidating disparate bureaus, the White House blunted Republicans and Southern Democrats' arguments about the sprawling proliferation of smaller agencies. Bureaucrats occasionally offered spirited resistance. Sounding a note of alarm at the prospect of combining employment placement and social insurance services, the Labor Department all but predicted the collapse of the economy if its U.S. Employment Service was consolidated with the Social Security Board under the FSA:

We are opposed to the proposed transference of the U.S. Employment Service to the Social Security Board on the following grounds... An insurance dominated employment service would almost certainly lead to neglect of aggressive placement activities, which

⁹⁰ See Polenberg, *supra* note 17, at ___. See also Felix Belair, Jr., *President Decrees Three Big Offices in Centralizing 21*, N.Y. TIMES, Apr. 26, 1939.

⁹¹ See, e.g., Chesly Manly, *President Puts U.S. Agencies in 3 Supergroups: Makes First Transfer of Reorganization*, CHI. DAILY TRIB. 2, Apr. 26, 1939. The fact that polling organizations at the time attempted national surveys asking the public about the agency also indicates the relative degree of attention levied on the President's structural choices at the time.

⁹² *Our Autocratic State*, CHI. DAILY TRIB., 15, April 27, 1939.

in turn would lead to increased demands upon insurance benefits. *The net result? A static, dying economic order.*⁹³

Most, however, quickly fell into line. Some, particularly FDA officials who had chafed under an unsympathetic Agriculture Department, were quite favorably inclined to the move. Nor did the President, generally skilled at quelling internal Administration dissent, run into much opposition in his own Administration. Though Ickes' Interior department was a "loser" in the reorganization process but the president considered the effort a priority and even Ickes ultimately cooperated.⁹⁴

The combination of the newspaper coverage about the creation of the agency itself and the intense battle over reorganization suggests that a substantial proportion of the nation's elites and its politically engaged public were aware of the FSA's creation. Polls not long after the creation suggest that Roosevelt's action met with considerable support, either because it was perceived as advancing the relatively anodyne efficiency goals he sought to emphasize (thrift appealed even to moderate Republicans) or because some constituents supported the health and public benefit programs that the FSA would administer and correctly perceived that the move would bode well for the political future of these programs. The most vociferous opponents were Republicans and a smattering of Southern Democrats who by this point were emphatically opposed to the President's agenda. These anti-Roosevelt partisans also repeatedly noted that the creation of the FSA was probably a move to make permanent a number of allegedly temporary programs. Over time this proved to be partly true and partly false, but far more complex currents were at work within the agency – and these help explain why its functions continue to play such a prominent role today.

Table 1: Selected Bureaus Transferred to FSA by 1940⁹⁵

<i>Bureau</i>	<i>Budget (1940)</i>	<i>Previous Status</i>	<i>Key Functions (1940)</i>
<i>Social Security Board</i>	\$368,000,000	Independent Commission	Administering social insurance payments for older Americans; provide grants for states to develop pension and unemployment insurance schemes
<i>Office of Education</i>	\$19,100,000	Bureau of the Interior Department	Allocating education assistance grants to states; developing vocational education programs; conducting and fund education-related research
<i>U.S. Employment Service</i>	\$6,700,000	Bureau of the Labor Department	Employment placement and training services
<i>Food and Drug Administration</i>	\$2,700,000	Bureau of the Agriculture Department	Ensuring the safety of most food products; regulating the pharmaceutical and cosmetics industries

⁹³ U.S. Department of Labor, Memo on Proposal to Transfer the U.S. Employment Service to the Social Security Board (1939), avail. at Franklin D. Roosevelt Library, Correspondence and Papers of the President's Committee on Administrative Management, Correspondence and Papers: Reorganization, Box 24, Reorganization Plan I Folder.

⁹⁴ See generally Miles, *supra* note __, at __; Polenberg, *supra* note __, at __. For an example of press opposition, see *Our Autocratic State*, CHI. DAILY TRIB. 15, Apr. 27, 1939.

⁹⁵ See U.S. GOV'T MANUAL 1943 (1943); FSA, *Organizational Chart 1952*, *supra* note __.

<i>Public Service</i>	<i>Health</i>	\$29,200,000	Bureau of the Treasury Department	Conducting health research, providing public health services to combat infectious diseases, providing health services to communities that were economically marginalized (especially in rural areas) or affected by disasters, administering health-related grants to states
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b. Overview of Evolution and Growth.

Although the decade or so that followed the creation of the FSA was indeed a time of “considerable shifting,” consistency also characterized the basic structure of the agency, including the existence of four core agencies – the FDA, the Social Security Board, the Public Health Service, and Education – that accounted for the lion’s share of its budget and regulatory responsibilities. Some explicitly war-related functions, most notably the biological weapons-focused War Research Service and the Office of Community War Services, were eventually transferred or abolished. Changes also affected employment-related functions, some of which were abolished or eventually transferred to Labor. Finally, President Truman centralized control over social security in 1947 by abolishing the Social Security Board altogether and transferring its functions to the FSA Administrator.⁹⁶

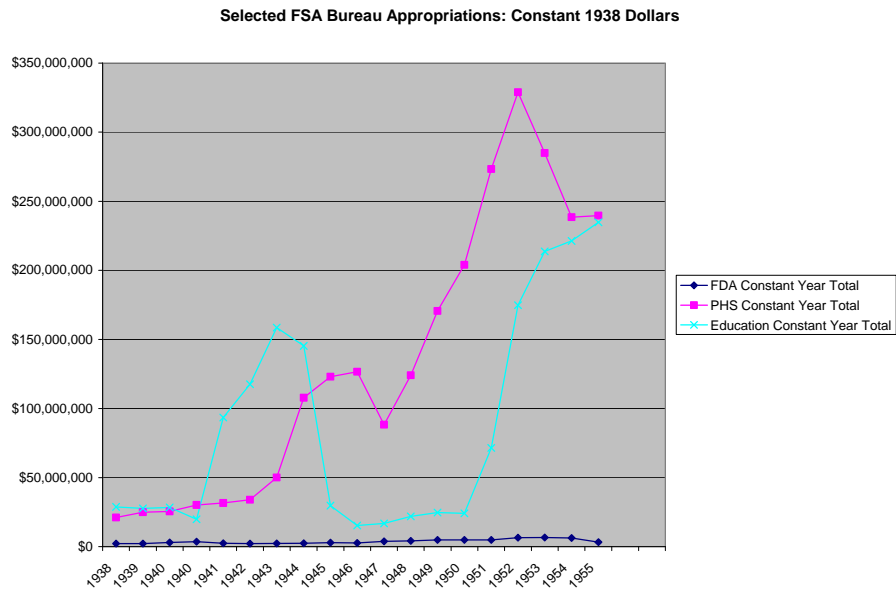
The overall trajectory of the FSA during and after the war was one of sharp expansion. Most FSA bureaus experienced marked budget increases, growing administrative responsibilities, and continuity of their organizational lease on life. What was then the National Institute of Health – a component of the Public Health Service – acquired new funds and responsibilities for national defense-related research. The Social Security Board covered agricultural workers and domestic workers. The resources funneled to state education programs through the FSA’s Office of Education skyrocketed. In contrast, the Federal Loan Agency and Federal Works Agency – the other two “super-agencies” created when the FSA was forged – soon suffered declines in funding and were both eventually abolished.⁹⁷

Some of the changes occurring during the war years can be appreciated in the budgets of the FSA’s four major administrative and policymaking bureaus. As the figures below indicate, the Food and Drug Administration managed to retain its budget even during the war years. Both the Public Health Service and the Office of Education experienced dramatic increases during the war years, with the Public Health Service increases coming later and becoming more permanent than those seen by the Office of Education. Growth in appropriations for the sprawling social security apparatus – including grants for states to establish social insurance systems – continued to increase

⁹⁶ See U.S. GOV’T MANUAL (1939-1946). FSA ANNUAL REPORTS (1940-1945).

⁹⁷ Regarding dissolved agencies, see U.S. GOVERNMENT MANUAL (2001) Appendix on Agencies Abolished and Transferred. See also *Agency Absorbs 8 Bureaus But Boosts Payroll*, CHI. DAILY TRIB., Sept. 10, 1949; W.H. Lawrence, *President Merges Housing Agencies*, N.Y. TIMES, Feb. 25, 1942. Regarding changes in the responsibilities of FSA units, see Dean, *supra* note __, at __; Swain, *supra* note __, at __. See also Polenberg, *supra* note __, at __; Miles, *supra* note __, at __. Regarding the legislature’s role, see WILLIAM MORROW, CONGRESSIONAL COMMITTEES (1969). Regarding organized interests, see Polenberg, *supra* note __, at __; Francis, *supra* note __.

during much of war, even while many other domestic agencies were forced to accept flat or declining budgets. Increases became even more pronounced for the Public Health Service and the Office of Education following in the postwar period.⁹⁸

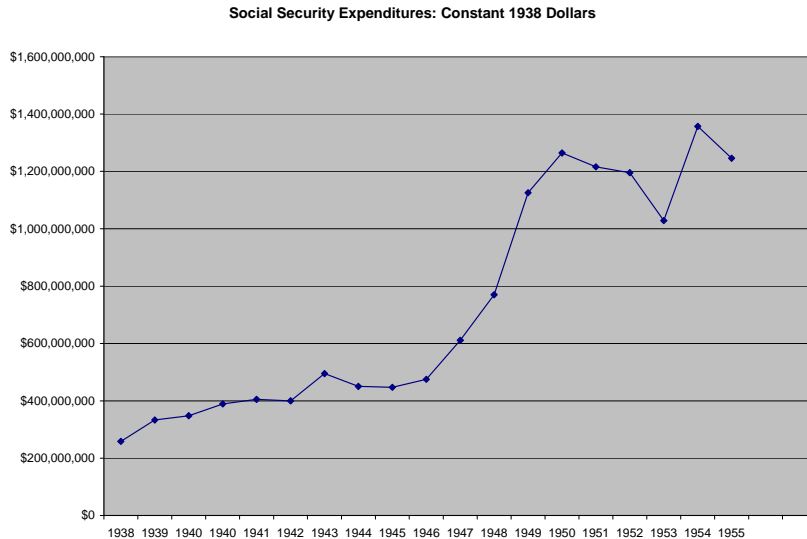


Note: The second set of figures for 1940 show adjusted appropriations changed after the creation of the FSA.

Beginning in 1947 President Truman sought to use the recently-renewed presidential reorganization authority to elevate the agency to cabinet status. Truman's move may have had some symbolic purposes in mind, but they were bound up with more practical political considerations. For one, Truman decided to make a major push to achieve national health insurance. He may have believed the plan would be furthered by elevating its primary proponent – FSA Administrator Oscar Ewing – to cabinet status. Doing so would have generated additional (and, assuming the plan to elevate the agency to cabinet status succeeded, probably favorable) news coverage, and would have enhanced perceptions that the necessary federal administrative structure to administer national health insurance was already in place. For another, the structural impact of turning an independent agency into a cabinet agency could be significant. In effect, doing so would have added yet another layer of political appointees (three assistant secretaries) to the mix of senior FSA officials, further increasing the Administration's ability to direct how food and drug regulations were administered (something that the first HEW Secretary, Oveta Hobby of the Eisenhower Administration, soon realized would absorb a considerable amount of her time and effort), how benefit payments were issued, and how the agency's myriad other functions were carried out. Despite the fact that Truman retained reorganization authority much like what Roosevelt had, his efforts

⁹⁸ See U.S. STATISTICAL ABSTRACT (1999)(inflation figures used to adjust agency budgets to constant 1983 dollars); Agency figures obtained from the annual BUDGET OF THE UNITED STATES, reviewing the 1935 through the 1955 editions.

to create the FSA were thwarted by a legislative veto – the only such veto of one of his reorganization plans.⁹⁹



Note: The second set of figures for 1940 show adjusted appropriations changed to reflect the creation of the FSA.

Where Truman failed, President Eisenhower eventually succeeded. Shortly after his inauguration, he submitted a reorganization plan that sailed through congressional review and, by the middle of 1953, transformed the FSA into the Department of Health, Education, and Welfare. In the process, the FSA again garnered considerable media attention, some of it – as with the article below – chronicling the agency’s staggering growth during and after the war years:

The reception in political and professional circles accorded new Administration proposals to raise the Federal Security Agency to Cabinet status indicates the great importance that has come to be attached to Federal welfare activities. The federal agency that would, thus, attain full and responsible membership in the Administration family is one of the youngest in the Government. It mushroomed out of the New and Fair Deal eras. Moreover, in its days of fabulous growth, since its birth in 1939, it has embraced a number of old-line offices. The organization of 38,000 employees... *collects and disburses billions of dollars in old age and survivors insurance. And it also enforces the Federal pure food and drug laws. It builds hospitals and operates research laboratories. It runs an institution for the mentally ill, and funnels public funds for a printing house to the blind...*¹⁰⁰

Even more dramatic than changes in the agency as a whole were the evolving capacities of specific bureaus, perhaps most notably at the PHS:

[The Public Health Service] which came into the agency in 1939 with 6,200 employees and an annual appropriation of \$24,692,000, has experienced phenomenal growth, even in a fast-expanding agency. Public Health today has a personnel of 15,170 and for 1953

⁹⁹ See Miles, *supra* note __, at __, Jay Walz, *Welfare Agency Has Grown Fast*, N.Y. TIMES E7, March 1, 1939.

¹⁰⁰ See generally Walz, *supra* note 99.

an appropriation of \$383,453,000. It makes grants for hospitals (\$134,700,000 this year), maintains laboratories, and directs such important research organizations as the National Cancer Institute and the National Health Institute.¹⁰¹

As with Roosevelt's own reorganization plan of 1938, the transformation of FSA into a cabinet-level department proved to be something of a battle which was given a measure of coverage in national newspapers. Truman's effort to create a cabinet-level security and welfare department failed initially amidst opposition in the Republican-controlled Congress. Part of the reason is likely to have been divided government. As David Lewis later speculates in his study of the politics of agency design – in periods of divided government, the legislature is skeptical of supporting the President's reorganization efforts. Elevating the FSA at the time was particularly troubling because of its health-related functions and the identification of its Administrator, Oscar Ewing, with efforts to achieve national health insurance – a goal that was particularly offensive to the congressional Republican leadership.

Illustrating again how a President could deploy the structure of the FSA in the service of a legislative agenda, Truman ordered Ewing to deploy “all the resources within the FSA for vigorous and united action toward achieving public understanding of the need for a national health program.” The newspapers covered this. They also covered Eisenhower's efforts to elevate the Department in 1953 – one of his first substantive actions as President – which was achieved with relatively little opposition.¹⁰²

Between the end of the Roosevelt years and the agency's bestowal of cabinet status early in the Eisenhower Administration, the FSA lived through the eventful years of the Truman Administration. During this critical period, the FSA navigated a transition through a postwar political and budgetary environment. Its staff played a major role in President Truman's “Fair Deal.”¹⁰³ And FSA Administrator Oscar Ewing, an ambitious New York lawyer eager to raise his profile, continued to promote the idea that security-related laws and policies should encompass both defense-related and domestic risk-reduction initiatives.¹⁰⁴ Each of these developments appears to have left its mark on the organization.

Although funding for some wartime education and health-related programs dried up, the agency found itself awash in appropriations for health research and public health initiatives. Wartime programs in this domain appeared to whet congressional appetites

¹⁰¹ *Id.* Inflation-adjusted figures confirm the staggering growth at PHS, as do more scholarly accounts of the growth of the agency's research capacity through the creation of the National Cancer Institute and the modern National Institutes of Health. See, e.g., Donald Swain, *The Rise of a Research Empire: NIH, 1930 to 1950*, 138 *SCIENCE* 1233 (1962).

¹⁰² See Anthony Leviero, *Eisenhower Offers Plan to Give F.S.A. Cabinet Status*, *N.Y. TIMES* 1, Mar. 13, 1953 (discussing FSA elevation to cabinet status); Lewis, *supra* note 17, at __ (divided government); JILL QUADANGO, *ONE NATION, UNINSURED* 30 (2005) (“all the resources within the FSA...”).

¹⁰³ See President Harry S. Truman, *State of the Union Address* 6 (January 5, 1949) (“Our domestic programs are the foundation of our foreign policy. The world today looks to us for leadership because we have so largely realized, within our borders, those benefits of democracy for which most of the peoples of the world are yearning”).

¹⁰⁴ See generally Oral History Interview with Oscar R. Ewing (May 1, 1969), Harry S. Truman Presidential Library (on file with author), transcript avail. at <http://www.trumanlibrary.org/oralhist/ewing3.htm#transcript> (Ewing Oral History).

for a large health research infrastructure.¹⁰⁵ Social Security benefits payments also rose as wartime financing constraints began to ebb. As the agency grew, the White House forged a domestic agenda – Truman’s “Fair Deal” – that included further expansion of the FSA programs to include national health insurance and bestowal of cabinet status.¹⁰⁶

The FSA also began playing a more explicit role in civil defense during the Truman years. Civil defense and security functions lay dormant in the United States for most of the period between the end of the First World War and the beginning of the Second. Roosevelt formally convened efforts at civil preparedness within the White House in 1940, as American participation in the spreading conflict in Europe and Asia was becoming more likely.¹⁰⁷ Those functions remained lodged in the White House for much of the war. Although the initial interagency group focused on civil defense did not specifically include the FSA, the FSA’s history is in fact connected to civil defense activities in a number of ways. First, Roosevelt’s creation of the agency emphasized the need for preparedness and held up the agency as an example of it. In that statement and subsequent speeches, the Administration emphasized the link between domestic regulatory and welfare functions and national defense (both before and during the war itself). Second, the White House was in fact drawing on the new super-agency for a number of functions related to civil defense preparedness, including draft-related planning and the use of Social Security Board resources for placing workers in defense-related industries. Later, during the war itself, Roosevelt gave the FSA head a major role in overseeing certain manpower-related preparedness functions. Third, despite the reluctance of civil defense head Fiorello La Guardia (concurrently also serving as Mayor of New York) to focus on “sissy stuff,” the formal civil defense preparedness effort was eventually forced to shift attention to public health, education, and welfare aspects of civil defense. These pursuits related directly to the role the FSA was expected to play in emergencies.¹⁰⁸

Ewing did not consider civil defense to be the only security priority within his mandate. When Ewing became one of the Administration’s point-men on national health insurance, he encountered an environment of intense social cleavages and political disagreements about domestic policy.¹⁰⁹ At least some of these tensions were tangled up with anxiety about the spread of communism and socialism. While the American Medical Association relentlessly sought to link national health insurance to socialism, Ewing sought to respond with an even more pointed version of the Roosevelt-era penchant for melding domestic risk reduction and geostrategic national defense concerns into a single, overarching appeal to the value of security. Writing in the auspiciously

¹⁰⁵ See *supra* notes ___ (discussing the expansion of the National Institutes of Health in the postwar years).

¹⁰⁶ See generally Ewing Oral History, *supra* note ___.

¹⁰⁷ See generally Thomas J. Kerr, *Civil Defense in the United States* (1983).

¹⁰⁸ See National Security Resources Board, *Materials for Use in NSRB Program Development: Preliminary Draft* (November 25, 1949), White House Confidential Files, National Security Resources Board (3 of 10), Box 27. The Federal Security Agency and its bureaus are mentioned 21 times as integral to national defense-related functions. Some of its key roles include: providing inventory of health manpower resources, providing estimates of wartime needs for health manpower, planning for the distribution and safety for food during wartime, administering a communicable disease control program, and assessing health needs following civilian wartime disasters.

¹⁰⁹ See Monte M. Poen, *HARRY S. TRUMAN VERSUS THE MEDICAL LOBBY: THE GENESIS OF MEDICARE* (1979).

named *American Magazine* in 1949, Ewing celebrated the value of expanding FSA programs by deliberately framing security concerns in a manner that could apply interchangeably to risk regulation and national defense. “Security measures,” Ewing opined, “[are] simply an orderly way to take care of ourselves in times of distress – as well as keep us well – with everyone sharing the burden.”¹¹⁰ He continued:

Just how secure are you at this moment? If, tomorrow, you have an acute attack... could you foot the bill? If a child is born in your family, are you secure in the knowledge that he will receive the best attention the medical profession can offer – that he can have the education he may set his heart upon, perhaps a college degree? Suppose you lose your job, or become disabled. What sort of world would lie ahead for you? *These personal matters of security* are the direct concern of your Federal Security Agency, of which I happen to be the Administrator... As I see it, security means a sure knowledge that we shall not want for the basic necessities of life, no matter what fate may have in store... With that sure knowledge, we can proceed to go about getting the things we want from life under the American system of free choice.¹¹¹

“Free choice,” Ewing’s philosophy here implied, depended at least as much on remedying potential market failures as it did on allowing consumers to feel that they were making ostensibly unconstrained choices: “When... an American buys a can of food from a grocery-store shelf, he is so sure that the food is healthful, and that the contents are according to the label, he scarcely thinks about it. *I call this real security.*”¹¹² From these theoretical foundations, Ewing then offered an explicit response – again mixing geostrategic national defense concerns and risk-reduction rationales – to the American Medical Association’s charges about how the FSA was placing the United States on the road toward socialism.

Some people will tell you that these advances for the good of the general welfare are approaches toward Communism. The exact opposite is true. Security is the best defense we have against Communism. When a man is provided through democratic government with the basic securities which make it possible for him to get what he wants, to stand on his own two feet, independently, he will not listen to wild ‘isms.’¹¹³

Ewing’s pointed advocacy drew the attention of the Republican majority in Congress, who took the kinetic Administrator to task for excessive lobbying and travel. In one such matter, congressional investigators took Ewing to task for an elaborate trip he took to Europe with the apparent purpose of playing up Western Europeans’ success in building national health insurance arrangements.¹¹⁴ In response, Ewing again played the security fugue, insisting that:

For more than a year, the Federal Security agency had been working on plans for civilian defense, first at the request of the Department of Defense and later for the National Security Resources Board. We knew that in the United Kingdom the Ministry of Health

¹¹⁰ Oscar R. Ewing, *More Security For You*, AMERICAN MAGAZINE 2 (Jan. 1949), Papers of Oscar R. Ewing, Federal Security Agency, Speeches and Articles, 1948-1949, Box 38, Truman Presidential Library.

¹¹¹ *Id.* at 1 (emphasis added).

¹¹² *Id.* at 3 (emphasis added).

¹¹³ *Id.* at 4.

¹¹⁴ See Statement by Federal Security Administrator Oscar R. Ewing, Aboard S.S. LaGuardia (January 17, 1950), Papers of Harry S. Truman – President’s Secretary’s File (Federal Security Agency – Ewing, Oscar: Administrator), Box 125, Truman Presidential Library.

and the Home Office had done a great deal of planning in this field; and the time had come when it was necessary for us to have face-to-face discussions on the subject.... Our talks covered plans for distribution of medical and related manpower as between civil and military activities in wartime; recruitment, training, and assignment of medical personnel for defense operations; organizations of the nation for civil defense; and organization of other health-related services.¹¹⁵

These controversies did not stop Ewing's advocacy. Nonetheless, coupled with the advent of the Korean War, congressional pressure kept the FSA from attaining cabinet status and made it marginally harder for the Truman Administration to obtain statutory changes expanding health and welfare programs. They did not, however, diminish the importance of the agency's bureaus to the overall scope of federal activity – even if cabinet status was not obtained until the beginning of the Eisenhower Administration.¹¹⁶ Neither did they stop the FSA from remaining involved in explicitly defense-related activities, discussed in more detail below.

c. Broadening the Scope of “Security.”

Ewing's tendency to parry criticisms of the FSA by playing up the agency's role in national defense had some basis in what the agency actually did. Defense-related activities were a major constant of the FSA as it endured the war years and its responsibilities continued to swell. Increasingly, the FSA framed its essential purpose both to external constituencies and internal employees in terms of national security. “Few... Have Better Opportunities for Service of Value Both to the Armed Forces and to the Civilian population Than Those Who Guard the Entrance to the Alimentary Canal,” proclaimed, for instance, a newsletter to FDA employees during the war.¹¹⁷ While other domestic agencies occasionally assisted in the war effort, they generally did so by seconding resources or cooperating with temporary wartime coordinating bureaucracies. Rarely did those agencies directly assume responsibility for national security-related efforts, nor did they (as the FDA did) brand entire regulatory programs as essential to national defense.

In contrast, at nearly every turn the FSA assumed responsibility connected to national security, or framed its regulatory activities as essential to the same. Consider some examples from early in the war. The FSA's annual reports emphasized the war-related functions of bureaus such as the Public Health Service, the Office of Education, and the Social Security Board. The frequently-mentioned specific examples were then combined with overarching discussions of the war effort, the importance of national security, and the allegedly deep relationship of both to the health and welfare-related

¹¹⁵ Statement by Oscar R. Ewing, Federal Security Administrator, before the House Select Committee to Investigate Lobbying Activities (July 28, 1950), Papers of Oscar R. Ewing, Federal Security Agency Subject File (General Correspondence)(Comptroller General's European Trip – Folder 1), Box 29, Truman Presidential Library.

¹¹⁶ See Anthony Leviero, *Eisenhower Offers Plan to Give F.S.A. Cabinet Status*, N.Y. TIMES 1, Mar. 13, 1953(discussing FSA elevation to cabinet status); Lewis, *supra* note __, at __ (divided government); JILL QUADANGO, ONE NATION, UNINSURED 30 (2005)(“all the resources within the FSA...”). Opposite a Republican Congress, Eisenhower achieved cabinet status for the agency with almost no opposition.

¹¹⁷ *Federal Facts and Fancies*, 27 FOOD & DRUG REV. 191 (1943), quoted in James Robert Dean, *FDA at War: Securing the Food that Secured Victory*, 53 FOOD & DRUG L.J. 453, 453 n.1 (1998).

work of the FSA.¹¹⁸ The Social Security Board paid benefits to bereaved families of the military. Because the agency's mandate at the time included employment placement, the agency served as a conduit to funnel displaced (or otherwise willing) workers into war-related industries. The Office of Education, its budget swelling during wartime, trained workers for war-related industrial occupations. So did the National Youth Administration while it continued in existence as part of the FSA. In Congress, the agency's staff constantly used national security arguments to ask for greater appropriations. The FDA relentlessly promoted its mission "guarding the alimentary canal" and ensuring the flow of safe pharmaceutical products to the armed forces as essential national security functions. The Public Health Service, working through its National Institute of Health unit, devoted a growing share of its resources to defense-related research projects. The FSA also created specialized war-related units through the Federal Security Administrator's internal reorganization authority. These included the War Research Service to spearhead American biological weapons research, and the Office of Community War Services to provide health and related services to the military and engage in anti-prostitution enforcement near military bases. Working with the War Relocation Authority, the agency also played a crucial support role in the relocation of Japanese Americans by serving as a conduit for the provision of benefits and assisting in the placement of Japanese Americans in approved supervised occupations in the areas to which they were being relocated.¹¹⁹ Together, these activities blurred the distinction between national security and the economic and social security that was initially associated with the FSA's bureaus.¹²⁰

Although the agency's defense-related activities had begun before the war and increased in the early phase of the conflict, the pace of these activities quickened as the conflict progressed. Together, McNutt and his assistants formed an agency-wide

¹¹⁸ See *infra* Part V.c. Regarding the connection between war and the growth of the state generally, see CHARLES TILLY, *EUROPEAN REVOLUTIONS: 1492-1992* (1993) (aphoristically developing the idea that war makes the state). Tilly's account suggests that Roosevelt's strategy for mixing references to national and economic security was not without precedent, but it does not entirely explain the political or legal consequences of the reorganization itself.

¹¹⁹ Regarding the FSA's role in relocating Japanese Americans, see Dorothy Swaine Thomas, *Some Social Aspects of Japanese-American Demography*, 94 *PROC. AM. PHIL. SOC'Y* 459 (1950); *Alien Enemies and Japanese-Americans: A Problem of Wartime Controls*, 51 *YALE L.J.* 1316 (1942). The FSA's role in the saga of Japanese American relocation and internment underscores not only the agency's considerable defense-related functions, but also the darker, potentially coercive dimension of an expansive federal capacity. Cf. Polenberg, *War and Society*, *supra* note __, at __ (discussing the two-edged nature of New Deal administrative capacity by referencing the FSA's limited but nonetheless material role in relocating Japanese Americans). Nonetheless, it should be noted that the FSA's role in the internment episode overall was limited compared to that of entities such as the War Relocation Authority. Indeed, the fact that the FSA was not even more heavily involved in the program may reflect the Roosevelt Administration's reluctance to assign a publicly-controversial assignment to a relatively young agency harboring some of the administrative functions of greatest concern to the President. For a discussion of the Administration's difficulty in finding a suitable (and willing) bureaucratic unit to handle internment, see generally TETSUDEN KASHIMA, *JUDGMENT WITHOUT TRIAL: JAPANESE IMPRISONMENT DURING WORLD WAR II* (2003).

¹²⁰ See FSA Annual Reports (1940-1944); FSA Subcommittee Hearings (Appropriations), *supra* note __, at __. See also Dean, *supra* note __, at __ (regarding the FDA); Swain, *supra* note __, at __ (discussing the PHS and NIH).

“Victory Council” to imbue the agency’s employees with a sense of mission about the war effort and obtain suggestions. Letters such as the following poured in:

A suggestion for saving hundreds of pounds of fat in the form of soap. Calgonite or Trisodium Phosphate compound can be used for washing glass-ware and other laboratory apparatus, and washing dishes in a pan instead of holding soap and glass-ware under faucet and allowing the cleanser to flow down the waste pipe before it is fully used. A few users of great quantities of soap: U.S. Public Health, Regional Laboratories, U.S. Food & Drug Administration.¹²¹

As early as 1940, the FSA also became involved in developing a nationwide system to register young men for a military draft. To do this the FSA leveraged its nationwide network of Social Security Board and U.S. Employment Service offices and its relationship with state employment services. That same year, the FSA’s Office of Education worked with the War Department to design a system of “individual record cards to be issued to students of vocational schools” so these could be more quickly placed in defense-related industries upon completion of their training. A few months later, the President involved the FSA in an interagency committee “to study at this time the question of making some financial provision for the dependents of men in the military service.”¹²²

The new structure also served the needs of the political appointees chosen to run it. On occasion, McNutt and his assistants seemed to view the FSA as a national early-warning system for detecting trends among the civilian population that could eventually imperil some expanded version of “national security.” Fearing that the simmering possibility of war beginning to siphon young men away from college and into the military, McNutt warned Roosevelt that “a large number of young people who had planned to enter college this September [1940] and many of those who attended college last year are intending to interrupt their education to find employment in industries essential to national defense, to enlist in the Army or Navy.” He recommended that Roosevelt “advise the young people of the country... to continue their education and assure them that they will be promptly advised if they are needed for other patriotic services.”¹²³ White House records indicate the President obliged:

...urging college students to continue their education, as any other decision would be unfortunate. Must have intelligent citizens, scientists, engineers, and economists.

¹²¹ Letter from A.E. Mix of the U.S. FDA to Mr. Leo Miller, Victory Council, FSA, *included in FSA-WMC Victory Council Meeting Agenda for July 17, 1945*, avail. at National Archives, Watson Miller Archive, Federal Security Agency (Entry 10), Box 1.

¹²² See Letter from J.M Studeebaker, Commissioner, Office of Education to Paul V. McNutt, Administrator, Federal Security Agency, re War Department and Office of Education Record Cards Report (February 12, 1940), avail. at National Archives, Federal Security Agency, Classification File (Entry 1), Box 21 (Folder 26)(vocational records); Memorandum, Federal Security Agency, Social Security Board, Bureau of Employment Security to All State Employment Security Agencies (October 18, 1940), avail. at National Archives, Federal Security Agency, Classification File (Entry 1), Box 21 (Folder 26); Internal White House Memo, Summary of Discussion with Director, Bureau of the Budget (original correspondence September 1, 1940, memo circa September 30, 1940), avail. at Franklin D. Roosevelt Presidential Library, Official File 3700 (Federal Security Agency)(1940 folder)(“making some financial provision for the dependents...”).

¹²³ Internal White House Memo, Summary of Correspondence with Paul V. McNutt, Administrator, Federal Security Administration [sic] (correspondence July 30, 1940), avail. at Franklin D. Roosevelt Library, Official File 3700 (Federal Security Agency)(1941 folder).

Patriotic duty of all young people to continue the normal course of their education, unless and until they are called.¹²⁴

This coterie of activities supporting traditional defense-related functions made the FSA stand out even among the larger milieu of domestic agencies that had been enlisted into the war effort. As the war progressed, these functions expanded to include biological weapons research. Such work was controversial even among military officials and Congress; the U.S. government had signed a treaty outlawing it in 1925 (though it had yet to ratify it). Once the President was persuaded that the research should include both offensive and defensive applications, he decided that it should occur within the FSA. Funds would be made available from the President's Special Emergency Reserve, which required no elaborate accounting to appropriations overseers. The FSA boasted a comparatively small and loyal oversight staff and a less developed relationships to congressional committees (compared to the War Department). Moreover, its overt health-related mission provided what aides described as "political cover," allowing top university scientists across the country to receive the laundered White House funds without revealing the sensitive nature of their work. After conferring with the President, McNutt selected pharmaceutical mogul George W. Merck of Merck & Co. to run the what became the newest bureau of the FSA, the War Research Service.¹²⁵ McNutt described the early stages of the project thus:

In accordance with our understanding, Mr. George W. Merck has assumed the duties as Director of the Branch of War Research in Chemistry on my staff [sic]. It is my understanding that following the letter which Secretary Stimson wrote you on April 29, 1942, concerning this whole program, you indicated that you would make available \$200,000 out of our Special Emergency Fund for preliminary expenses. It is desirable now to establish the headquarters office of the organization in the Federal Security Agency. I therefore request that this \$200,000 be made available for the purposes covered in this program to me as Federal Security Administrator and that an immediate transfer of \$50,000 be effected for first steps in the program. After a conference with the staff of the Secretary of War, it appears desirable to request that this money be spent as part of the \$25,000,000 in the proviso of the supplemental national defense appropriation Act for 1943... It is understood, of course, that all appropriate records will be kept as part of the secret files of the Director and of the Federal Security Administrator.¹²⁶

¹²⁴ *Id.*

¹²⁵ See Paul McNutt, Letter to President Roosevelt (September 4, 1942), avail. at Franklin D. Roosevelt Library, Official File 3700 (Federal Security Agency), 1942-1945 Folder.

¹²⁶ *Id.* See also Letter from George W. Merck, Director, War Research Service to Lt. Col. Chester W. Goble, State Director, Selective Service System, Ohio (May 1, 1944), avail. at National Archives, War Research Service Files (Entry 5A), Box 12. There, Merck explains to a military official the basic outline of the program in order to arrange for a deferment for a scientists working the weapons projects administered from the FSA:

There has been established in the Office of the Administrator of the Federal Security Agency, by verbal Presidential directive, a unit known as the War Research Service. All activities relating to the work of the War Research Service have been classified by the Secretary of War as SECRET. The work is largely research and is carried out in collaboration with a small selected group of highly specialized scientists in universities throughout the country working under Federal Security Agency contracts.

A further characteristic of the FSA's national security focus is evident in the extent to which the FSA's leadership joined the White House in promoting its elastic conception of "security" during the length of the war, and in subsequent years. The public message about the FSA from the White House and the agency's leadership was as ubiquitous as it was simple: "security" encompassed not only explicit war-related functions, but the agency's more conventional domestic and regulatory responsibilities, such as food safety, nutrition education, and public health activities not concerning the military.¹²⁷

Agency activities during the Truman Administration amply demonstrated the persistence of defense-related roles and responsibilities well after World War II. Inveigled both by domestic political concerns associated with the Cold War and the Korean War, Truman established an elaborate coterie of national security-related bureaucracies using statutory and executive authority. He set up a National Security Council and a National Security Resources Board. The latter also included a Federal Civil Defense office combining some of the functions now included in FEMA and the Office of State and Local Coordination within DHS.¹²⁸ Nonetheless, the FSA's explicit defense-related functions persisted. It played the preeminent role in health research and assessments relevant to outbreaks of communicable disease, germ warfare attacks, and preparedness of human military resources. Despite the fact that other agencies were also involved in civil defense efforts, the FSA's role was pronounced. FSA-led functions are mentioned 21 separate times in the National Security Resources board document describing agency missions critical to strengthening defense on the home front.¹²⁹ And both FSA Administrator Ewing along with President Truman continually framed the Administration's domestic welfare and regulatory agenda as an element of a broader security policy to disrupt the spread of ostensibly subversive ideas.¹³⁰

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The picture that emerges from this narrative is one of a President who greatly valued the power to reorganize the bureaus that performed administrative and regulatory functions. Given his earlier proposals to Congress and where he first deployed his newly-acquired reorganization authority, it seems FDR was especially concerned with those functions involving the White House, public health, social welfare, education, and temporary relief programs he had created earlier in the New Deal. What remains to address is: (a) precisely *why* Roosevelt believed he needed reorganization authority – which could be used to create a new agency – to accomplish his goals; (b) why the FSA

¹²⁷ See Memorandum from President Roosevelt to the Federal Security Administrator, U.S. Naval Communications Service (March 28, 1941)(with attachments), avail. at Franklin D. Roosevelt Library, President's Secretary's Files on the Federal Security Agency, Box 134 (connection between nutrition conference and national security).

¹²⁸ See U.S. GOVERNMENT MANUAL 1948 (1949); U.S. GOVERNMENT MANUAL 1950 (1951).

¹²⁹ See National Security Resources Board, *Materials for Use in NSRB Program Development: Preliminary Draft* (November 25, 1949), White House Confidential Files, National Security Resources Board (3 of 10), Box 27, Truman Presidential Library.

¹³⁰ See, e.g., President Harry S. Truman, 1949 State of the Union Address 6 (January 5, 1949)("Our domestic programs are the foundation of our foreign policy. The world today looks to us for leadership because we have so largely realized, within our borders, those benefits of democracy for which most of the peoples of the world are yearning.... Universal training is essential to the security of the United States.").

blended domestic administrative and regulatory functions with national security ones; and (c) what the merger actually seems to have accomplished. The answers will emerge in part by placing the FSA in the context of theoretical approaches to law and bureaucracy, and in part by closely scrutinizing the events that unfolded as Roosevelt's initial reorganization decision culminated some years later in a new cabinet-level super-department.

II: UPDATING THEORIES OF THE POLITICAL DESIGN OF LEGAL MANDATES

Observers from Max Weber to modern judges and political scientists have readily appreciated politicians' interest in delegating the execution of legal mandates to agencies. Nearly every one of government's legal responsibilities is implemented through such agencies. Bureaucratic structures seem inherent in the very essence of many of the state's legal responsibilities – such as distributing public benefits in accordance with statutory criteria or monitoring private sector behavior for compliance with statutory rules. The difficulties associated with closing military bases illustrate another rationale for delegation, as doing so allows politicians to achieve desired goals without bearing the full political cost of doing so themselves. It is also conceivable that politicians may leverage the capacity of agencies to amass expertise, and in the process, to solve complicated technical problems important to politicians' goals. These commonly accepted rationales for delegation have something in common. They recognize that a defining feature of the modern administrative state – in both the United States and most non-failed states – is the delegation of legal power to agencies by strategic politicians.¹³¹

In contrast to our relatively clear picture of why agencies exist at all, we have a much more blurry image of why they are structured as they are, why their structures or jurisdictions change over time, and what effect bureaucratic structure actually has on legal mandates. The uncertainty does not arise from a lack of potentially compelling explanations, but from questions about which of the conventional rationales proves particularly compelling in explaining the fate of a particular agency and its legal mandates. More fundamentally, one might question whether the existing approaches provide a sufficient explanation for all the important bureaucratic phenomena that merit investigation. This Part surveys those approaches, and provides a conceptual map for updating them to better explain the trajectory of the FSA and similar entities.

A. Building Blocks for a Theory of Law and Organization: Strategic Action, Divided Control, and Crisis.

Casual observers of organization theory might be forgiven for assuming that we already know much of what there is to know about how organizational structure affects the implementation of legal mandates. There is little doubt that scholars beginning in the latter half of the 20th century greatly clarified our understanding of organizations. We know, for example, that politicians may use the creation of an agency as a means of

¹³¹ See Kenneth McNeil, *Understanding Organizational Power: Building on the Weberian Legacy*, 23 ADMIN. SCI. Q. 65 (1978)(discussing the application of Weber's theories to understanding why agencies as a vehicle for implementing rules and standards). See *Dalton v. Specter*, 511 U.S. 462 (1994)(discussing the legislative structures developed to manage the closure of military bases).

satisfying a public demand for action on a particular issue,¹³² or that they may deliberately set up mechanisms designed to impede organizational effectiveness.¹³³ It's also clear from a substantial body of research in institutional sociology and social psychology that organizations may spontaneously develop internal routines and cultures that take on a life of their own, leading individuals and groups to interpret the law in accordance with certain patterns that may or may not correspond to prescriptive standards about those legal mandates. In more recent years, political scientists and scholars in law and economics have shed light on how bureaus may be understood to be part of a principal-agent dynamic, where politicians make decisions about how to structure organizations and what powers to give them in accordance with their expectations of how those powers will be used.¹³⁴ While all of these perspective reveal important features of what could be called the organizational logic of legal mandates, case studies of how organizations develop and how they carry out their legal mandates may shed light on crucial questions that remain.

To better understand some of the most prevalent approaches seeking to explain the impact of developments in bureaucratic structure on legal mandates, we might begin by asking how those approaches would explain a *change* in bureaucratic structure such as the one that created the FSA. Policymakers prefer to treat structural changes as a means of achieving prescriptive benefits (presidential statements associated with the creation of DHS, Energy, creation of the National Intelligence Director structure; implicit to some extent in judicial opinions justifying deference to “expert” agencies).

But policymakers' claims should be regarded with considerable skepticism. Many legal mandates prove far too ambiguous to discern *what* should count as prescriptive benefits across the board (consider, e.g., new Food Drug and Cosmetic Act enhancing the power of the FDA; Social Security Act and its technical complexities; authority for the PHS to fight infectious diseases). Moreover, history and theory give us considerable reason to question the prescriptive justifications policymakers give for changes in bureaucratic structure. President Bush, for example, pursued the creation of a vast homeland security bureaucracy despite the misgivings of many of his advisers who believed such a move could threaten bureaus' ability to undertake even security-related functions. The initial structure of the Defense Department served the interests of the military services at the expense of those of the larger public. And even when there is little political disagreement, the costs and benefits of reorganization are often highly uncertain and counter-intuitive.¹³⁵

¹³² See Mayhew, *supra* note 12, at ___.

¹³³ See generally Kagan, *Presidential Administration*, *supra* note 53, at ___; Cohen et al., *supra* note 24, at ___.

¹³⁴ Regarding organizational culture and routines, see CHARLES PERROW, *COMPLEX ORGANIZATIONS: A CRITICAL ESSAY* (1986); DIANE VAUGHAN, *THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA* (1996). For an insightful treatment of delegation dynamics, see DAVID EPSTEIN AND SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999).

¹³⁵ See Cohen et al., *supra* note 24, at ___ (discussing the ambiguous prescriptive benefits of reorganizations); Hult, *supra* note __, at ___ (discussing transition costs); Wilson, *supra* note __, at ___ (suggesting the futility or perversity of some reorganizations).

As an alternative, one prominent line of scholarship assumes that structural changes primarily involve symbolic position-taking benefits with no real effect on the implementation of legal mandates (James Q. Wilson's work is one example, and even discusses the creation of HEW itself – with no empirical support cited – as an example). This perspective proves especially attractive to those who would consider the development of the state – and of the law – to be most readily controlled by broad social forces. Hence, at one level, the contrast between the views of those who think organizational structure has a limited impact and those who think it is central comes down to a contrast between the sort of macro-level determinism associated with Marx and the focus on hierarchy and organizations reflected in Weber's canonical writings.¹³⁶ Even for those who consider the development of law and policy to arise in a more dynamic context, there may be reasons to question whether bureaucratic structure tends to prove more than window dressing in light of broad social forces or large-scale political trends. Neo-realism in international relations, for example, consistently questions the impact of internal bureaucratic politics, and by implication, of differences in bureaucratic structure.¹³⁷ Other scholars might agree that changes in agency structure are associated symbolic position-taking activities but emphasize that their impact is to create a dysfunctional agency,¹³⁸ and still others suggest that formal organization spreads along with ideas that become fashionable -- regardless of whether they advance political agendas or prescriptive goals.¹³⁹

There is plainly some overlap among these approaches – both in terms of how they are deployed as explanations and how they might be defined in principle. But each of these nonetheless reflects a somewhat distinct focus in explaining structure, and accordingly, each is often deployed as a sort of dominant organizing principle to interpret how developments in structure affect the implementation of legal mandates. Because the focus of this analysis is a detailed case study, it is the second, more fundamental question about existing explanations that is of greatest interest here. We can begin addressing it by evaluating the extent to which some of the dominant approaches give a convincing account of bureaucratic structure in a variety of contexts, and in particular, in the case of the evolution of the FSA.

What soon becomes clear is that the preceding approaches seem to explain some, but not all, facets of organizational structure. If there is a problem with assuming that changes in structure will generally enhance efficiency, there is also a problem with

¹³⁶ See, e.g., MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (1968)(discussing the formal rationality of the bureaucracy and the impact of bureaucratic structure on the organization of social life); ANTHONY GIDDENS, *CAPITALISM AND MODERN SOCIAL THEORY: AN ANALYSIS OF THE WRITINGS OF MARX, DURKHEIM, AND WEBER* (1971)(discussing Marx's deployment of economic determinism).

¹³⁷ See BARRY POSEN, *THE SOURCES OF MILITARY DOCTRINE: FRANCE, BRITAIN, AND GERMANY BETWEEN THE WORLD WARS* (1984)(discussing neo-realist approaches to developments in military and defense policy that minimize the importance of bureaucratic structure).

¹³⁸ See Moe, *supra* note 12, at ___. See also Barry R. Weingast, *Caught in the Middle: The President, Congress, and the Political-Bureaucratic System* in *THE EXECUTIVE BRANCH* 312 (Joel D. Aberbach and Mark A. Peterson, eds. 2005).

¹³⁹ See Strang and Meyer, *supra* note 12. Cf. Linda M. Lovata, *Behavioral Theories Relating to the Design of Information Systems*, 11 *MIS Q.* 147 (discussing behavioral, non-rational bases for the structure of bureaucratic mechanisms to manage information).

assuming that reorganizations are purely symbolic. Although institutional sociologists rightly caution that informal routines and cultures may occasionally dwarf the importance of formal lines of authority, other scholars have shown structural changes to matter in a variety of contexts. The creation of the Department of Homeland Security led to cuts in Coast Guard environmental activity. The Carter-era Energy Department, a creation rich with opportunities for the Administration to reap symbolic rewards, also centralized power over the strategic petroleum reserve and redistributed control over the national laboratory system. In short, while questions about the precise impact of structural changes remain to be addressed, it seems more sensible to assume that structural changes will have *some* effect than to assume they will have none (at least in the absence of context-specific information suggesting that the structural changes are entirely a sham).¹⁴⁰

Similar problems beset the proposition that changes in bureaucratic structure tend to be motivated by the goal of, and to inexorably lead to, dysfunctional organization. Some changes in bureaucratic structure not plainly dysfunctional, such as the creation of the Joint Staff or the Federal Reserve Board. It is not clear why Roosevelt Administration would *want* some of the agencies and programs for which it had fought so hard – including Social Security, the FDA, plus legacy New Deal agencies such as the National Youth Administration or the Civilian Conservation Corps) to be “dysfunctional.” Even defining what counts as “dysfunctional” is beset by conceptual difficulties similar to those associated with defining “success” in the implementation of legal mandates.¹⁴¹

Finally, there is a problem with explaining structure primarily through the spread of ideas that become popular among the public or policymaking elites and are adopted without conflict. This perspective may explain why dysfunctional states in African nations have science ministries when they have essentially no science going on, but it does not account for the intense strategic activity and political conflict surrounding structural questions in many advanced industrialized nations. The creation of the FSA, for example, was part of a long-term struggle over whether health, welfare, and security responsibilities would be concentrated in a single, powerful agency. It strains both theory and historical analysis to assume all of this reflected the diffusion of ideas, nor can that rationale fully account for the striking differences that persist in bureaucratic structure across nation states.¹⁴²

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Centrality of Strategic Action. Eager new lawmakers from politically-polarized districts, seasoned Senate committee chairmen secure in their reelection, recently-confirmed agency commissioners, White House advisors, and lawyers representing organized interests often differ in what they want from government. Their very ideas about ultimate goals may be confused or uncertain. But in the contested arena of the regulatory state, what these actors have in common is an impulse toward strategic action.

¹⁴⁰ See AMY ZEGART, *FLAWED BY DESIGN* (1999)(discussing the JCS); G.L. Bach, *The Machinery and Politics of Monetary Policy*, 8 J. FIN. 169 (1953) (discussing the relative political consensus surrounding the Federal Reserve); Hult, *supra* note __; Moe, *supra* note __.

¹⁴¹ See Zegart, *supra* note __;

¹⁴² Compare Strang and Meyer, *supra* note 12, with Wilson, *supra* note __.

It is all but impossible to make sense of organizations without assigning a central role to the strategies political actors use to pursue their goals. Too much is riding on who supervises an organization, what officials make ultimate judgments of fact and value, whose legal advice is considered authoritative, and why controls purse strings to assume that choices about organizational structure only occasionally or intermittently provoke strategic behavior.

As used here, the reference to strategic behavior simply suggests that legislators, executive branch officials, and organized interests seek to achieve concrete goals through changes in structure. Precisely *what* those goals may vary to a considerable degree. Some participants, such as legislators imposing procedural requirements on administrative agencies, may be interested simply in improving their ability to monitor what bureaucratic organizations do. The NRA's interest in the responsibilities of agents at the Bureau of Alcohol, Tobacco, and Firearms may stem from their keen sense that a bureau whose budget is held constant while shouldering additional responsibilities may be less able to carry out regulatory activities. Regardless of their content, however, the challenge of achieving their goals may encourage participants in the bargaining over bureaucratic structure to act in ways that are at odds with their public pronouncements.¹⁴³

Scholarly observers and legal practitioners commonly recognize that statutes and regulations are shaped by strategic action. But why would bureaucratic *structure* – in effect, the rules governing where in the U.S. Government Manual certain bureaus appear and what officials are listed as being in charge of them – be subject to strategic activity? After all, it is not difficult to think of examples where organizational realities fail to conform to bureaucratic structure. Despite the fact that former FBI Director J. Edgar Hoover was a nominally a subordinate of the Attorney General, he stopped behaving like one soon after becoming Director. Conversely, nominally independent agencies such as the Federal Reserve Board and the National Labor Relations Board may be subject to political influence through appointments and appropriations. With these examples in mind, some observers may be skeptical about the importance of bureaucratic structure. They might even deploy a simple political “Coase Theorem,” implying that bureaucratic changes are unlikely to have much importance, perhaps only reflecting pre-existing distributions of political power. In effect, they would suggest that – perhaps other things being equal – formal bureaucratic structures do not matter much in a world where organized interests, legislators, and politicians have some mix of interests and powers to direct what public organizations actually do. This conclusion might be bolstered by a particularly expansive reading of the work on institutional sociology and social psychology emphasizing the limits of formal structure in reshaping norms, routines, and informal networks that arise within organizations.¹⁴⁴

¹⁴³ See Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N.KY. L. REV. 705 (2002) (discussing the NRA's role in controlling the ATF).

¹⁴⁴ On Hoover and the FBI, see ATHAN G. THEOHARIS, *THE FBI AND AMERICAN DEMOCRACY: A BRIEF CRITICAL HISTORY* (2004). Regarding the “political” Coase theorem, see D. Acemoglu, *Why Not a Political Coase Theorem?* 31 J. COMP. ECON. 620 (2003). With respect the expansive readings of institutional sociology and social psychology, see Philip Selznick, *An Approach to a Theory of Bureaucracy*, 8 AM. SOC. REV. 47 (1943); MARK GRANOVETTER, *INEQUALITY AND LABOR PROCESSES* (1987). With respect to political influence on the Federal Reserve, see KELLY H. CHANG, *APPOINTING*

Yet formal bureaucratic structure is the legal backdrop against which the policymaking game is played. Though formal structure rarely tells the whole story of organizational power over legal mandates, most participants in the drama of governance proceed on the assumption that hiring decisions, policy priorities, budget requests, office assignments, and future career advancement all depend to some extent on formal lines of bureaucratic authority. Politicians and interest groups engage in bitter fights over whether an agency should be a commission or a typical administrative agency, whether a position should be subject to Senate confirmation, or whether – for example – the U.S. Biological Survey should be an independent bureau of the Interior Department or a subsidiary office of the U.S. Geological Survey. The recurrence and intensity of these fights suggest something other than mass delusion about the importance of bureaucratic structure. Moreover, existing work in political economy and sociology suggest that structure can have effects by conditioning residual decisionmaking rights and shaping expectations (both internal and external) regarding accountability. Even the territory of modern administrative law suggests that structure is likely to matter, because it determines who decides how to interpret an ambiguous legal mandate. In effect, arguing that lines of organizational jurisdiction are entirely inconsequential is likely to be as difficult as arguing that lines of geographic jurisdiction are inconsequential. The relevance of bureaucratic structure is also supported by theories grounded in sociology, political science, economics, and psychology. Broadly speaking, institutional sociology, political economy, and social psychology approaches all suggest that formal lines of authority, jurisdictional limits, and formal hierarchical arrangements should be expected to change how legal mandates are carried out. The effects may not be salutary, intended, or obvious. Nonetheless, from an intellectual perspective, it is a radical position indeed to suggest that formal organizational structure should routinely have no effect on how legal mandates are carried out.¹⁴⁵

Politicians have repeatedly treated structure as particularly important in the context of health, education, and security. Major legislative fights occurred in connection with Roosevelt's reorganization plans, over Truman's efforts to elevate the agency to cabinet status eventually, earlier fights (documented in Skocpol) over whether to create a federal health department. Moreover, while there is next to no scholarship specifically on the FSA or even on the development of the Department of Health, Education, and Welfare (see below), what little is known suggests that the FSA's existence was eventful, and perhaps even momentous. Between the late 1930s and the early 1950s – when the Department of Health, Education, and Welfare became a fixture of the president's cabinet – the FSA's bureaus matured. The FDA and the Social Security Administration radically expanded their budgets.¹⁴⁶ The National Institutes of Health effectively began their

CENTRAL BANKERS (2003). Political control of the NLRB is analyzed in Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094 (1985).

¹⁴⁵ See Lewis, *supra* note __, at __ (discussing the fight over the U.S. Biological Survey and chronicling other conflicts over bureaucratic structure).

¹⁴⁶ Compare BUDGET OF THE UNITED STATES (1935) with BUDGET OF THE UNITED STATES (1950). See also MARTHA DERTHICK, POLICYMAKING FOR SOCIAL SECURITY __ (1979)(discussing the growth in social security expenditures during this period); JANICE GILBERT DEE, THE UNITED STATES FOOD AND DRUG ADMINISTRATION – PURPOSE, HISTORY, AND FUNCTION (1982)(chronicling the agency's growth in the decades after World War II).

modern existence as the premier funder of federal intramural medical research.¹⁴⁷ And the public heard countless times from high-level presidential appointees how intimately connected the federal government's health and welfare functions were to the overall success of the American national security effort.¹⁴⁸

Divided Control and Prescriptive Ambiguity. If strategic action is a recurring feature of the process shaping bureaucratic jurisdiction over legal mandates, then divided control is nearly always its corollary. Even dictators rarely have an entirely free hand in shaping their bureaucracies. Despite the fact that FDR himself was often accused of seeking dictatorial powers through reorganization by political elites, the reorganization powers he sought in 1938 would have been exercised in the shadow of legislative control (this was even more true with the powers he obtained under the 1939 reorganization bill, which were subject to a one house congressional veto). It is now widely understood that lawmakers share power over bureaucracies with the executive through their control of substantive statutory mandates, budgets, oversight activity, and procedural requirements. Indeed, presidents pursue reorganization in part to bolster their interests in the midst of lawmakers' efforts to assert their own power.¹⁴⁹

But the reality of divided control is important beyond the confines of legislative-presidential interaction. With so much at stake in decisions about organizational structure, bureaucratic officials and organized interests often support fragmented control, with one agency controlling initial regulatory decisions and another commanding enforcement. Hence, the Department of Health and Human Services – the principal descendant of the FSA – decides on chemical exposure limits for workers, while the Labor Department's Occupational Safety and Health Administration (OSHA) enforces those provisions.¹⁵⁰ Even when political pressures do not explicitly favor divided control, fragmentation of legal responsibilities becomes commonplace given pre-existing bureaucratic divisions and the enormous complexity associated with some legal mandates. Thus, anti-money laundering policy is best understood not as a federal function designed to achieve a coherent goal, but as a mix of statutory decisions controlled by prosecutors, rulemaking choices governed primarily by regulators, and

¹⁴⁷ See Swain, *supra* note __.

¹⁴⁸ See Oscar R. Ewing, *Conservation – In Terms of Our Human Resources*, Presented at Utica Sesquicentennial, Utica, New York (July 3, 1948), Papers of Oscar R. Ewing, Federal Security Agency, Speeches and Articles, 1948-1949 (Speech – Conservation in Terms of Human Resources), Box 38, at 23:

Today, in terms of military and productive strength, we are the greatest nation on earth.... We are strong. Yes. But we must maintain our vigor. And above all we must conserve both our natural and our *human* resources. For in the last analysis it is from the land and the people that a national derives its real strength.

See also Polenberg, *War and Society*, *supra* note __, at __ (discussing the fate of the Farm Security Administration).

¹⁴⁹ See Wilson, *supra* note __ (discussing how presidents might pursue reorganization in order to bolster their power against Congress). See also *infra* Part III.b.; Lewis, *supra* note __, at 70-88 (discussing why presidents would want to use structural changes to undo congressionally-imposed constraints on presidential control).

¹⁵⁰ See U.S. GOV'T MANUAL __ (2007)(describing the work of the Agency for Toxic Substances and Disease Registry, and the division of labor between OSHA and HHS on chemical exposure limits for workers).

investigative decisions mostly in the hands of criminal investigators. Because it is such a common feature of the allocation of bureaucratic authority, divided control is both a contributor to pressures for change in structure – as presidents and organized interests maneuver for advantage – as well as a constraint on how those changes are implemented.¹⁵¹

It is not impossible to anticipate how bureaucratic structure will affect the success of legal mandates. But given the breadth of many such mandates, along with the political divisions about what counts as “success,” it becomes extremely difficult to connect particular structures to some defensible concept of “success.” The difficulties are complicated by the gaps in our knowledge of bureaucracy. Together these factors should make one skeptical of bald assertions, such as those frequently made by FDR, about the capacity of reorganization to promote “efficiency” in the strict sense of the term. One must recall that there is considerable uncertainty about the extent to which particular types of bureaucratic structures will contribute to “effectiveness” in achieving consensus goals associated with the implementation of legal mandates. (2) Even when a probability exists that a particular structural change – such as centralization of functions – will have a given impact, key audiences (such as members of the mass public) may not appreciate the extent to which desired effects are contingent on complex factors such as the nature of congressional organization. Given the pervasive reality of divided control of bureaucracies, there are strong reasons to question the conventional prescriptive case for reorganization; some costs to organizational changes; potential complexities associated with the impact of organization on different legal activities an agency might have to perform (e.g., adjudication of benefits applications versus regulation of an economically powerful industry).¹⁵²

B. Theoretical Refinements: Capacity-Building, Coalition Expansion, and Endogenous Crisis.

Although the history of the FSA and other structural changes seems to confirm the importance of some of the preceding dynamics, it may also provide an opportunity to develop some refinements on the approach described above. Such refinements may be especially helpful in addressing the persistent puzzles about the FSA’s creation.

Capacity-Building. Just as politicians may sometimes reap rewards by appearing to address a problem while creating an agency that will fail to do so, in other cases their goals could give them a great state in the ability of a bureaucracy to carry out complicated tasks. Whether those tasks actually fulfill a President’s publicly-asserted

¹⁵¹ See Cohen, Cuéllar, and Weingast, *supra* note __, at __ (discussing divided control of occupational safety policy); Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOL. 311 (2003)(discussing the consequences of the fragmentation of control in the anti-criminal finance system among prosecutors, regulators, and investigators).

¹⁵² As noted earlier, legal mandates are often too ambiguous and subject to contested interpretations to yield a consensus idea about what counts as “effectiveness” from a prescriptive perspective. Disagreement about goals thus makes it difficult to fix (conceptually) what it means for an agency to be structured in a prescriptively effective manner. Even when there is relative political consensus about underlying goals, we have limited existing knowledge of how changes in bureaucratic structure actually affects the implementation of legal mandates.

goals is not the primary issue. The point is to recognize that politicians may have a good deal riding on building bureaucratic capacity. For example, Dutch politicians recognize how their fortunes are tied to the success of the nation's levee system, and have every reason to bolster the capacity of that bureaucracy to perform effectively.¹⁵³

Most statutory mandates are naturally subject to more controversy. The Public Health Service's forays into rural health inspired as much support among poor farmers as they did scorn among private doctors associations, who saw such moves as the first step of a campaign to nationalize health insurance. The Food, Drug, and Cosmetic Act continues to this day to mean one thing to government regulators and another to pharmaceutical companies. But even – and indeed, perhaps especially – when there is an absence of political consensus, presidents or their aides may seek additional resources to enlarge the layer of superiors overseeing an agency's functions, so these can be better controlled or (in some cases) protected from political attacks.¹⁵⁴

If a president persuades Congress to create a new layer of executive branch officials above the bureaus that carry out the government's work and the president can fill those ranks with loyal officials, he can better control how agencies carry out their functions. He can cement emerging political coalitions by ensuring that agencies carry out their missions in a favorable manner. He can use the new layer of appointees to blunt the influence of legislators and organized interests seeking to assert control over agencies. He could align existing bureaus – such as the Public Health Service, which was a minor office of the Treasury Department – under new superiors who will devote more time and energy to using the bureau's resources and building a distinctive organizational culture, thereby facilitating the development of statutory proposals or policy initiatives advancing presidential goals.

These opportunities do not guarantee that executive branch officials would want bureaus to work as effectively as possible (recall that even defining effectiveness beyond extreme cases like the levees in Holland soon becomes taxing). Moreover, building up agencies with new bureaus, leaders, and resources is not without risk. The experience of FEMA in handling Katrina indicates, the creation of a new super-agency such as DHS can be associated with major setbacks in performance; and bureaus such as the National Parks Service can use new resources to bolster their independence from politicians. Despite these risks, some politicians may have good reason to enlarge bureaucratic capacity while protecting agencies from legal changes that would set them up for failure. Faced with opponents who would rather keep bureaucracies weak and difficult to monitor, proponents of bureaucratic capacity should be especially inclined to take advantage of windows of opportunity for political change that emerge during (actual or imagined) crises.¹⁵⁵

¹⁵³ See, e.g., Nicholas Pinter, *One Step Forward, Two Steps Back on U.S. Floodplains*, 308 SCI. 207 (2005) (discussing the consensus supporting the Dutch levee system and its oversight structure). Cf. Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*.

¹⁵⁴ See Polenberg, *supra* note __, at __; KAREN HULT, *GOVERNING THE WHITE HOUSE: FROM HOOVER THROUGH LBJ* (1995).

¹⁵⁵ See *infra* note __ (discussing econometric studies of the allocation of grant funds during the Roosevelt Administration. See also Cohen, Cuéllar, and Weingast (on FEMA, Katrina, and the importance of crises); Daniel Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*,

Coalition Expansion. Why did the Roosevelt Administration entrust so many defense-related functions to the FSA? The answer may depend on whether changes in bureaucratic structure have the capacity to alter the public's responses to political appeals. The loading up of FSA with defense functions may also shed light on how *politicians* such as Roosevelt, Carter, and George W. Bush use agency reorganizations affect the distribution of power among policymakers, thereby reshaping the implementation of legal mandates.

Most work on bureaucratic structure has little to say about the reactions of the mass public – except perhaps to note that politicians can gain some political credit by making structural changes to soothe pre-existing public demands. Yet the position-taking opportunities associated with bureaucratic structure at least show that bureaucratic matters can occasionally break through the public's inattention barrier. Because questions of structure may register with voters, we might ask whether changes in agency jurisdiction can nudge the public's demand for particular policies rather than merely following those demands. Consider: if a grant program for funding youth education and community centers is run by the Justice Department rather than the Department of Housing and Urban Development, how might public perceptions about those grant programs change? Presumably, the answer depends on the underlying mechanisms through which individuals form opinions, and on the extent to which associating community grants with crime control can evoke more favorable associations among politically-relevant constituencies. The possibility of such an effect, however, is enough to suggest that politicians could use organizational structure, like legal doctrine, to carry on a conversation with the public and elites about the essential nature of particular government programs. Such a process could implicate several building blocks just mentioned, especially position-taking, expertise, and forging political coalitions. This makes it important to answer the question of whether it's possible for the politics of structure to have an "epistemic" dimension relevant to conflict over the merits of particular legal and policy functions, alongside the more conventionally acknowledged policy control dimension.¹⁵⁶

In contrast to situations where politicians support reorganization in response to preexisting public demands (as with Nixon's creation of the EPA, Carter's design of an Energy Department, or George W. Bush's campaign to forge DHS), an alternative strategy would deploy reorganization to foment public demand for a particular statutory mandate. *First*, the reorganization itself could deliver a means of generating media attention, which is one reason why organizational changes are also useful to politicians who want to assuage a concern already present among the public. By the same token, politicians can use the attention to focus concern on a new issue that advances their political agenda. *Second*, some proportion of voters may become more supportive of statutory mandates if politicians supply a new version of what political scientists describe

90 AM. POL. SCI. REV. 283 (1996).(discussing how new layers of bureaucracy blunt the impact of legislative strategies to control the bureaucracy); DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY (2002)(discussing techniques bureaucracies use to foment relative political independence).

¹⁵⁶ On state-building, see STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982); Skocpol, *supra* note __. For a discussion of the psychological and political mechanism through which organizations could shape public perceptions about the nature of a government program, see *infra* Part V.b.

as a “policy metaphor”: a narrative to organize the relationship between widely-shared concerns and policy prescriptions. Not everyone is amenable to new policy metaphors. Some (indeed, perhaps most) may expend considerable cognitive effort to resist such appeals. But just a few people taking another look at energy law as a component of environmental policy (for example), or food safety as a component of national security, may tip the scales in favor of more aggressive regulatory expansion. *Third*, policy elites favoring one agency mission but not another may have a harder time deciding whether to withhold support for an entire agency when doing so may also restrict the functions they value – a point developed in more detail below.¹⁵⁷

Executive branch officials might achieve an additional benefit by mixing functions in a new bureaucracy. By modifying the bundles of adjudication, expenditures, investigation, and legislative activity undertaken by bureaucracies, executive officials could fashion a new relationship between bureaucracies and more conventionally rational -- but skeptical -- political elites such as lawmakers. The key idea is that weaving national security functions into the fabric of a domestic agency change the political game for legislators who would have preferred to cut administrative and regulatory programs. Once mixing has occurred, the lawmakers’ choice is beset by two new complications: the possibility that by cutting domestic programs the legislators are genuinely hobbling defense (which may run counter to their own political goals), and the risk that even if such adverse effects never materialized, some members of the mass public might now ironically punish the legislators for cutting defense-related programs. In short: creating bureaucracies could involve *more* than just passively exploiting a crisis such as impending or actual war. The very act of creating the bureaucracy can help reshape how the public understands the role of government, the scope of a crisis, and the nature of the “security” that the resolution of the crisis would presumably entail.¹⁵⁸

Endogenous Crisis. While agency architecture can drive the law’s implementation, stark economic crises, natural disasters, or national security emergencies can in turn shape agency architecture. But what does “crisis” actually mean? Upon closer inspection, there may be more to crisis than the simple idea of an unexpected, exogenous shock.

If crisis can be the handmaiden of legal change, we should also expect certain factors to drive lawmakers or executive branch officials’ capacity to argue about the presence of a crisis. Undoubtedly some of what seems like a crisis in retrospect reflects an exogenous shock, such as an unexpected, sharp upswing in the number of Haitian asylum seekers requesting entrance to the United States, an economic recession, or a terrorist attack. As a variation on this theme, rapidly crumbling political fortunes faced

¹⁵⁷ See Charles O. Jones and Randall Strahan, *The Effect of Energy Politics on Congressional and Executive Organization*, 10 LEG. STUD. Q. 151 (1985)(discussing the creation of the Energy Department); Wilson, *supra* note __, at __ (discussing Nixon’s creation of EPA); Cohen, Cuéllar, and Weingast, *supra* note __ (discussing DHS); Mark Schlesinger and Richard Lau, *The Meaning and Measure of Policy Metaphors*, 94 AM. POL. SCI. REV. 611 (2000)(discussing policy metaphors); Peter Burnell and Andrew Reeve, *Persuasion as a Political Concept*, 14 BRIT. J. POLI. SCI. 393 (1984) (discussing how attitude change occurs as the result of new information or symbolic imagery).

¹⁵⁸ Cf. Michael Ting, *A Theory of Jurisdictional Assignments in Bureaucracies*, 46 AM. J. POLI. SCI. 364 (2002) (discussing how politicians face difficulties when they consider restricting funding for an agency that performs *both* functions that they value and those that they don’t value as much).

by a coalition or an individual political actor can also spur action because of further expected deterioration that could occur in the absence of some response. Nixon's firing of Archibald Cox and other Justice Department officials may be an example.¹⁵⁹ Separately from the underlying shock itself, officials in a presidential administration, lawmakers, and other political actors can use their agenda-setting power to coax public attention toward the conclusion that a crisis is underway. Senator Kefauver's hearings on the dangers of thalidomide and drug safety in the early 1960s are an example: even though the FDA had in fact blocked the drug from being sold in the United States, the Senator leveraged public concern over the episode to create a crisis atmosphere contributing to statutory expansion of the FDA's power.¹⁶⁰ Finally, a position taken by actors external to the political branches, such as organized interests, can contribute to the public perception that there is a crisis (particularly if it is unexpected).¹⁶¹ Think of Supreme Court opinions taking a position on the quality of evidence about global warming,¹⁶² oil companies unexpectedly acknowledging the existence of global warming, or individuals from a party historically opposed to immigration reform. By the same token, public officials' desire to pursue politically-costly legal changes – such as the creation of new bureaucracies or even the use of controversial interrogation techniques – could play a role in fostering public perceptions that the country faces a particularly difficult period.¹⁶³ The more public officials are willing to shoulder costs of a particular legal change or policy course, the public can infer, the greater the magnitude of a crisis they can observe better than the public. Each of the foregoing choices could help political actors foster an impression that a crisis is afoot. Yet these actors often face a devilish trade-off between facilitating desired policy change by fostering a perception of crisis and paying the political costs associated with being viewed as not effectively or appropriately managing that crisis.¹⁶⁴

These dynamics should underscore the difficulty of deciding on what counts as a genuine crisis in prescriptive terms. To a considerable degree, the contemporaneous or even historical perception that a crisis has occurred probably emerges endogenously from political choices made by presidents, executive branch officials, lawmakers, courts, and organized interests. By contrast, the prescriptive analysis of what counts as a crisis depends on a combination of close scrutiny to a specific temporal and policy context – the number of lives affected after a natural disaster, or the extent of exposure to toxic contaminants after an industrial accident – along with a sense of the goals of the evaluation. Because such evaluations are difficult in a world of limited information and

¹⁵⁹ See generally RICHARD REEVES, *PRESIDENT NIXON: ALONE IN THE WHITE HOUSE* (2001). The “Saturday Night Massacre” firings were not specifically a change in agency structure, but rather an effort to use a preexisting structure and to test the limits of the President's ability to control that structure.

¹⁶⁰ See Cohen et al., *supra* note __, at __ (discussing the thalidomide hearings).

¹⁶¹ Cf. James D. Fearon, *Signaling Versus the Balance of Power and Interests: An Empirical Test of a Crisis Bargaining Model*, 38 J. CONFLICT RES. 236 (1994).

¹⁶² See *Mass. v. EPA*, 127 S.Ct. 1438 (2007).

¹⁶³ Cf. Fearon, *supra* note __; James D. Morrow, *How Could Trade Affect Conflict*, 26 J. PEACE RES. 481 (1999).

¹⁶⁴ This trade-off describes Franklin Roosevelt's situation in the years immediately before the entry of the United States into World War II, particularly as he navigated a period of transition from insisting that American forces would not participate in the European war to underscoring the dangers of that war to the interests of the United States.

voters with cognitive constraints, one should expect considerable room for politicians to play up the crisis theme in pursuit of achieving the desired legal architecture for agencies charged with governing.

Shaping Law by Altering Organizational Evolution. Most of the theory presented so far develops the idea that external conditions affect organizations implementing the law. The FSA and its bureaus depend on external support. External constraints can interfere with agency plans, whether they involve new regulations expanding food safety inspections or secret biological weapons programs. Nor is the FSA unique in this regard: no account of the law's implementation works without considerable attention to the external context.

But if agencies are a product of their environment, so too are they occasionally capable of shaping that environment to some extent. Agency officials can facilitate or impede the adoption of legislation reshaping the organization's architecture, as when Congress sought to cut off nuclear security functions from the rest of the Department of Energy in the mid-1990s.¹⁶⁵ Civil servants can lay the groundwork for subsequent statutory changes, in some cases even using limited legal authority autonomously to pursue goals later mandated by statute. FDA employees are a case in point, having articulated and accepted innovative legal arguments to pursue efficacy testing of drugs before it was required by statute.¹⁶⁶ These examples merely illustrate how external pressures on agencies can coexist with, and in some cases are even premised on attempting to control, the autonomous agendas of agency staff.

So what happens when the possibility of autonomy and the reality of external pressure intersect? Across the constellation of interests within and around an agency, it remains possible that some players would be all too aware of an agency's potential capacity to acquire a greater measure of autonomy over time, as it builds an external constituency of support or acquires an ever-stronger reputation for technical competence. After all, not all agencies are in the same position to protect themselves from external interference, and the Federal Reserve Board (sitting firmly at the more-autonomous end of the spectrum) acquired its relatively more independent status gradually – thereby becoming harder to challenge over time.¹⁶⁷

If lawmakers, executive branch officials, and organized interests recognize that budgets and formal organizational constraints could affect agency behavior in the present, they could also recognize that an agency's capacity for autonomy over time depends on a host of factors that could be controlled in the near-term. Potentially important but subtle variables contributing to autonomy over time, such as the cohesion of an agency's internal culture, may depend on factors that can be controlled by external actors in the near-term, such as where in the larger scheme of government an agency is located (e.g., whether a parent cabinet agency supports a bureau's overall mission or views it as peripheral), what an agency's capacity is to generate technical knowledge (thereby affecting whether the organization can use a reputation for scientific or technical

¹⁶⁵ See Lewis, *supra* note __, at 107.

¹⁶⁶ See Carpenter, *Forging of Bureaucratic Autonomy*, *supra* note __.

¹⁶⁷ See generally BERNARD SHULL, *THE FOURTH BRANCH: THE FEDERAL RESERVE'S UNLIKELY RISE TO POWER AND INFLUENCE* (2005).

competence to bolster autonomy), and whether it is overseen in its early phases of development by political officials sympathetic to the agency's likely trajectory as it gains independence. Accordingly, we might examine the history of the FSA to see if the structural moves that created it could have contributed to changes in the relative autonomy of its bureaus over time.

III: APPLYING THE THEORY

That federal authority could be a double-edged word was nowhere more clearly illustrated than in the evacuation of Japanese-Americans from the West Coast, a process facilitated by a number of New Deal welfare agencies... The ease with which relief programs could serve the cause of relocation suggested that such a massive and efficient movement of people would have been immeasurably more difficult before the advent of the social service state.¹⁶⁸

On April 26, 1939, readers of the nation's paper of daily record awoke to the following headline: "President Decrees Three Big Offices in Centralizing 21 – A Warning to Dictators – Democracies Need Not Always Be Weak, He Says, But Must Keep Tools Up To Date."¹⁶⁹ Under the Reorganization Act of 1939, readers learned, a new Federal Security Agency would be born along with two smaller agencies, as long as no House of Congress approved a resolution disfavoring the plan. While the immediate consequences of this move were clear enough to readers of the nation's newspapers that morning, the previous Part suggested that our theoretical tools to explain why and how politicians decide on whether to create agencies such as the FSA are incomplete. In particular, such theories should more thoroughly address how structural changes allow politicians to simultaneously assert greater control over agencies, build their capacity, and reshape how the political elites and the mass public understand a bureaucracy's mission.

This Part provides support for those theoretical refinements. Its focus is on demonstrating how presidents can control the bureaucracy by *building* bureaucratic capacity, and how they can enlarge support for regulatory and administrative activities by engineering bureaucracies to reshape public views and to bolster legislative coalitions. Its payoff is not only in better understanding what happened with the FSA, but in elucidating how political actors more generally shape legal mandates through organizational choices that parallel and interact with their decisions about how to interpret statutes and legal doctrines.

A. Augmenting Capacity for Presidential Control.

i. Motivations: More Control, and More to Control.

It is helpful to begin by reviewing what the White House had at stake with the bureaus that were folded into the FSA. Unlike most other presidents then or since, Roosevelt had previously served in a senior position within the executive bureaucracy. He arrived into that bureaucracy via a position as Assistant Secretary of the Navy in the Old War, State, and Navy Building, where he sat behind the same massive mahogany

¹⁶⁸ RICHARD POLENBERG, *WAR AND SOCIETY: THE UNITED STATES 1941-1945* 83 (1972).

¹⁶⁹ Felix Belair, Jr., *President Degrees Three Big Offices in Centralizing 21*, N.Y. TIMES 1, APRIL 26, 1939.

desk his cousin Theodore Roosevelt had occupied in the same position decades earlier.¹⁷⁰ he began learning firsthand of the political techniques lawmakers used to control bureaus.¹⁷¹ He decried the formal legal independence of bureaus within the Navy Department, which allowed bureau chiefs to bypass the Navy Department and even the president in their dealings with Congress.¹⁷² For an astute young Assistant Secretary, these constraints naturally led him to acquire a measure of human capital optimized for the task of strengthening a measure of control – even in a legally-restrictive environment - - over bureaus whose performance could so heavily impact his political future.¹⁷³

Against the backdrop of these experiences, it should have been only too clear to Franklin Roosevelt the President two decades later how much the political context gave the White House a cluster of overlapping reasons to be concerned about the bureaucracy in general, and particularly about the fate of key regulatory and administrative bureaus with major new or politically important responsibilities (e.g., FDA, PHS, SSB, Education). *First*, Roosevelt’s insistence on reorganization authority, and his almost immediate use of that authority once he obtained it, reflects the challenges he faced in dealing with the increasing political controversy associated with the New Deal. Perhaps largely as a result of the President’s own determination to wring maximal policymaking advantage from his 1936 electoral victory, the Administration’s allies in Congress had dwindled by 1938.¹⁷⁴ The Republicans gained 80 seats in the legislature that year.¹⁷⁵ It was not inconceivable that the growing ranks of New Deal opponents would seek to block presidential efforts to carry out the new legal mandates for which he’d secured approval by trying to assert legislative control over the bureaucracies. Opponents could impose administrative burdens on bureaus, seek subtle but significant technical changes in the underlying legislation that would limit the scope of regulatory powers, or restrict budgets funding agency operations.¹⁷⁶ Indeed, an increasingly threatening political environment should have led the White House to desire more political control of bureaus in the short-term even if it eventually wanted those entities to become impervious to political manipulation by less-sympathetic politicians.¹⁷⁷ In effect, the White House

¹⁷⁰ See JEAN EDWARD SMITH, *FDR* __ (2007).

¹⁷¹ See *id.*, at __.

¹⁷² See *id.* (Roosevelt complaining over independence of sub-departmental bureaus within the Navy).

¹⁷³ See *id.* (Roosevelt saying he had the “run of the place,” and most of the time there wasn’t “any law” to stop him).

¹⁷⁴ Some secular decline in political support is possible, but decision to shed marginal members and reorient the Democratic Party towards the Northeast and activist government probably more important. See generally Polenberg, *supra* note __, at 183-184; McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. L. ECON. & ORG. 180 (1999).

¹⁷⁵ See Polenberg, *supra* note __, at 184.

¹⁷⁶ See Sundquist, *supra* note __ (on the growing political power of opponents to the New Deal).

¹⁷⁷ The existing literature on “policy insulation” seems to ignore the possibility that politicians’ desire to create ultimate, long-term autonomy in bureaus might lead them to desire *more*, not *less* control in the short-term to create the conditions increasing the probability of bureau autonomy in the longer-run (among others, these would likely include a constituency of public supporters, a more favorable portfolio of missions, actual or perceived technical competence, and a preferred position in the inter-agency process). Because short-term control could actually strengthen longer-term autonomy, politicians would face a host of interesting strategic problems in seeking to calibrate the timing of control. In a democratic system involving a measure of uncertainty over *who* would wield control in the long run, policymakers might ideally seek to secure enough control to shape the architecture of public programs in the long-term, without

would find itself in a stronger position to make use of scarce agency resources to serve a range of political goals (including, perhaps, growing the political autonomy of prized programs) if it secured greater control over the bureaus in the short-term, and realigned agency responsibilities to facilitate the bureaus' growth in the longer-term. Whatever concerns Roosevelt or his staff had about how subsequent presidents might use greater authority over the bureaus would have been mitigated somewhat by the fact that nearly 50% of the President's second term remained in which to exercise control. And even well before World War II, the notoriously optimistic Roosevelt had copiously ruled out running for a third term.¹⁷⁸

The White House's rocky time expanding Social Security illustrates the stakes. Social Security only expanded to cover farm-related employment by 1950.¹⁷⁹ But before then, its advocates sustained a number of defeats in trying to move towards expansion. Even the Social Security Board sometimes rejected opportunities for expansion. Early on, supporters of Social Security were among those who were cautious. Some urged that the focus be on private wage-earning employment to simplify administrative burdens on the agency at the time when it would be most vulnerable. The role of the Social Security Board illustrates the stakes for Roosevelt in trying to assert greater control over the bureaucratic structures associated with his programs. At the same time, the link between bureaucratic capacity to supervise program administration and further expansion suggests that the President could have had incentives to expand resources that could be made available to the Social Security Board by subsuming it into a larger agency that could draw on the budgets and capacities of other agencies (and indeed, the Labor Department-related functions transferred into the FSA were in fact placed at the disposal of the social security bureau).¹⁸⁰

With tighter control over administrative bureaus, the White House could also steer growing stream of federal grants in a manner that could simultaneously fulfill their statutory purposes while cementing the new Democratic coalition. Three of the bureaus administering some of the largest national grant programs at the time – the Social Security Board, the Public Health Service, and the Office of Education – were among those moved to the FSA. By the second half of the 1930s, the federal government had increasing resources and legal authority to provide grant funds to states and localities. Just four years before the FSA's creation, significant legislative changes further opened the spigot of federal grant money that would eventually be housed within the new super-agency. States received a growing amount of funds for public assistance, child and material health, unemployment compensation, child welfare, and (through the Public Health Service) the provision of medical services in underserved areas. Although the grants came with strings requiring the development of merit systems for staffing the new programs, the statutory enactments left the Administration a measure of flexibility for directing *where* the funds were spent. Indeed, some historians have suggested that the Roosevelt Administration sought to direct funding to states that were politically

allowing the residual amount of control they secure to be used by subsequent politicians desirous of re-engineering the federal bureaucracy.

¹⁷⁸ See Leuchtenburg (possibility of a third term).

¹⁷⁹ See Derthick, *supra* note __.

¹⁸⁰ See *supra* notes __ (discussing the evolution of the social security system).

supportive. But with grant funds and bureaucracies expanding, the Administration may have had a particular interest in increasing its capacity to monitor how grants were being administered and where funds were going. In addition, temporary relief entities such as the National Youth Administration were folded into the new agency. The President insisted through his advisers that “he desires all projects of this Adm. [National Youth Administration] to be presented to him for approval...”¹⁸¹

Second, the often complex new mandates for which the Administration had secured approval required growth in the bureaucracy. The National Labor Relations Act, the Food Drug and Cosmetic Act, and the Social Security Act were not capable of carrying out their own functions without an army of lawyers, clerks, supervisors, and analysts. As the bureaucracy grew, the President’s own capacity to supervise and control how that bureaucracy carried out the mandates remained limited.¹⁸²

Third, even before the outbreak of the war, the White House sought to carry out certain projects in relative secrecy. The strong existing relationships – even back then – between legislators and certain established departments such as War and Navy made this more difficult than it might be at a new, sub-cabinet agency with fewer existing links to Congress and a leaner bureaucratic structure.

Fourth, there is likely something to an account occasionally developed in the political science literature, suggesting that the President’s connection to a national constituency makes him somewhat more interested in the extent to which the bureaucracy can achieve relatively widely-held political goals. One should expect legislators to have a comparatively lesser interest in “efficiency” (as one might refer to the capacity of the bureaucracy to achieve widely-held political goals) because only rarely are individual legislators sufficiently identified with government performance to make it worth their while to sacrifice jurisdiction-specific gains in exchange for benefits at the national level. Hence, veterans’ opposition to the creation of a Department of Welfare should be expected to sway a legislator in a district with a large concentration of veterans and no countervailing political pressures, even if the performance of the federal government as a whole would be enhanced by the move. Presidents, in contrast, face no such “common pool” problems.¹⁸³

ii. Adding a Layer of Political Staff.

¹⁸¹ See internal White House Memo (VMB – Federal Security Agency, Administrator, SEE 444-D)(August 11, 1939), avail. at Roosevelt Presidential Library, Official File 3700 (Federal Security Agency)(1939 Folder)(Roosevelt explicitly requests control of some relief grant funds). See also Miles, *supra* note 13, at 15 (discussing the range of grant programs transferred to the FSA and the requirement for the state-level merit systems that contributed to the unraveling of patronage-based control of administrative activity). For analyses of the political rationales affecting the allocation of grant funds, see Gavin Wright, *The Political Economy of New Deal Spending: An Econometric Analysis*, 56 REV. ECON. & STAT. 30 (1974); John Joseph Wallis, *Employment, Politics, and Economic Recovery During the Great Depression*, 69 REV. ECON. & STAT. 516 (1987).

¹⁸² See CHARLES O. JACKSON, *FOOD AND DRUG LEGISLATION IN THE NEW DEAL* (1970); Dean, *supra* note

¹⁸³ See Cohen, Cuéllar, and Weingast, *supra* note __, at __ (discussing common pool problems); Zegart, *supra* note __ (discussing presidential incentives for enhanced functioning of bureaucratic activities likely to be valued by national political constituencies).

As it forged the new FSA, the White House sought to achieve its objectives precisely along the lines of what the theory developed above would imply. The creation of the FSA established a new layer of political appointees loyal to the President, a large general counsel's office relative to its previous scope (mentioned below), and a capacity to develop and advocate for legislative proposals that could cut across different agency functions at a time when the White House staff – even after the White House-related changes in reorganization – was tiny. All of these changes made it easier for the President to monitor policy developments, control how legal authority was deployed in the present, and control how proposals for future statutory and regulatory changes were developed.

The most immediate consequence of the FSA's creation was plain from comparing the U.S. Government Manual of 1940 or 1941 to that of 1938 or 1939. The reorganization yielded for the White House the bounty of a new staff to monitor the activities of a bundle of government bureaus. A job description for one of the junior analysts in what became Paul McNutt's office at FSA headquarters gives an inkling of what these appointees might accomplish:

[R]esponsibilities primarily along the following lines: (1) Maintaining current knowledge of all policies, programs, and procedures involved in the work of the United States Public Health Service, the Food and Drug Administration, the health and Medical Committee of the Office of Defense health and Welfare Services, and all other Governmental organizations whose activities bear upon health problems. (2) With respect to the Public Health Service this involves an understanding of various projects and programs and the objectives of such operations particularly in their non-technical aspects; with respect to the Food and Drug Administration this involves an acquaintanceship with the meaning and intent of various standards and policies, procedures with respect to legal actions, and the relation of specific cases to other work in the Food and Drug Administration...¹⁸⁴

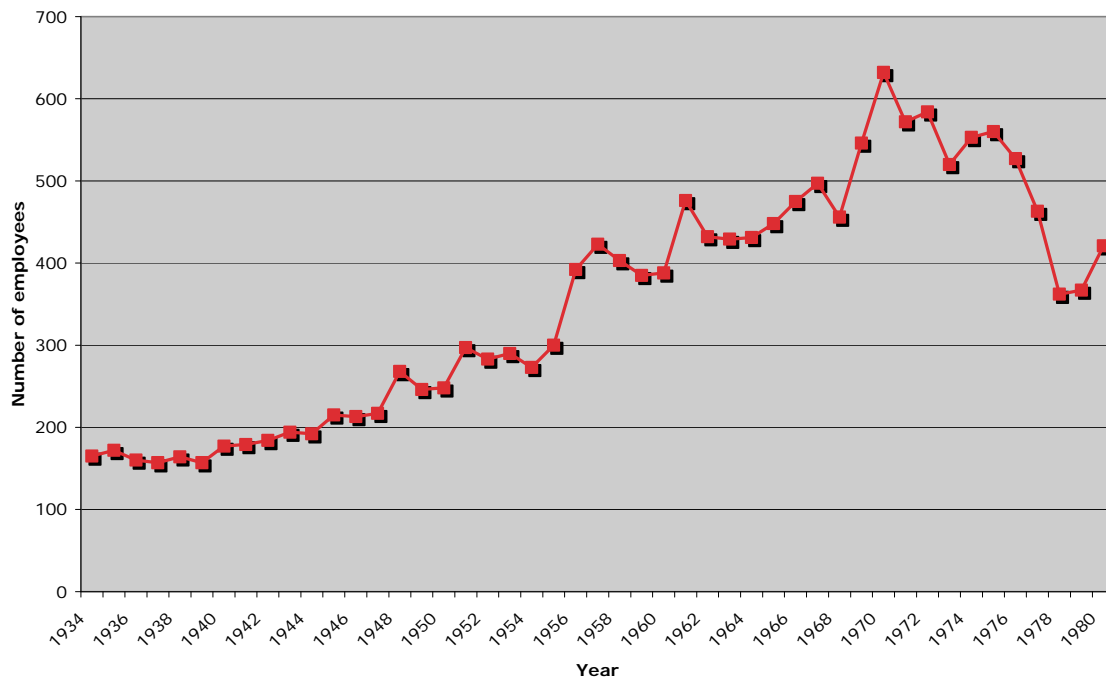
Such officials augmented what was, by 20th century standards, a tiny White House staff. It also expanded on what even quite loyal staff at existing executive departments could accomplish in overseeing the bureaucracy. The challenge of departmental staff management was all the more acute if the department's (and the political staff's) reputation depended more heavily on performing core functions unrelated to those of the soon-to-be-transferred bureau. Thus, beyond the fact that the FSA added generally loyal supervisory staff, the Treasury political appointees' concern about the PHS was unlikely to ever approximate that of the FSA's appointees. Nor was the President shy in using that new layer of staff for developing policy proposals that leveraged both the administrative expertise and perceived competence of the FSA, as when Truman asked FSA Administrator Oscar Ewing to use the agency to promote national health insurance. Ewing responded with an FSA-prepared report purporting to draw on the experience of the agency's full complement of bureaus to urge adoption of national health insurance legislation.¹⁸⁵

¹⁸⁴ Federal Security Agency, Employment Position Classification Sheet (c. 1943), avail. at National Archives, War Research Service Files (Entry 5A), Box 12.

¹⁸⁵ Cf. Polenberg, *supra* note __, at __ (pointing out how doctors resisting the movement of the PHS because they thought it would receive greater oversight in a Department of Welfare). Regarding Ewing and national health insurance, see Quadango, *supra* note __, at 30.

Because the White House staff was small and other mechanisms of bureaucratic control (including partisan patronage politics) were fraying, the White House sought to add a layer of political staff that facilitated the White House's monitoring and control of bureaus placed within the FSA. In effect, the creation of the FSA allowed the President to move agencies such as the FDA and Social Security Board, changing their structure to make them more amenable to oversight.

White House Employees 1934-1980



[Sources: See White House Staff Source Data file]

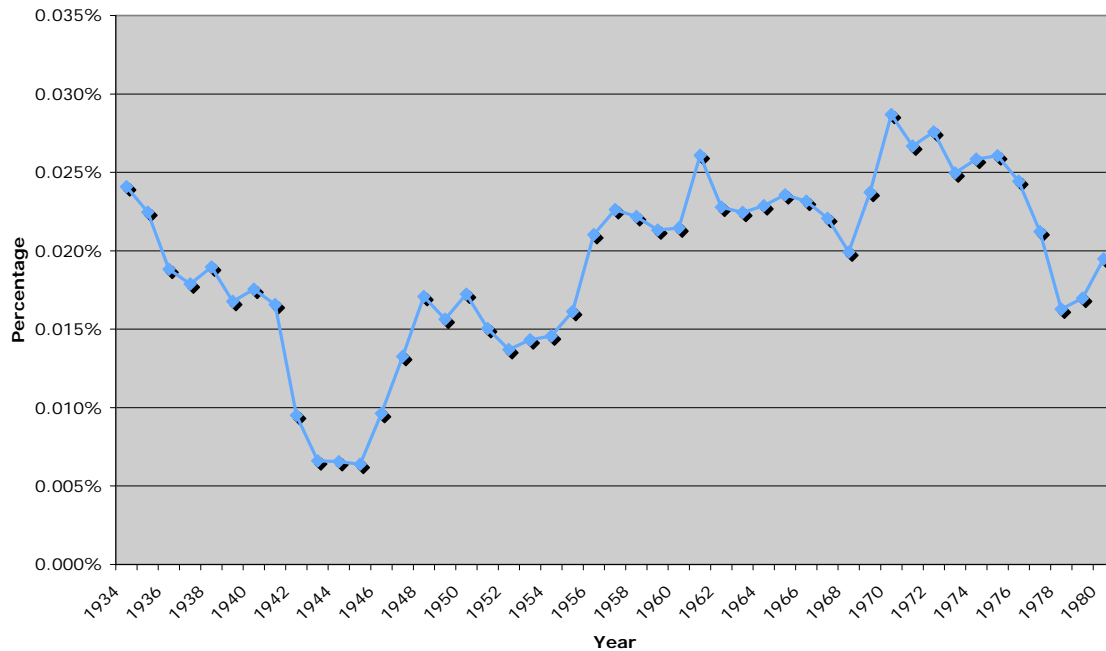
As the figure indicates, the White House staff was tiny compared to what it would be a few decades later. Meanwhile, the executive branch was expanding. Some of this expansion was among the military, but a substantial chunk of it was occurring among the ranks of civilian executive branch workers. In this environment, the creation of the FSA added a layer of political and administrative appointees to oversee the bureaus; the Social Security Board was an independent agency that lost its independence under the plan and didn't regain it again until the mid-1990s. Because the goal of monitoring and controlling government functions depends in part on such staff, the White House sought to increase the size of that staff beginning in the late 1930s. But it also sought substitutes for that staff in the form of new layers of political appointees to oversee existing bureaus, and in the form of initiatives limiting the formal legal independence of independent commissions such as the Social Security Board.¹⁸⁶

Along with the Social Security Board, all the bureaus within the FSA would now report to the Administrator and his senior staff. The agency head, moreover, would be

¹⁸⁶ See KAREN M. HULT, *GOVERNING THE WHITE HOUSE* (2000). See also MATTHEW J. DICKINSON, *BITTER HARVEST: FDR, PRESIDENTIAL POWER, AND THE GROWTH OF THE PRESIDENTIAL BRANCH* (1997).

vested with the legal authority to undertake all the agency's functions. Even with respect to the bureaus that were not previously independent as a matter of law, the officials associated with the new FSA structure represented a net increase in the number of staff available to monitor bureaus (compared to the status quo), with the significance of the staff accentuated by the fact that it would be dedicated to monitoring certain bureaus, such as the PHS, that had previously received relatively meager attention in their original bureaucratic homes.¹⁸⁷

Percentage of Executive Branch Employees Working at the White House 1934-1980



[Sources: See White House Source Data File]

The difficulties associated with White House monitoring and control of the executive bureaucracy can be further appreciated by examining the percentage of federal executive branch employees working at the White House. As early as 1934, that ratio was falling, and could be anticipated to fall even further. Even if Roosevelt succeeded in gradually expanding the purview of the White House to include new detailees and the Bureau of the Budget, the task of overseeing bureaucratic activity was becoming ever more challenging for the White House. If legislators would continue restraining growth in White House staff, the White House could respond by changing the oversight structure directly responsible for the bureaus – both by increasing the number of politically-loyal overseers as well as by reallocating legal authority over bureaucratic responsibilities and vesting it more clearly in higher-level officials.

The consequences of the FSA's new position, allowing it to better monitor its bureaus, were not lost on participants at the time. The President had tremendous interest

¹⁸⁷ See Organizational Chart 1952, *supra* note ____.

in “trying to find some method by which he and future Presidents would be relieved of a certain amount of paper work and a certain amount of personal conferences...” and believed this had been “...in great part accomplished through the Reorganization,” and in particular through the creation of the Federal Security Agency.¹⁸⁸ Along with this goal the President’s staff sought a “reduction in [the] number of independent agencies,” such as the Social Security Board, that had been designed by Congress to limit presidential control.¹⁸⁹ While public administration intellectuals such as Louis Brownlow insisted on crediting reorganization for nearly every American wartime success, internal White House documents belie the Administration’s insistence that reorganization was meant to advance widely-held social goals rather than presidential power.¹⁹⁰ Lest there be any doubt about the White House’s *actual* goal of using efficiency to benefit the President, an internal White House memorandum setting forth the guiding principles for using the President’s coveted reorganization powers provides further insight:

[A]s a guide to the timing of steps in reorganization the following is suggested: First, do those things which when done will *reduce the difficulties of the President in dealing with his multifarious duties and which will assist him in discharging his responsibilities as the chief administrator of the government.* Second, *do those things which when done will advantage the work of those administrative aids [sic] who have been chosen by the President to assist him in the discharge of his duties... whose responsibility to the people is through the President.* (These two purposes may be accomplished by (1) reduction of the number of independent agencies reporting directly to the President, and (2) better organization of the managerial arms of the President – budget, planning and personnel agencies). Third, *do those things which when done will advantage heads of departments in the discharge of their own responsibilities.* (This can be accomplished by bringing together scattered agencies dealing with the same functions so that the heads of departments may better plan and coordinate their work).¹⁹¹

¹⁸⁸ See Internal White House Memo (VMB – Federal Security Agency, Administrator, SEE 444-D)(August 11, 1939), avail. at Franklin D. Roosevelt Library, Official File 3700 (Federal Security Agency)(1939 Folder)

¹⁸⁹ See White House Memo on Administrative Organization: General Recommendations (1939), avail. at Franklin D. Roosevelt Presidential Library, Papers of John Winant, Box 157.

¹⁹⁰ An article published in 1944 provides one of several examples of Brownlow’s continuing campaign to promote the wisdom of the reorganization with which he was so intimately involved:

In our own country the administrative success has been the greatest of all... There were the indignant protests of those who believed that if this were not changed, or if that were not done, or if t’other [sic] were not stopped, the war was lost. Military men saw too much civilian interference, civilians too much military control. Industrialists feared the coddling of labor; labor feared the coddling of industry; farmers feared they were being neglected; and everybody else had his fears, too. Experts in every specialty wrung their hands as they saw their particular prescriptions seemingly tampered with by amateurs. Nobody was satisfied. Yet, despite all this (maybe because of all this), the success was achieved.

Louis Brownlow, *Reconversion of the Federal Administrative Machinery From War to Peace*, 4 PUB. ADMIN. REV. 101 (1941). Brownlow also argued that the reorganization plan that led to the creation of the FSA would make it easier to “reconvert” federal activities to peacetime challenges after the war.

¹⁹¹ Internal White House Memorandum on Reorganization (April 16, 1939), avail. at Roosevelt Presidential Library, President’s Committee on Administrative Management, Correspondence and Papers, Reorganization (1939), Box 24 (Folder on Reorganization Plan 1) (emphasis added).

Roosevelt the Assistant Secretary of the Navy could have written a similar brief decades earlier, and indeed did at the time write similarly exalting the notion of executive accountability functioning through cabinet (and sub-cabinet officials) reporting to the president.¹⁹²

The nature of these goals as they map onto the competition *between* branches becomes even clearer in the next passage of the analysis, which is styled as a “historical note”:

During the era of legislative encroachment on executive prerogative the President’s assistants (cabinet officers et al.) have had *direct* access to Congressional committees denied to the President and often have unwittingly aided in the process of undermining Executive authority by making parochial trades with special interest committees in the Congress. A thorough reorganization will give the Congress the benefit of the considered and rounded knowledge and opinion of the whole Executive Branch rather than, as has been so often the case, the specialized opinion of a particular part of the administrative corps. It is an interesting fact that few federal administrators have spoken to the members of the President’s Committee on Administrative Management in terms of the *interest* of the President or the presidency or the Administration – but nearly always in terms of the immediate and particular interest of a department or a bureau as if it were satrapy.¹⁹³

The analysis proved to be more than theory. It was, in fact, precisely the view articulated by subsequent FSA officials explaining their role in overseeing the agency’s coterie of bureaus. Paying no regard to the complexities associated with statutory grants of authority to *subordinate* officials, Oscar Ewing was particularly explicit about his perceived duty to the White House when testifying before the House Select Committee on Lobbying Activities in 1950:

The department head must be regarded as an extension of the President’s personality. He is expected to carry out any basic instructions which a President may provide for his guidance... Furthermore, a department head is expected to provide a certain political point of view to departmental operations. He must be more than a mere channel of communication between the department and the President for vital matters on which the latter must make a decision. The department head should bring a political attitude to all departmental affairs. Such a political attitude is not to be defined in terms of a narrow partisanship... Rather, a political attitude reflects prevailing beliefs on broad public issues, beliefs about the scope and magnitude of Government activities, about both the ends and means of government action.¹⁹⁴

With the President’s new political appointees more tightly controlling the FSA’s bureaus, they assisted the White House in monitoring regulatory developments at the agencies, giving political speeches about the FSA’s work across the country, and developing new policy and legislative proposals that often, in turn, led to increased

¹⁹² See Smith, *supra* note __ (quoting the Assistant Secretary of the Navy seeking reforms to make bureau chiefs more directly responsible to the central Department of the Navy bureaucracy).

¹⁹³ *Id.*

¹⁹⁴ Bureau of National Affairs, Official Verbatim Transcript of Statement, Oscar Ewing, Before Select Committee on Lobbying Activities, U.S. House of Representatives (Friday, July 28, 1950), Papers of Oscar R. Ewing, Federal Security Agency Subject File (General Correspondence)(Comptroller General’s European Trip – Folder 1), Box 29, Truman Presidential Library.

budgets.¹⁹⁵ Given the extent to which the reorganization changed the White House's capacity to control bureaus, it is surprising that some observers believe presidential control of the bureaucracy is a relatively recent development. Elena Kagan's magisterial account of presidential administration is an example. Although Kagan acknowledges the significance of some battles over reorganization, such as the conflict over Roosevelt's 1938 reorganization plan, she still describes the trajectory of presidential control by emphasizing the innovations of the Clinton Administration. These techniques, including taking credit for rulemaking and using the White House staff to monitor bureaucratic developments, surely enhanced presidential control at a time when the White House confronted a politically-empowered and Republican-controlled Congress. But presidential administration at the end of the 20th century was in fact foreshadowed by the uses and consequences of organizational structure in the 1940s and 1950s.¹⁹⁶

iii. Changing the Organizational Environment Affecting Presidential Goals.

New organizational structures altered the context of decisionmakers wielding statutory authority. Even when the White House could not directly monitor what bureaus were doing, the work of bureaus might be shaped by placing these in organizational environments more amenable to the missions that the Administration supported. Recall that the AMA explicitly *wanted* the Public Health Service to remain at Treasury at one point; the bureaus were in agencies that made their work almost certainly peripheral (PHS in Treasury, Education in Interior). The Agriculture Secretary eventually made a half-hearted effort to keep the FDA in his department in 1940. When the former Bureau of Chemistry was nonetheless transferred to the new health and security agency, the bureau's employees faced a new political equation. Agricultural interests lacked the same close relationship they had enjoyed with the Agriculture Department's leadership.¹⁹⁷

The importance of shifting the organizational context was not lost on the White House. Facing daunting practical constraints when seeking policy results from government bureaus, Administration officials understood themselves to be changing the agencies' political environment as a means of bolstering policy goals. Return to the internal White House analyses of Reorganization Plan 1. Although they a brief reference to the rhetoric about "democracy" found in public statements, the analyses quickly defines a very particular version of democracy emphasizing the importance of presidential control, the goal of strengthening functions considered critical by the White House, and – in particular – the value of changing the existing relationship between bureaus, interest groups and Congress.¹⁹⁸ Even if changes at the top of the hierarchy did not guarantee policies more aligned with the President's goals, at a minimum these provided an opportunity that could be exploited to scramble and complicate existing

¹⁹⁵ See Bureau of the Budget Staff, *supra* note __, at __. See also Internal White House Memo, Other Reorganization Proposals (circa April 1939), avail. at Franklin D. Roosevelt Presidential Library, President's Committee on Administrative Management, Correspondence and Papers, Reorganization (1939), Box 24 (folder on interdepartmental transfers)(indicating the President's decision to have some agencies transferred after the FSA's first year of operations).

¹⁹⁶ See Kagan, *supra* note __, at __.

¹⁹⁷ See Polenberg, *supra* note __, at __; Jackson, *supra* note __, at __; and Dean, *supra* note __, at __.

¹⁹⁸ See Internal White House Memorandum on Reorganization, *supra* note __.

relationships between external organized interests, bureaus, and their legislative overseers.

iv. Using a Board Mandate as Cover for Sensitive Projects.

The creation of a new agency with a broad mandate for “security” allowed the president to take advantage of bureaucratic resources at his disposal for sensitive projects that commanded the President’s attention and would have been more difficult to control or hide within established bureaucracies subjected to significant monitoring from interest group and Congress. For instance, the biological weapons research activity conducted by the FSA was by its nature politically-sensitive, was paid for with White House funds, and placing it in the FSA was later described in a memo to the president as being justified because of the need for “political cover.”¹⁹⁹ As former War Research Service Director George Merck himself explained in a speech just a few years after the war:

In the fall of 1941, opinion in the United States regarding the value of Biological Warfare was by no means united. But common prudence dictated to those responsible for the nation’s defense that they give serious consideration to the dangers of possible attack.... Starting as a project under the most extreme secrecy, the work was undertaken under the wing (and cloak) of the Federal Security Agency). Emerging from this “cover” (but not from secrecy) the Army, with the Navy collaborating, took over. Unique facilities were built by the Chemical Warfare Service and by the Navy for experimentation on pathogenic agents...²⁰⁰

Neither these divisions in opinion nor the fact that the U.S. government had signed a treaty against biological weapons stopped the White House from fomenting such research, however. In the years that the War Research Service operated from the bowels of the FSA, the White House managed to funnel millions of dollars into secret – and highly controversial – biological and chemical weapons research. Eventually, once the work of the War Research Service had matured, political appointees at the War Department and the FSA agreed to recommend that the President transfer many of its functions to the War Department. The joint memo moving many WRS functions to the War Department written in 1944 admits not only that the FSA was doing both offensive and defensive weapons research, but that these functions were initially placed at FSA for “political cover” (the extent of Nazi atrocities in the interim period may have made it less politically important for the President to seek political cover by the end of 1944 for these secret activities. Conversely, by then the organizational and research capacity of the War Department had expanded substantially, making it potentially less important to keep these functions at the new FSA bureaucracy.²⁰¹

Nonetheless, the FSA continued to engage in biological and chemical weapons research even after the transfer of the WRS to the War Department. And by the war’s end, Merck proudly proclaimed that he considered the WRS’ chief accomplishment to have been:

The development of methods and facilities for the mass production of pathogenic microorganisms and their products: First, the microorganisms selected for exhaustive

¹⁹⁹ See *supra* note ___ and accompanying text (describing the responsibilities of the War Research Service).

²⁰⁰ George W. Merck, Speech on the Implications of Biological Warfare 3-4 (May 17, 1946), avail. at National Archives, War Research Service Files (Entry 5A), Box 12.

²⁰¹ See *supra* note ___ (discussing relevant treaty commitments).

investigation were made as virulent as possible, produced in specially developed culture media under optimum conditions for growth... In this work it was necessary to determine how well various organisms of high disease-producing power could retain their virulence, and how long they would remain alive under different conditions of storage.²⁰²

Nor were the sensitive political functions of the FSA confined to the national defense sphere. Correspondence and newspaper articles suggest Paul McNutt had almost unquenchable presidential aspirations at the time that Roosevelt put him in charge of the largest of the new agencies he created using his reorganization authority. McNutt's biography uncannily foreshadows that of another ambitious heartland governor who attained the White House a half-century later: William Jefferson Clinton. Like the Arkansan, McNutt grew up in a heartland state and attended an ivy-league law school, began his career as a law professor, and continued it as a governor. Also like Clinton, McNutt's gift of effortless articulation and record as a moderate Democratic governor soon earned him a national following – and a few committed enemies eager to sabotage their presidential ambitions.²⁰³

Even before McNutt left for his Philippines post in 1937, it appears that “he was thinking of the Presidency in 1940.”²⁰⁴ By the summer of 1939, some columnists were suggesting that there were “just two genuine, gilt-edged candidates for the Democratic Presidential nomination in 1940 – President Roosevelt and his newly appointed Federal Security Administrator.”²⁰⁵ Yet the new agency gave the President a major new slot to deploy – large enough to entice his potential rival for the nomination while requiring sufficient close collaboration and subjecting the new FSA Administrator to enough supervision that it would allow the President to minimize McNutt's ability to act independently. The point was not lost on some observers in the press:

Despite his disclaimers, President Roosevelt cannot put a stop to the reading of political significance into the surprising appointment of Paul V. McNutt to head the new Federal Security Agency... In most quarters, the feeling is growing that McNutt, no matter how canny he may have been in the past, was neatly taken in by the White House. He is, to veteran interpreters, right behind the eight ball. Outside the official circle, he could campaign freely, walking a tightrope if necessary, criticizing unpopular New Deal policies and Presidential actions... It will be hard for him to come out next year with convincing statements that he did not approve of things which happened while he was in Mr. Roosevelt's good graces. If the President wants to deflate the McNutt boom, the appointment was a brilliant stroke. Coordinating the far-flung social ventures of the Federal government will be a man-sized job, with plenty of chances for error and bungling... Of course, there still is the change the White House wants to look him over at close range, with a view to making him the crown prince or the President's running mate on a third-term ticket. But the gamble seems exceedingly risky to individuals who

²⁰² See George W. Merck, Speech on the Implications of Biological Warfare 3-4 (May 17, 1946), avail. at National Archives, War Research Service Files (Entry 5A), Box 12.

²⁰³ See Blake, *supra* note __, at xi-xii (brief biographical sketch of McNutt); *id.* at 227-292 (discussing the efforts of McNutt's enemies, most notably Postmaster General Farley, to derail McNutt's chances for the presidential or vice presidential nomination).

²⁰⁴ See *id.* at 173.

²⁰⁵ See Daniel Kidney, Indianapolis Times, July 15, 1939.

have kept a constant watch on the political machinations of the Chief Executive and the palace critique. The consensus is that McNutt's ambition overreached itself.²⁰⁶

Such risks could hardly have escaped McNutt. But the former governor was nonetheless inveigled by the challenge of running the new super-department, and encouraged to accept it by his friend, General Douglas MacArthur.²⁰⁷

If the FSA proved useful in carrying out secret weapons development projects and co-opting the ambition of a potential rival, why would a president not have been able to achieve these goals *without* creating the FSA? Although the White House also supported military research at the War and Navy Departments, it anticipated some of the challenges presidents have faced repeatedly in the decades since: that the military is both difficult to control and capable of severely damaging policies that prove controversial among the armed services.²⁰⁸ Biological weapons research was controversial in the military. In contrast, the White House could benefit by creating an agency with a range of functions in order to provide a measure of cover facilitating certain defense-related work. While the agency was trumpeting its relevance to national security, it was not publicly announcing its role in offensive biological weapons research, allowing civilian scientists and the universities where they worked relative anonymity. New bureaucratic offices – not characterized by close relationships to existing legislative committees -- to administer programs secretly by expending White House funds. Finally, perhaps the President could even benefit from having an additional high-level position to bestow on an ambitious individual such as McNutt, harnessing his ambition to the fate of the new agency and possibly transforming a potential political rival into a supporter without having to reshuffle his existing cabinet.

v. Why Congress Allowed Greater Presidential Control When it Had Fought White House Growth.

Why did congressional majorities in 1939 allow Roosevelt to undertake a reorganization that enhanced his power when they had denied him such powers before (e.g., in 1938 and before)? Recall that the Reorganization Act of 1939 was a *compromise* saddled with a two-house veto a coterie of limits on presidential power over nearly any independent commission.²⁰⁹ Perhaps one the median legislator believed would yield somewhat less authority than the President actually exploited. Even supporters of the President had initially balked at giving FDR all the powers he'd first sought in the 1938 reorganization bill, in part because critical organized interests – including veterans, and

²⁰⁶ See L.A. TIMES, *supra* note ____.

²⁰⁷ See Blake, *supra* note __, at 230. Despite the aforementioned risks, from McNutt's perspective, the FSA post may nonetheless have appeared as a fine perch from which to mount a presidential campaign if Roosevelt chose not to run. If the President did choose to pursue a third term, McNutt seemed to think that the FSA would be a suitable vehicle for his work while furnishing him a chance to compete for the Vice Presidency.

²⁰⁸ Cf. David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477(2008)(discussing the challenges inherent in civilian control of the military; or in the military's opposition to certain initiatives).

²⁰⁹ See *infra* notes __ (discussing the changes in reorganization legislative proposals between 1938 and 1939).

doctors working through the American Medical Association – strenuously objected to some aspects of the bill.²¹⁰

In contrast, the new reorganization bill included sunset provisions, statutory limits on what reorganizations could be proposed, provisions for a two-house congressional veto, and reporting requirements facilitating legislative policing of reorganization plans.²¹¹ The President was supposed to be limited to reorganizations that were justifiable on financial grounds, but he made something of a mockery of that statutory requirement. The final reorganization bill also preserved pre-existing legislative compromises protecting independent commissions by exempting many of them from reorganization.²¹²

Finally, some members of the legislative coalition supporting reorganization authority were almost concerned about the fate of certain administrative or regulatory programs, and may have been quite happy to have the President gain some authority to more effectively shield these from subsequent legislative encroachment. This last category of legislators, in particular, may have been reacting to new information revealed in the 1938 elections, where the New Deal Coalition was further eroded by the arrival of 80 congressional Republicans. With the New Deal majority eroding, legislators who might have preferred to expansive regulation but legislative control may have opted for vesting greater power in the President and hoping that such power could be used to create the bureaucratic structures that would protect the agencies from subsequent encroachment by a more hostile Congress.²¹³

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To summarize: a key dimension of the FSA's trajectory involves the President's strategy in the time leading up to World War II to use its creation as a vehicle for asserting greater political control over bureaucratic functions. Although this goal was repeatedly camouflaged amidst discussions of strengthening national security and promoting efficiency through reorganization, the control-related aspects of the reorganization were not lost on Congress or the press. Though it is understandable that newspaper accounts of the FSA's creation would emphasize presidential control as much as anodyne efficiency goals, it is worth recognizing that such efforts to enhance White House control do not necessarily culminate in an emaciated agency with little power to resist external political interference. On the contrary: in the FSA's case the shorter-term policy goals pursued by the Roosevelt (and subsequently, the Truman) Administration also coincided with the strategies that would enhance the agency's policymaking capacity – and even a measure of bureaucratic autonomy – in subsequent years.

While this account emphasizes the ways in which structural changes could further presidential control and objectives through the building of presidential capacity, it is not meant to suggest that the White House was devoid of congressional allies in this process. In at least a limited sense, legislative majorities ratified President's initial choices by conferring on him a limited authority to reorganize the government, and by not vetoing

²¹⁰ *See id.*

²¹¹ *See id.*

²¹² *See id.*

²¹³ *See* Polenberg, *supra* note __, at __; *see also* Sundquist, *supra* note __, at __.

his initial changes. But even at the risk of unduly minimizing the legislature's crucial role, the building of bureaucratic capacity here still seems best understood as a vehicle for enhancing presidential control. The President had the preeminent role in forging the legislative coalition supporting reorganization and tracing – literally in his own hand – the path of different bundles of legal responsibility across the government's elaborate pre-existing jurisdictional lines. The capacities engineered within the bureaucracy, including the capability to undertake sensitive projects using White House funds and the cadre of legal and political superiors foisted on bureaus, seem especially suited to serve presidential needs.²¹⁴

Some might still insist on examining the FSA's history through a theoretical lens focused on congressional power. In that account, congressional majorities would be seen to achieve their goal of protecting domestic agencies at a time when war was growing increasingly likely and Roosevelt's political fortunes were declining. Even so, that story is one where the legislative majority sought to achieve goals by strengthening presidential power, and where the end result was not a contribution to maintaining the status quo but the setting in motion of a process that further grew the resources available to the FSA's bureaus as well as their underlying legal powers.²¹⁵

C. Enhancing Political Coalitions.

Another implication of the FSA's creation emerges if we focus not only on how its creation affected the internal workings of the executive branch, but on how it affected the external relationships of the Administration. It may not seem remarkable to observe that the FSA's creation allowed the Administration to engage in an epistemic process of "framing" policy priorities by emphasizing their role in achieving the widely-desired goal of "security." While it is common for political and legal observers to talk about the impact of reframing, the term has multiple meanings. In addition, it is not obvious how or why reframing can change the political prospects for the implementation of a certain law. Framing effects involving perceptions of utility associated with gains and losses have been extensively analyzed in the context of individual decisionmaking.²¹⁶

As will become apparent, the Roosevelt Administration's determination to identify the FSA with the concept of security involves a different type of framing. One advantage of considering that "framing" process in a specific context is that it becomes possible to make more fine-grained observations of *how* the reorganization could have had an epistemic, or "framing," effect on politics. In particular, developments regarding

²¹⁴ See Bureau of the Budget Staff, *supra* note __; Internal Reorganization Memo, *supra* note __.

²¹⁵ Given these details, the burden should be on those emphasizing congressional dominance or shared responsibility to further document the extent to which the legislature anticipated and stage-managed a process that seems now, even upon close inspection, to have been centrally forged by a White House that sought and gained sufficient legislative support for its own goals. For an interesting discussion emphasizing the centrality of the legislative role, see Barry R. Weingast, *Bureaucracy Discretion or Congressional Control? Regulatory Policy-Making by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

²¹⁶ See WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* (1986)(discussing the effect of introducing a new dimension in a political battle). A legion of articles discuss framing effects in the cognitive, prospect theory sense. The seminal work is Daniel Kahneman and Amos Tversky, *Prospect Theory: An Analysis of Decisions Under Risk*, 47 *ECONOMETRICA* 313 (1979).

the FSA suggest the importance of two specific mechanisms – identified earlier in our discussion of refining existing theories – through which the blurring of the security concept could enhance the FSA’s prospects: one involves shaping the perceptions of the mass public about the meaning of security, and another involves the separate enlargement of legislative coalitions supporting agency functions by ambiguating the extent to which a vote for the FSA also constitutes a vote for national security or war-related efforts.

Both of these strategies depend heavily on demonstrating to legislators, organized interests, and the public at large that the legal mandates the FSA was implementing were inextricably connected to national defense and the war effort. Regardless of whether the Roosevelt Administration wanted to enter the war at the time when the FSA was created, the White House was increasingly cognizant of a foreign policy crisis that could further complicate its domestic political goals. As one historian observed recently, it was by March 15, 1939, just over a month before he reorganization creating the FSA was publicly proclaimed, that “foreign affairs achieved the absolute dominance over domestic affairs that they were destined ever after to retain in his [Roosevelt’s] mind.”²¹⁷ The impending foreign policy problems made the President increasingly anticipate that the nation could find itself embroiled in war:

The experience was, for him, not dissimilar in some essentials to that of the spring of 1933 when, amid universal ruin and collapse, he had presided over the birth of the New Deal... (‘Never in my life have I seen things moving in the world with more cross currents or greater velocity,’ he wrote in a personal letter on March 25, 1939).

Nor was the President alone, as legislators increasingly favored repealing federal neutrality laws to facilitate American involvement in the European theater.²¹⁸

The Administration’s goal of emphasizing the connection between the work of the FSA and national defense became easier to achieve because of the importance of the new agency’s activities to the military. The FSA’s functions not only contributed to an expansive conception of security that encompassed ordinary health, education, and public welfare activities, but also served ends specifically connected to domestic and international security in the conventional sense. These included facilitating the relocation of Japanese Americans, providing technical assistance to law enforcement agencies engaged in police work against juvenile delinquents, the aforementioned research programs in biological weapons and related areas, anti-prostitution enforcement designed particularly to protect the armed forces, and the development of disaster assistance programs to be deployed in case of war-related attacks against civilians. In addition, the FSA emphasized the defense-related import of a host of other activities, ranging from vocational education to nutrition. Together, these presidentially-driven choices afforded the Administration with an opportunity to affect how the public understood the concept of security and how legislators understood the payoffs of supporting the FSA as the nation prepared for war.²¹⁹

i. Shaping Public Perceptions of the Meaning of “Security.”

²¹⁷ KENNETH S. DAVIS, *FDR: INTO THE STORM* 423 (1993).

²¹⁸ *Id.* at 427.

²¹⁹ *See supra* Part I.d,

Following the merger, FSA officials endeavored to present the public with information about the blending of national security and domestic administrative, regulatory, and social welfare functions. Speeches in 1939 and 1940, such as the following statement Paul McNutt made at a speech to college students in Lakeland, Florida in 1939, set the stage for future appeals:

The formation of the Federal Security Agency, mobilizing as it does, the Government's technical facilities for coordinated action, represents a first stage in the campaign against insecurity and want, but the battle is not yet won. *Here, as elsewhere, in the conflict with the enemies of democracy, vigilance and courage are necessary at all times, for here, if not elsewhere, America cannot afford to wage a defensive war. We have assumed and must retain the offensive.*²²⁰

In television programs and live speeches, McNutt unrelentingly alluded to the “enemies of democracy” and the need to quicken the pace of efforts against “insecurity and want” that the nation may better be able to face its adversaries. So pointed was McNutt’s war-focused rhetoric at a time when public and legislative opinion was still largely isolated, that the White House received correspondence criticizing “the jingoism of Paul McNutt over NBC last Saturday evening. He is doing his best to defeat the excellent leadership for peace you are so nobly exercising.”²²¹ Yet the White House joined McNutt and his aides – particularly by mid-1940 – in issuing statements linking national defense to “preparedness” on the home front. On June 12, in response to a request from Senator Claude Pepper for a message “on national defense,” the President indicated to the National Convention of Townsend Clubs, meeting in St. Louis, that :

[W]e have mobilized our industrial resources to meet pressing conditions confronting us and assure[d them] that the Government has no intention of neglecting the other phase of preparedness, namely continued improvement of social, economic, and moral structures of American life.²²²

Statements such as these echoed the content of the presidential reorganization message accompanying the executive order that created the FSA, reinforcing the president’s message.

Over time, that message appears to have contributed in subtle but material ways to how the agency was described and perceived in the public sphere. In the process, the White House and Roosevelt Administration officials used the creation of the FSA as part of an effort to shape public perceptions, particularly of the meaning of “security.” They sought to broaden the scope of the term to place social, economic, and health-related security *on par with* traditional definitions of national security; and they sought to emphasize the interconnections between national security and security involving public

²²⁰ Address by the Honorable Paul V. McNutt, Federal Security Administrator, Congression Education for Democracy, Florida Southern College, Lakeland, Florida 3 (November 12, 1939), avail. at Franklin D. Roosevelt Presidential Library, Papers of Richard V. Gilbert: Speeches on the Federal Security Agency by Paul V. McNutt, box 18 (emphasis added)..

²²¹ See Franklin P. Cole, Minister of Williston Congregational Church, Portland, Maine, Letter to President Roosevelt (January 13, 1940), avail. at Franklin D. Roosevelt Library, Official File 3700 (Federal Security Agency)(1940 folder).

²²² See Internal White House Memorandum, Summary of Correspondence From Lowell Mellett (original correspondence June 5, 1940, memo c. June 12), avail. at Franklin D. Roosevelt Presidential Library, Official File 3700 (Federal Security Agency)(1940 folder).

health, economic, and social guarantees. There was by the time of the FSA's creation widespread familiarity with the Roosevelt Administration's tendency to describe social and economic challenges as akin to war, and historians since then have widely acknowledged this pattern. But the realignment of health, education, and security functions within the FSA, and the circumstances immediately following this realignment, show how government officials directly sought to blur the distinction between national, economic, and social security at the level of organizational structure and bureaucratic mandate. This dimension of the FSA's trajectory included efforts to justify the FSA's creation in terms of strengthening national capacity to counter brutal dictatorships, deployment of FSA resources to support the war effort, and public communications emphasizing the FSA's national defense role.²²³

The determination of the White House and the FSA's leadership to identify the new agency with national security and defense emerged almost immediately upon its creation. Not even one year after having been created, the agency issued a report chronicling its activities. The report provides a revealing picture of the agency's aggressive focus on activities related to national security. The Social Security Board, for example, had engendered a program to organize the massive movement of workers – some of which were unemployed, and others who sought more desirable jobs – towards defense-related industries. The bureau had over a thousand offices nationwide, a national system for keeping records of employees, and a mission that broadly encompassed the provision of assistance to individuals seeking work. Increasingly, the Social Security Board achieved its employment-related goals through grants to states, allowing it to graft the state bureaucracies onto its growing administrative structure. These characteristics made the Social Security Board a useful vehicle in lubricating the massive defense-related reallocation of labor already afoot by 1940. This is how agency reports to congressional staff put it:

[T]he Board's Bureau of Employment Security was directing, through the 1,500 local offices of the United States Employment Service, efforts to insure orderly redeployment of the existing labor supply and more effective placement of workers already employed. Procedures for obtaining more current information needed for recruiting workers through the local employment offices were also put into effect. In June 1940, \$2,000,000 was appropriated for the use of the Social Security Board in providing special Federal assistance to, and supervision of, State employment services for the selection, testing, and placement of defense workers in occupations essential to national defense.²²⁴

While the Social Security Board was busy funneling workers into defense-related industries and helping the states develop administrative systems to do the same, the rest of the FSA was also in the process of forging defense-related capacities. In contrast to the Social Security Board, many of the other bureaus folded into the FSA lacked the dense, nationwide network of offices or the copious nationwide recordkeeping system. Nonetheless, the fledgling new agency emphasized how its bureaus were aggressively contributing to the national defense:

²²³ Regarding Roosevelt's analogies to war, see Leuchtenburg, *FDR's Legacy*, *supra* note __, at __. With respect to the FSA's priorities, see FSA, Annual Reports (1940-1946).

²²⁴ Federal Security Agency, Annual Report 7 (1940).

In the last month of the fiscal year the Congress appropriated the sum of \$15,000,000 for the vocational education of defense workers. The appropriation act provided that the program was to be carried out under plans submitted by agencies of the several States and approved by the Commissioner of Education. It was specified that the plans must include courses supplementary to employment in occupations essential to the national defense and pre-employment refresher courses for workers, selected from the public employment office registers, preparing for such occupations. The Office of Education immediately began to set in motion the machinery for carrying out the purposes of these appropriations. At the same time, the Public Health Service was in consultation with the council of National Defense for the purpose of formulating plans for advising the Council regarding the health and medical aspects of national defense and to coordinate health and medical activities affecting it. The Public Health Service was also laying the groundwork for a program allied to defense to promote the health and improve the physical fitness of out-of-school young people employed on projects administered by the National Youth Administration. The National Institute of Health at the request of the Navy Department was also conducted studies of physiological problems connected with high altitude flying and rapid decompression. Both Army and Navy authorities were advised on standard immunization procedures for the military forces. Cooperation of the International Health Division of the Rockefeller Foundation was secured in the manufacture of 150,000 doses of yellow fever vaccine. Plans have been made for the continued production on a large scale of this vaccine at the Rocky Mountain Laboratory, Hamilton, Mont.²²⁵

These descriptions emphasize not only the speed with which the FSA's units sought to create among the public a perception of their role in defense efforts, but also the extent to which the young agency had begun convincing Congress to appropriate resources to fund the agency's defense-related activities. Over time, the perceptions the agency fomented in Congress contributed to the creation of a bureaucratic reality wherein significant policy innovation increasingly blurred the distinctions between national security and social or economic security.²²⁶

The agency's own employees were still another audience for the agency's emphasis on defense-related efforts. Periodically, the Federal Security Administrator's office would convene conferences to review the agency's progress in defense-related pursuits. The Office of Community War Services (CWS), focused on providing health and welfare services to military and civilian individuals in areas surrounding military establishments, was the hub of such conferences. Documents such as the following conference agenda conveyed to employees one of the critical missions the FSA now prioritized:

For over three years, CWS has been concerned with the provision of adequate health, welfare, and related community services to the citizens of the Nation during the period of the war emergency – particularly in critical war production centers and in centers adjacent to military establishments. It is the purpose of this conference to review our past achievement, to analyze critically our present direction, and to plan together further accomplishment.²²⁷

²²⁵ (*id.* at 8).

²²⁶ *See supra* Part I.d.

²²⁷ Federal Security Agency – Community War Services, Agenda and Folder of Reference Material, Conference of Regional Directors and Assistant Regional Directors 1 (February 12, 1944), avail. at

The extent of the FSA's identification with war and national security left its mark in the long term. Eventually, some of the most explicitly militarized or national-security related functions of the FSA were shut down – including the quasi-military Civilian Conservation Corps, the War Research Service, the operations to facilitate relocation of Japanese Americans, and the Office of Community War Services. At the same time, a substantial cluster of defense-related research projects continued. The Truman Administration allowed George Merck to announce in public the FSA's success in building for the country a viable biological weapons capacity. A New York Times described the disclosures in May of 1946:

While the physicists spoke on the bomb, a biologist, George W. Merck, of Merck & Co, pharmaceutical house, exemplified the peculiar duality of modern science by discussing more horrors to come in the field of biological sciences. In a review of work done in the field during the war, *Mr. Merck discussed American achievements both in the production of disease for large-scale use as a weapon and in defenses against enemy-sent disease.* Like all reports on this subject made to date, Mr. Merck's remarks were clothed in a security-forced vagueness. Discussing the matter of security, however, he assured his hearers that, should the needs of humanity call for release of any information so far withheld, the Army would at once release it. One of his more interesting revelations was the discovery by biologists of a new chemical agent on living plants. This agent, of which the identity was not revealed, may be spread on enemy farmlands. The enemy then cultivates and works his farm, and everything appears normal. Only when harvest time comes does he discover that his months of work have been – literally –fruitless. His garden and field crops have borne no fruit, for just before harvest time their roots have withered away and they cannot yield.²²⁸

Continuing agency involvement in defense-related activities dovetailed nicely with the experience of Eisenhower's choice when appointing the first Secretary of HEW, the FSA's successor agency. Oveta Hobby was chosen for the post. Her principal experience before being entrusted with the mammoth cabinet agency was running the Women's Army Corps. The commissioned corps of the Public Health Service retains a quasi-military organizational structure and wear correspondingly martial uniforms. The Centers for Disease Control retains the preeminent operational role in responding to deliberately-promoted or natural outbreaks of infectious diseases, and the NIH continues to engage in substantial research activities funded by or related to military mandates.²²⁹

The Administration's persistence in broadening the scope of security by discussing national defense suggests several realities. First, the Administration emphasized the existence of another dimension to the political choices associated with FSA bureaus.²³⁰ In response, some public constituencies already concerned about defense – like the editorial writers that shaped the public discourse – likely found themselves more drawn to supporting the bureaus than they would have been otherwise. A few may even have found resonance in the idea that security was a concept that

National Archives, Watson Miller Archive, Federal Security Agency (Entry 10), Box 1 (Community War Services Folder).

²²⁸ New York Times (May 18, 1946)(on file with author).

²²⁹ See generally Miles, *supra* note 13; FITZHUGH MULLAN, PLAGUES AND POLITICS: A HISTORY OF THE UNITED STATES PUBLIC HEALTH SERVICE (1989).

²³⁰ Cf. Dennis Chong and James Druckman, *Framing Public Opinion in Competitive Democracies*, 101 AM. POLI. SCI. REV. 637 (2007).

extended (if not seamlessly, then at least malleably) from strengthening military capacity to boosting the nation's resilience in the face of adversity. Whether that adversity came from economic dislocation or military disaster mattered less, in this conception, than whether the government had built the administrative capacity to assist citizens in responding to crises. Second, there were some voters who lacked – then as now – the sophistication, time, and political knowledge to form elaborate opinions about the proper scope of “security.” For them, the determination of the Administration and the FSA to identify the agency with national security efforts suggests something else. Perhaps the agency's identification with the symbols of national power sufficiently reinforced the Administration's political rhetoric, translating into longer term support of broad policy prescriptions. At a time when the Administration was also seeking to broaden support for a potential United States role in international conflict, Roosevelt probably also gained some political rewards by conveying a sense of urgency about looming international threats. Even progressives concerned with the erosion of New Deal programs could be reassured that budgetary and administrative initiatives to expand national defense would not necessarily erode New Deal goals.²³¹ As the war progressed and the agency's responsibilities grew, so too did the support these members of the mass public were willing to provide for the idea that the FSA's assortment of bureaus should become the newest cabinet-level department of the federal government.

While these dynamics help explain the importance the White House and the FSA officials assigned to promoting their conception of national security, one might question the precise connection between their “framing” strategy and the bureaucratic changes that wrought the FSA. Perhaps the White House could have argued that nutrition, physical education, social insurance, and medical research were essential to national security even without acquiring reorganization authority, or using it to create the FSA. But the bureaucratic changes seem to have enhanced Administration's position in pursuing its distinctive security agenda. The creation of the agency generated considerable media attention, giving the Administration a chance to ply its version of security. The FSA increased the bureaucratic capacity at the White House's disposal who could help make a case to the public that the FSA's programs were contributing both to national defense as well as to the expansive conception of security that encompassed both war-related and domestic regulatory activity. Paul McNutt, imbued with the singular authority of the “Federal Security Administrator” traveled the country discussing his agency's role in promoting its particular brand of “national security.”²³²

When he was *not* giving speeches, McNutt could join his aides in managing the bureaus' new relationships with constituencies *within* the government. Serving wartime and national security needs while expanding domestic functions required political engagement from top agency administrators, who could curry favor with legislators, other

²³¹ Cf. Polenberg, *War And Society*, *supra* note __, at __ (discussing concerns of New Deal supporters regarding the domestic policy impacts of war).

²³² See *supra* Part I.d. See also *supra* notes __ and accompanying text (examples of internal memos from the Roosevelt archives emphasizing the importance of *reshaping* the public's understanding about what counted as “security” and why the FSA's work was so directly linked to the war effort); Paul V. McNutt, Draft Book Manuscript, entitled Using Our Heads 73 (April 4, 1940)(“Chapter 6: National Security”), avail. at Franklin D. Roosevelt Library, President's Personal File 2836 (Paul McNutt)(referring to social security as part of “national security”).

federal government officials, and the mass public. This was unlikely to be available to the agencies that represent the federal government's health, social welfare, regulatory, and educational capacity if they'd remained scattered throughout government. Treasury and Agriculture Secretaries had more pressing demands than building up the FDA or PHS. The dynamic the White House faced therefore suggests that bureaucratic changes could make a difference, even if individual bureaus would have sought – on their own – to refocus some of their work on defense-related activities as the war approached. In contrast, fragmentation of health, social welfare, education, and regulatory capacity could have strengthened arguments for meeting wartime needs by developing exclusively military -- or temporary war-focused – programs. Such moves would have placed the future of many health and welfare initiatives in doubt after the war.

In some respects, the FSA leadership's efforts to emphasize the centrality of its work for national defense represented an Administration-wide move to emphasize the importance of defense as international conflict become more likely. Yet the rhetoric emanating from the FSA appears more pronounced than what was emerging from other agencies (with the occasional exception of the Agriculture Department – whose budget followed a similar trajectory to that of the FSA in some years). The FSA appears to have differed from other major domestic administrative and regulatory agencies – such as the Agriculture and Interior Departments, from which some of its major bureaus were drawn, and the sister agencies created by reorganization (the FWA and the FLA) in *two* ways: by having a greater concentration of *actual* defense-related activities, and by repeatedly emphasizing how even the work it was performing *not* explicitly related to defense was nonetheless integral to a broad and conceptually coherent version of the concept of security. To take just one example, the FSA's summaries of its annual activities between 1940 and 1942 mentioned war, emergency, and national defense more often on average than other major domestic agencies. The agency's national security focus is starker still in the headings of some annual reports, which emphasize the bureaus' war-related activities and describe the agency's goal of providing "Security for All Americans."²³³ If anything, the tendency of the FSA Administrator to promote an expansive conception of the security trope and specifically to link the FSA's work to national defense continued even more aggressively under the leadership of Oscar Ewing in the Truman Administration.²³⁴

It should also be noted, however, that the precise implications of linking domestic administrative and regulatory programs to *security* depends heavily on whether the underlying concept of security is defined broadly or narrowly, which in turn depends considerably on presidential choices. Thus, while associating the domestic administrative and regulatory functions of the FSA with the concept of security appears to have

²³³ See *supra* Part I.e. Distinctions in the type of war-related rhetoric in the agencies' annual reports are apparent from how the reports discuss individual bureau activities, as well as the frequency with which report summaries (providing an overview of agency activities) mention war or national defense. Though all of these agencies were pervasively emphasizing war-related activity by 1943, the FSA's particular interest in these matters is apparent in its more aggressive use of defense-related rhetoric between 1940 and 1942. The ratio of the incidence of the terms "war," "conflict," and "defense" per page in the FSA Annual Report's summary was nearly .5 in 1940, just under .2 in 1941, and about .33 in 1942. By comparison, the figures for the FWA were .25, .1, and .12 respectively, and were far lower for Interior and Agriculture.

²³⁴ See *supra* Part I.d.

enhanced their budgets and political support, a different scenario seems to have emerged with the recent creation of DHS. In that case, the president a similar political opening to shift resources away from the “legacy” mandates of domestic and regulatory agencies rather than expanding them. In situations where actual bureaucratic discretion and statutory mandates give the Administration some flexibility to use the new resources, one should expect the Administration’s political agenda to make a difference.²³⁵

ii. Enlarging Legislative Coalitions by Ambiguating Functions.

Apart from shaping public perceptions directly, Roosevelt and his supporters had a lot to gain from emphasizing the connection between national defense and domestic policy initiatives that he favored. Southern Democrats and Republicans who were skeptical of the New Deal were often also quite negative about American participation in an international conflict. But there is some indication that these constituencies in fact favored a strong, vigorous military – both for domestic political reasons, and (perhaps) for purposes of deterring international activity that could offend U.S. interests and provoke conflict. By ambiguating the distinction between national defense and domestic regulatory efforts, Roosevelt could make it at least possible to galvanize new sources of support for his programs. At the same time, his focus on threats facing the United States when presenting his new super-agency to the American public served the purpose of highlighting the relative immediacy of threats facing the nation, even as he also endeavored to convey how he was preparing the structures of government to respond effectively in the face of such threats.

Recall that diminished legislative coalitions were a challenge for FDR during the second phase of the New Deal. Politically, Roosevelt had pushed the envelope in passing expansive new legislation, resulting in the shedding of marginal coalition members. And political support could be adversely affected and further wane with continued defeats. Consider the Social Security program as an example. From its origins, the Social Security program was politically controversial. Though it was relatively popular among Midwestern and Northeastern urban constituencies, it was not universally supported. In part as a compromise with Southerners, the Administration settled for a program that entirely excluded the farm sector from coverage. The importance of conservative Southern Democrats underscores Roosevelt’s challenge in expanding constituencies for one of his signature domestic policy efforts. If at all possible, he would have welcomed the chance to build such support among Southerners who were in a position to block the programs functions or future expansion.²³⁶ Moreover, other things being equal, the

²³⁵ Even when such flexibility is limited, presidential efforts to bolster an agency’s standing may in some circumstances benefit from involving an agency in more politically-salient activity. Witness, for example, the Roosevelt Administration’s efforts to persuade the public through public conferences and presidential statements that nutrition and physical education *were* components of defense and security. In contrast, the Bush Administration sought to persuade legislators and the public that regulatory agencies such as Customs and the Coast Guard needed to play a greater role in providing a distinctly narrow conception of national and homeland security – involving primarily protection against terrorist attacks – and that this function *contrasted* with the agencies’ legacy mandates. See Cohen, Cuéllar, and Weingast, *supra* note ___, at ___.

²³⁶ See Derthick, *supra* note ___, at ___.

outbreak of war was likely to erode support for domestic regulatory and administrative programs unconnected to the war effort.²³⁷

Finally, a non-trivial group of legislators, including prominent Southern Democrats and Republicans, were more inclined to support national security programs – though not necessarily active participation in international conflicts – than domestic regulatory, administrative, or social welfare programs.²³⁸ Before 1939, a number of such lawmakers viewed military strength in a different light compared to New Deal programs. Spurred by editorials and growing constituent concerns about defense, lawmakers showed themselves to be increasingly willing to fund military activities. Even in light of lingering isolationist concern, House and Senate leaders began ramping up military appropriations at the behest of the White House and the military in 1936.²³⁹ Against the backdrop of lingering concerns about budget deficits, many lawmakers as early as 1937 were nonetheless “volunteering to help unbalance [the budget] still further by making the sky the limit in appropriations for new naval buildings.”²⁴⁰ Newspaper editorials openly inveigled Congress to prioritize “the need for a stronger air fleet, a larger navy” and national security priorities at a time when “the Government is spending recklessly for numerous other purposes.”²⁴¹ Prominent Southern Democrats and Republicans – blocs rarely supportive of the President’s domestic agenda – nonetheless lauded the President’s criticism of dictatorship and voiced approval for ratcheting up national defense expenditures.²⁴² Indeed, by 1939, lawmakers were increasingly persuaded of the value in increasing their support for defense-related programs, while considerable debate persisted about core New Deal programs.²⁴³

²³⁷ See RICHARD POLENBERG, *WAR AND SOCIETY* __ (197X)(discussing the threat to New Deal programs posed by the war effort).

²³⁸ See Leuchtenburg, *supra* note __, at 300 (Congress was aggressively supporting a defense buildup by the middle of 1940). Southern Democrats were increasingly opposed to Roosevelt’s social welfare and regulatory agenda, see Polenberg, *supra* note __, yet were viewed as inclined towards internationalism and concern about national defense in the period immediately before World War II. See Alexander DeConde, *The South and Isolationism*, 24 J. SOUTHERN HIST. 332 (1958)(describing the period before the Second World War as “a high point of Southern internationalism”); Virginius Dabney, *The South Looks Abroad*, 19 FOREIGN AFFAIRS 177 (1940); Malcolm Jewell, *Evaluating the Decline of Southern Internationalism Through Senatorial Roll Call Votes*, 21 J. POLITICS 624 (1959).

²³⁹ *House Military Bill Sets Peak for Peace Time*, Wash. Post., Feb. 11, 1936, p. 13.

²⁴⁰ *The American Navy*, N.Y. Times, Dec. 30, 1937, p. 13.

²⁴¹ *To Safeguard Defense*, Wash. Post., Dec. 2, 1938, p. 12.

²⁴² See, e.g., *Congress Divided on the Message*, N.Y. TIMES, Jan. 5, 1939, p. 13 (quoting Southern Democratic senators praising the President’s focus on international security problems); Robert C. Albright, *Arms to Get Right of Way in Congress*, WASH. POST., Dec. 9, 1938 (quoting Republican senators supportive of presidential defense-related recommendations). See also James T. Patterson, *A Conservative Coalition Forms in Congress, 1933-1939*, 52 J. AM. HIST. 757 (1966)(noting how, at a time when foreign policy and domestic economic policy were still considered separate issue areas, conservative Southern Democratic lawmakers tended to have more internationalist views).

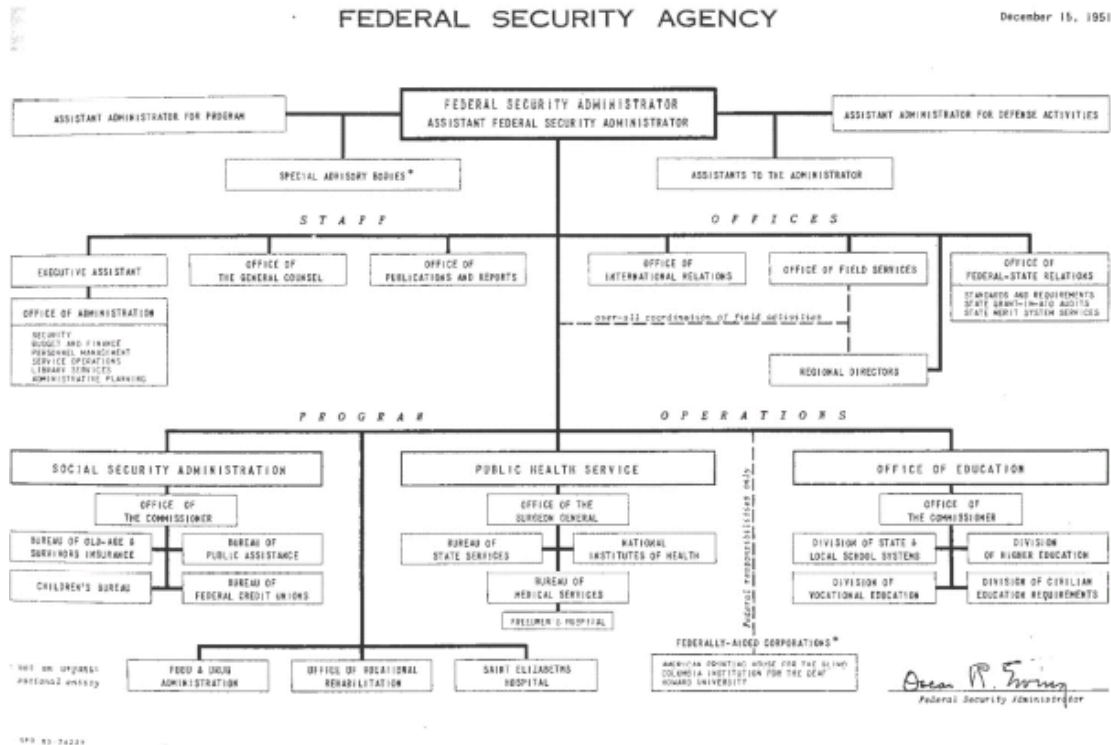
²⁴³ Summarizing an emerging consensus within official Washington, the New York Times reported that “[t]he totalitarian states... lead the world in immensity of preparations and in volume of expenditures for war, but the United States, slow to ‘strain every nerve’ in the international race for armaments, has speeded up all her preparations recently and the last session of Congress started her on her way toward one of the greatest peace-time national defense outlays in her history.” *Fourteen Billion Dollars a Year: The World’s Arms Bill*, N.Y. TIMES, Aug. 21, 1939, p. __.

In a world where presidential supporters could exert some influence over budgets and public discussion of federal priorities, the asymmetry in legislative attitudes regarding defense and social welfare posed an opportunity as well as a challenge. Once again, the White House might use reorganization to secure greater support for the bureaucracies entrusted with legal responsibilities that the Administration prioritized. By blending national security with health regulation and public benefits, the Roosevelt Administration provided legislators who were eager to support national security functions but skeptical about regulation and public benefits with a new reason to support bureaus within the FSA. This development was especially important in expanding the extent of political support for administrative bureaus that conservatives (especially Southern Democrats) would have otherwise been less interested in supporting.

Notice that the FSA's internal activities – and not just the public justification of its functions – reflected strong connections to national defense. Biological weapons research was being conducted through the War Research Service. The Social Security Board was providing special assistance to families impacted by the war. It was also assisting with placement of job-seekers in war-related industries through its employment service. The FSA was training of employees for war-related industries through the Office of Education. It was conducting anti-prostitution enforcement through the Public Health Service. Budget increases for the agency during the war years were substantial, and somewhat greater emphasis on war and defense is qualitatively apparent when comparing the FSA's Annual Reports to those of other major domestic agencies from which some of its bureaus were drawn, including Interior and Agriculture. And years after the war, the focus on defense continued. As the figure below indicates, the FSA organizational chart continued to show the presence of Assistant Administrator for Defense into the 1950s, with no comparable positions existing at Interior, Agriculture, or Treasury.²⁴⁴

²⁴⁴ See *supra* Part I.d See also *supra* note ___ and accompanying text (describing the President's and the FSA's strategy for using the WRS).

Organizational Chart of the Federal Security Agency (December 15, 1951)



The Roosevelt Administration clearly understood that lawmakers were among the most critical audience for the FSA's national security-related work. McNutt had his aides monitor congressional hearings focusing on defense research to ensure legislators were aware of the FSA's research in areas such as improving the prospects for "high altitude military flights."²⁴⁵ Even after the war, FSA staff prepared organizational charts for congressional staff explaining the enlarge scope of the FSA's defense-related activities:

The period of defense preparation and of actual war coincides with the time during which the Federal Security Agency was formed and has been developed. In this emergency because of the very nature of its functions – the safeguarding of health, the fostering of education, and the promotion of social and economic security – the Agency became the center around which numerous war activities were developed. At the very beginning of the Defense Program of 1940, the Federal Security Administrator was named Coordinator of the Office of health, Welfare, and Related Defense Activities which was established by the Council of National Defense on November 28, 1940 for the coordination of all health, medical, welfare, nutrition, education, recreation and other related fields of activity affecting the national defense.... The Council established the Health and Medical Committee... to advise on health and medical aspects of national defense and to coordinate health and medical activities affecting national defense. With the approval of the President this Committee was transferred to the FSA on November 28, 1940. The Family Security Committee was established on February 12, 1941 to study the problem

²⁴⁵ See *supra* Part I.b. See also Memorandum from Charles P. Taft to Paul V. McNutt, Admiral McIntire's Testimony before the Subcommittee of the Committee on Appropriations (July 15, 1941), avail. at National Archives, Watson Miller Archive, Federal Security Agency (Entry 10), Box 2.

of maintaining the security of American homes in the face of wartime social and economic dislocations. The Committee on Social Protection was established on June 14, 1941 to render advice with respect to the social protection aspects of national defense.²⁴⁶

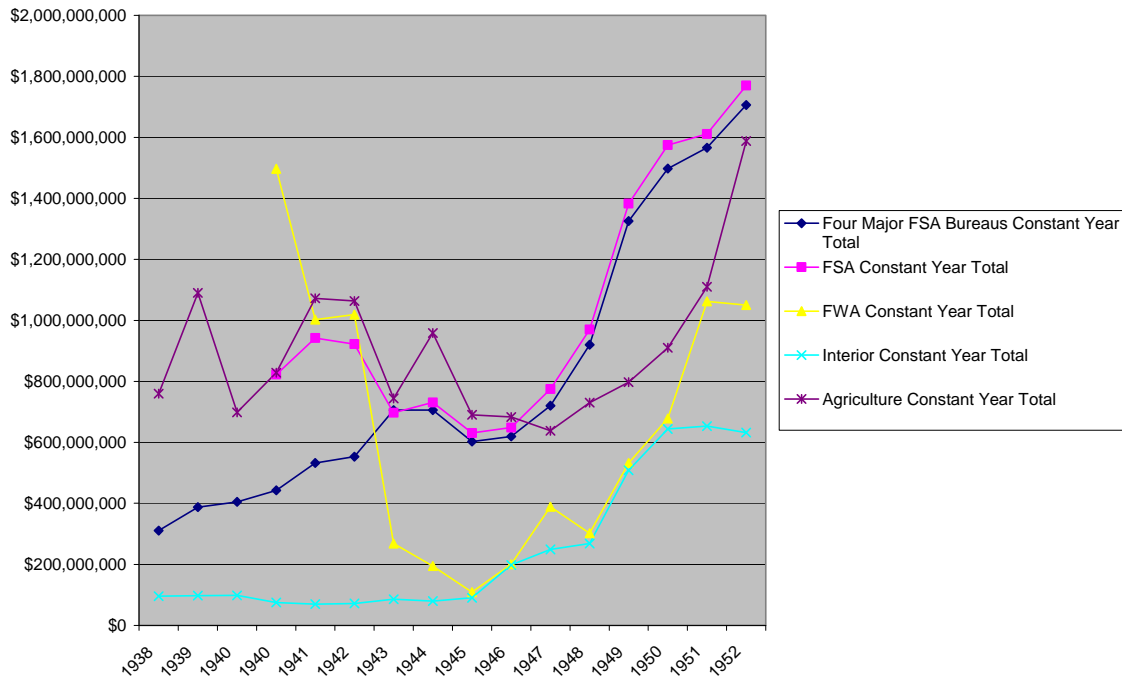
These changes were associated with rising budgets at many of the FSA's bureaus. Although the FSA's budget did not increase continually throughout the war years, the Administration's strategy seems to have succeeded in sparing the FSA the more severe funding declines that afflicted some major domestic agencies. Although the Federal Security Agency experienced some decreases in its budget during the latter part of the war, two things are notable about its funding trajectory. *First*, as the figure below indicates, in contrast to other major domestic agencies such as the Federal Works Agency, the FSA fared relatively well in the appropriations game. Even when compared to the massive Agriculture Department, the FSA's declines in funding from its wartime high was more limited and growth in its appropriations after the war more rapid. Moreover, between 1940 and 1945 the FSA's four major permanent bureaus (those that remained with the agency long-term: the PHS, the Office of Education, the Social Security Board, and the FDA) saw their combined appropriations increased by about a third in constant dollars. Even sharper increases were apparent at the PHS, whose budget quintupled in constant dollars between 1940 and 1945.

Second, the declines in funding the FSA experienced between its wartime highest funding levels and the year after the war were lower than those of Agriculture and the Federal Works Agency (Interior experienced a slight rise but its budget was an order of magnitude lower than the other agencies). As the figure below demonstrates, the FSA's four permanent bureaus saw steadily rising appropriations with only slight declines in 1943 and 1944, followed by further increases. And some of the FSA's key bureaus – most notably the Public Health Service – experienced pronounced and long-term increases in the rate of growth of appropriations and legal responsibilities. The declines in FSA funding were driven largely by the discontinuation of New Deal-era relief programs such as the Civilian Conservation Corps and the National Youth Administration. As the second figure below indicates, by focusing on the four core bureaus within the FSA that did *not* get abolished or transferred out of the agency. As these bureaus were consolidated into other agencies, total FSA appropriations and those of the major four bureaus converged almost entirely.²⁴⁷ These developments track the expanding responsibilities of the FSA's four core bureaus, and suggest that the agency's leaders and allies successfully marshaled support for its work during and after the war.

²⁴⁶ Federal Security Agency, Organizational Charts and Budgets, FY 1952 1-2 (1952), avail. at National Archives, Organizational Charts, Federal Security Agency (Entry 9), Box 2.

²⁴⁷ See Budget of the United States, Historical Tables [or equivalent], 1945, 1950, 1955[Shivan sources]. See also *supra* Part I (discussing budget developments associated with the FSA and its bureaus). Analysis of inflation-adjusted changes in appropriations percentages confirm the significance of these appropriations changes over the long term.

The FSA in Context: Constant 1938 Dollars



Note: The second set of figures for 1940 show adjusted appropriations made to reflect the creation of the FSA.

It may seem as though the national defense-oriented work of the FSA merely reflected a broader change throughout the government. Even if this were the case, it would still be significant that Roosevelt, McNutt, and the rest of the Administration sought so emphatically to include the FSA among the coterie of government agencies that could lay claim to importance in a time of war. Nonetheless, the FSA's connection to national security issues appears to have been distinctive not only in the intensity of its public communications, but in the substance of its work. Compared to other major domestic administrative agencies at the time, only the FSA was directly involved in sophisticated weapons research (through the War Research Service). In the early phase of the war and the preparation for it, only the FSA's Administrator, the ambitious Paul McNutt, was appointed coordinator of homeland security matters involving health, welfare, and "related activities," and Chair of the War Manpower Commission while he continued to serve as FSA Administrator (and in the process, he engineered the transfer of some of these responsibilities directly to the FSA). Though all the three agencies Roosevelt created using reorganization authority were justified publicly as essential to strengthening national capacity at a time of international instability, only the FSA's budget grew substantially during the war. And only the FSA was specifically structured – from its inception – to include a military liaison. Finally, the defense-related focus of the FSA lingered well after the war. In sharp contrast to any other domestic

administrative agency – whether cabinet or independent – only the FSA’s structure included high-level deputy in charge of defense-related programs.²⁴⁸

iii. The Connection Between Re-Branding and Bureaucratic Reorganization.

If it is true that injecting a substantial national defense ingredient into the mix of “security” bureaus could serve the President’s goals, why did the White House wait to pursue this strategy until it could order a bureaucratic reorganization? The answers reveal still further ways in which bureaucratic structure can play an essential role in cementing public expectations about their government’s legal responsibilities.

Although the type of re-branding Roosevelt sought to pull off by melding domestic policy and national defense in an expansive “security” metaphor may not have been impossible to try without reorganization authority, it would have proven far more difficult. Imagine, for instance, how much more trying it would have been for FDR to discuss his expansive version of security during fireside chats if the agencies carrying out that work were scattered bits and pieces across the government (e.g., PHS at Treasury, FDA at Agriculture, Education at Interior). In effect, the reorganization delivered three things that redounded to the benefit of the re-branding. First, the Administration gained a high profile opportunity to *announce* changes and make a case to the nation about its conception of security. The newspaper coverage of the reorganization announcement was intense. Roosevelt’s “warning to dictators” when he reorganized was widely disseminated. Second, the Administration put in place a structure – consisting of appointees to oversee bureaus with the legal authority to control what they did – to better monitor bureau activities, anticipate threats, and coordinate actions to advance the “expansive” security message. Finally, the Administration gained a staff whose job it was in part to promote what the bureaus were doing across the country, build alliances, and manage external relationships in a manner that promoted the desired conception of security.

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With the benefit of the framework developed in Part II and the evidence reviewed in Part III, we can revisit some of the lingering questions about the FSA: why Roosevelt forged in the first place, why it mixed defense and ordinary domestic mandates, and what impact its creation may have wrought. The FSA’s creation was a means of increasing presidential control and infusing defense-related missions into the agency as a means of enlarging the coalition supporting administrative and regulatory programs important to the Roosevelt Administration. It is of course possible that legislative majorities simply liked the fact that the new agency would help protect the New Deal programs (this is part of the story I tell). But a more interesting picture emerges if we look at things dynamically. After Congress grudgingly gave the Administration limited reorganization authority, the President pushed the envelope, making a mockery of the legal requirement

²⁴⁸ See *supra* notes __ (discussing McNutt’s involvement in the war planning process). See also Blake, *supra* note __, at __ (1960s); (discussing the placement of a military liaison at the FSA from 1939); Louis Johnson, Assistant Secretary of War, Letter to Rudolph Forster, the White House, Washington (August 17, 1939), avail. at Franklin D. Roosevelt Library, *supra* note __, at __, Official File 3700 (Federal Security Agency)(1939 folder).

that reorganizations be justified only on the basis of cost savings and administrative efficiency. He then gained a new layer of political appointees, abolished the Social Security Board's status as an independent agency, created a new structure through which to fund sensitive presidential projects that he kept shielded from Congress (including political control of grant money, and biological weapons research). And perhaps more crucially, he structured the agency to ambiguate the national security and domestic administrative functions, thereby creating a means of giving reluctant legislative opponents (and even members of the public) a reason to reexamine what they might be "buying" by supporting the FSA. The result tended to make the agency prosper despite the undeniable New Deal lineage of certain programs.

In contrast, other domestic agencies encountered serious problems during the war years. Agriculture and Interior, both among the most sprawling and important executive departments, assumed some war-related responsibilities as evidenced by the creation of bureaus such as the War Food Authority in Agriculture. But their budgets stayed flat or fluctuated in comparison to the steady growth in the FSA's four major bureaus (Social Security, Education, Public Health Service, and FDA).²⁴⁹ The Farm Security Administration, which provided assistance to farmers, also sought to market itself as a war agency protecting the food supply. But its efforts were complicated by the fractured nature of farming programs split between that agency as the Agriculture Department, the bureau's lack of success forging genuine ties to defense agencies (in contrast to the FSA), and the relatively narrow scope of its overall mission – thereby complicating efforts to persuade lawmakers or the public that its legal functions were critical to national security efforts.²⁵⁰ In the end, skeptical lawmakers decimated Farm Security's programs and transferred its remaining programs to an even more narrowly focused bureau within the Agriculture Department. Similarly, the narrowly-focused Federal Works Administration, a second major agency born from Roosevelt's fateful reorganization in the spring of 1939, saw its own funding plummet amid waning interest in domestic affairs. Eventually the agency was abolished.²⁵¹ In contrast, the FSA's broader mix of functions, explicit ties to defense agencies, and greater White House protection spared it such a fate, helping McNutt and other administrators find opportunities for agency growth amidst the war.

The creation of the FSA appears have placed its bureaus on a safer path. Reorganization opened the door to growth of bureaucratic capacity and reframing the purposes of the agency through incorporation of national security responsibilities, which in turn resulted in larger budgets and congressional acceptance of new legislation that expanded the agency's powers. The agency's eventual cabinet status and the endurance of its major legal mandates are in large measure a testament to the relative success of the Roosevelt Administration. As the next part explains, the success was no coincidence.

PART IV: IMPLICATIONS AND EXTENSIONS

²⁴⁹ See *infra* Part II (discussing budgets and organizational growth).

²⁵⁰ See Polenberg, *War and Society*, *supra* note __, at __ (discussing the vulnerability of the Farm Security Agency).

²⁵¹ See *infra* Part II (discussing the Federal Works Agency's abolition).

The sequence of events triggered by the formation of the FSA has a number of implications, in vital areas such as the prospects for agency autonomy or congressional reorganization. Although the available evidence does not establish whether these effects were explicitly intended in the case of the FSA, they nonetheless demonstrate additional goals that politicians may pursue in the course of allocating bureaucratic jurisdictions over legal mandates.

A. Changing Capacity for Agency-Driven Policy Innovation.

Over time, as their budgets and personnel swelled within an agency focused on health and welfare, some of the FSA's bureaus appear to have acquired greater capacity for autonomous policy innovation. Neither the White House nor Congress lost their grip on the bureaus. Instead, both the rate and the significance of policy innovations emerging from the bureaus quickened compared to what could be observed when the bureaus were in their original bureaucratic environments. These characteristics were buoyed by developments in the bureaus' organizational culture, recruiting practices, and effectiveness in building external coalitions of support.²⁵²

The FSA bureaus' relative independence is apparent in the agency's policymaking record after the merger – and its contrast to what the bureaus had achieved before the merger. Officials at the Office of Education developed plans new vocational education initiatives. Leveraging the security-related focus at the White House, these officials promoted the new vocational programs among legislators and White House officials. By 1943, the Office of Education's budget had more than quintupled from its prewar highs, dwarfing the budget of the entire Department of Interior, from which the Office had been transferred just four years earlier. FSA and social security employees took the lead in developing major changes to the scope of social security coverage during its existence; these changes had not been possible at the outset of the program and appeared to require close collaboration between the FSA staff, the White House, and the Social Security Board staff; during the existence of the FSA, the National Institutes of Health (at the time known as the "National Institute") grew dramatically, in a fashion that required promotion of health research and coordination with other agencies that would have been unlikely to materialize had the PHS been a small bureau of the Treasury Department.²⁵³ After promoting these statutory changes, FSA bureaucrats then insisted to legislative staff that they would require larger appropriations to carry out the changes:

Due to enactment during the closing days of the second session, 79th Congress, of amendments to the Social Security Act, the Public Health Service Act, the Vocational Education Act, and other new legislation, it will be necessary to request additional appropriations to carry out the Federal Security Agency's programs for the fiscal year 1947.²⁵⁴

Throughout this time, the FSA Administrator served as the senior government official in charge of administering health-related programs. Increasingly, during the Truman Administration, the head of the FSA served as the president's primary

²⁵² Cf. Carpenter, *Forging of Bureaucratic Autonomy*, *supra* note __, at __.

²⁵³ See *supra* notes __ (discussing budgetary developments at the bureaus).

²⁵⁴ See Federal Security Agency, *Organizational Charts and Budgets, FY 1946 (1946)*, avail. at National Archives, *Organizational Charts, Federal Security Agency (Entry 9)*, Box 1.

spokesperson to promote national health insurance, and used the resources of the FSA to make the case for it. No official with such legitimacy and bureaucratic resources would have existed without the FSA. Conservative Southern Democrats and Republicans strongly opposed the elevation of the FSA to cabinet-level status because (according to historians of the period) they did not want to bestow additional status and authority on the FSA Administrator.²⁵⁵

Even before its rise to cabinet status, the FSA already had a status and role that greatly facilitated the development of health, welfare, and related regulatory policies. By creating the FSA, the White House appears to have facilitated – wittingly or unwittingly – the evolution of the organizational cultures of the component bureaus. In particular, the reorganization signaled to employees of the bureaus that they were part of a larger agency whose core mission was more closely related to their own missions. It allowed these same bureaus to reap the prestige and resources associated with war-related and national security functions. The agency’s political appointees emphasized civil service and merit appointments at lower levels (something increasingly common across some but not all agencies of the federal government) and among grant recipients. And the new overarching administrative structure provided bureaus with enhanced capacity for outreach, advocacy of agency positions with respect to other entities of government, and access to the White House. Together, these changes may have spurred some of the qualities that allowed the agency to gain a measure of autonomy in pursuing significant policy changes on Capitol Hill.²⁵⁶

As these changes took hold within and around the federal bureaucracy, the FSA’s own administrators sought to trumpet the organization’s new *esprit* to employees and the public. Discussing the management of his agency with congressional appropriators in early 1950, Administrator Oscar Ewing put it thus:

The movement towards a cohesive Agency has not resulted only from... administrative shifts; it has resulted in considerable measure from an increasing desire by the heads of all the units to work together to strengthen the Agency. Without such cooperation what progress we have made would have been extremely difficult, if not impossible.²⁵⁷

Bureaucratic autonomy has proven essential to many features of modern life mediated through legal and policy programs promoted by autonomous bureaucratic actors. Structural changes can and do presage such autonomy. To the extent that other political actors recognize this and have a stake in promoting such autonomy (or avoiding it), they will attempt to shape bureaucratic structures with an eye on the autonomy-related consequences. Thus, structural changes may prove fundamental to understanding the evolution of legal mandates.

B. Expanded Pressure for Legislative Reorganization.

²⁵⁵ See Miles, *supra* note 13, at ___. See also *Truman Undecided, May Again Ask Agency Bill*, LA. TIMES 18, August 19, 1949.

²⁵⁶ Cf. Daniel Carpenter (unpublished FDA manuscript). See also DANIEL CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY* (2002)(discussing the factors that make it possible for agencies to enhance their autonomy).

²⁵⁷ See Ewing statement, *supra* note 94 at 663.

The creation of the FSA provoked intense debate in Congress in part because of the potential that it would create pressure to change existing congressional jurisdiction. Eventually, the realignments in executive branch functions *did* lead a reluctant Congress to sharply reform existing committee jurisdictions. In the short-term, the reorganization plan that allowed the FSA to be created led to the establishment of a reorganization committee in Congress. Although neither this committee nor the reorganization plan itself had the power to directly change the allocation of committee jurisdiction, both allowed for changes in the executive branch that had the potential to generate more conflicts among committees (e.g., as where a committee given primary jurisdiction over a newly reorganized agency could be in conflict with a committee retaining jurisdiction over a lower-level bureau). In the longer-term, the FSA and similar reorganizations created growing pressure for the legislature to reshape committee jurisdictions to account for the changes in the executive branch. Eventually, these pressures led to the most dramatic changes in congressional jurisdiction in modern history, during the 1940s. Congress also made decisive procedural changes that dramatically enhanced lawmakers' capacity to monitor the swelling bureaucracy that the executive had come to more closely control.²⁵⁸

These changes underscore how one important implication of bureaucratic structure is its effect on the probability of subsequent congressional reorganization. Even if such reorganization is resisted in the short term – as it largely has been in recent years after the creation of the new DHS structure – crucial factions in Congress may eventually find that the mismatch between executive reorganizations and the internal allocation of legislative power becomes all but impossible to ignore. Legislative entrepreneurs can use the disconnection between legislative and executive organization to agitate publicly for a different jurisdictional arrangement (as did Senator Lieberman years later in the homeland security context). The mismatch between legislative and executive organization can also make it harder for legislators to oversee bureaucratic activity when responsibility falls between the cracks of existing committee coverage. Even when this is not the case, the lack of fit between congressional and executive structure generates jurisdictional disputes that require resolution by committee chairs and the congressional leadership. For all these reasons, when executive agencies are reorganized, legislators receive a lottery ticket that could yield gains or losses in the power of committees in which the members have a vested interest. The *ex ante* fight over bureaucratic structure becomes even more convoluted because the returns from that lottery are not distributed equally for legislators.²⁵⁹

While the executive-congressional nexus in reorganization helps explain why fights over structure can become so intense, it also reiterates questions about the prescriptive merits of such reorganizations. Leave aside the substantive problem of agreeing on the precise meaning of efficiency or effectiveness in the context of a government program with contested functions. Even assuming that it could be shown that centralization of functions was wiser relative to some defensible set of policy goals,

²⁵⁸ See Morrow, *supra* note __, at __; *House Backs Plan on Reorganization*, N.Y. TIMES 1, May 4, 1939. See McNollgast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

²⁵⁹ Cf. Cohen et al., *supra* note 25.

there is a separate question regarding legislative power. Effective centralization depends to some extent on legislators allowing that centralization to be meaningful. When legislatures reorganize committee jurisdiction, it may not even be in a way that furthers the goals of a particular agency. In the case of the FSA Congress eventually did reorganize and tightly vested primary responsibility for the agency – and its future cabinet-level offspring – in a small number of committees. The larger lesson from the FSA story here is that bureaucratic reorganizations have the potential not only to affect the balance of power between the White House and the legislature, but to reshape the allocation of power within the legislature itself.²⁶⁰

C. An Organizational Gloss on Separation of Powers.

A common theme runs through battles over executive reorganization in the 1930s, cabinet-level status for the FSA under Oscar Ewing in the 1940s, and the shape of DHS in the early twenty-first century. In each of these conflicts, the players came to realize that choices about agency architecture inevitably affected the relationship between bureaus carrying out legal responsibilities and external pressures. As such, questions about agency architecture – whether legal authority is wielded by a single administrator or a fragmented board, how easy or difficult it is to fire a senior agency official, and what essential missions an agency prioritizes – are inevitably matters affecting the president’s power to control the legal machinery of the regulatory state. The Supreme Court recognized as much at least as early as *Myers*.²⁶¹ Its analysis turned on the intimate connection between the ease with which a president could control an agency and the overall balance of powers among branches. In effect, the Court laid out why questions of agency architecture were likely to remain preeminent separation of powers concerns across the decades. By understanding episodes of structural choice such as the evolution of the FSA, we can better understand at least three realities concerning legal debates over executive power.

First, “functional” separation of powers analysis almost inevitably involves regulating different political actors’ power over agency structure. As at least some courts and policymakers have realized, many problems in separation of powers doctrine involve questions about the amount of actual control a president can exercise over the bureaucracy.²⁶² By the time of the *Costle*²⁶³ decision, for example, courts routinely

²⁶⁰ Regarding prescriptive merits and ambiguity, *see id.*; Wilson, *supra* note __, at 265 (discussing the difficulty in assessing the range of motivations for specific reorganization plans given that “presidents have taken to reorganizations the way overweight people take to fad diets...”).

²⁶¹ *Myers v. United States*, 272 U.S. 52 (1926).

²⁶² The extent to which internal constraints on presidential control of the executive branch could substitute for power *across* branches is a central point in Neal Katyal’s recent discussion of presidential power. *See* Neal K. Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2313 (2006). Katyal tends to think of bureaucratic fragmentation as a distinct parameter that can be essentially disentangled from traditional separation of powers debates. In contrast, the story of the FSA highlights the connection between the macro-level separation of powers questions and bureaucratic fragmentation, particularly when viewed against the backdrop of the long history of constitutional disputes over the management of executive branch architecture. To an underappreciated degree, those disputes also reflect the curious relationship between more extensive presidential control in the short-term (which can be used to build agency resources, nurture agency reputations, and develop a desirable mission), and greater independence in the long run.

²⁶³ *See* *Sierra Club v. Costle*, 677 F.2d at 298.

approached separation of powers questions by trying to calibrate precisely the extent of presidential power over internal agency matters. In *Costle*, the court simultaneously acknowledging the value of judicial oversight of the president-agency relationship while recognizing that such oversight could also adversely impact the bureaucracy. Indeed, as early as right after *Humphrey's Executor*,²⁶⁴ the stage was already set for the rise of a more functionalist paradigm in separation of powers law. With its decision in *Humphrey's Executor*, the court simultaneously denied the White House a major instrument of control and ratified legislative experimentation with structures insulated from presidential control (e.g., independent commissions).

The White House responded to such constraints through a determined effort to gain the executive reorganization authority that eventually led to the creation of the FSA. Despite the difficulties created by court decisions such as *Humphrey's Executor*, the swelling size of the federal government relative to the size of the White House staff, and basic problems obtaining information across government, greater presidential success in achieving structural goals is likely to be associated with greater power to affect what federal bureaus actually do. Indeed, presidents' relative success in achieving structural goals such as the creation of the FSA or DHS further blurs a distinction – quite central to some otherwise cogent accounts of separation of powers – between presidential “oversight” and “directive authority.”²⁶⁵ True, directive authority implies that the president holds a special power to legally compel a decision from a subordinate, whereas oversight implies a power to force consultation and the production of information -- something short of a specific decision. But in the absence of such explicit “directive” authority, presidential power to reorganize who holds directive authority within organizations (as Roosevelt did when he placed the Social Security Board inside the FSA), to appoint loyal political supervisors to bureaus, and to control the flow of information to and from bureaus can limit the significance of formal distinctions between “oversight” and ‘directive authority.’

Even if some subordinate executive branch officials let their responses to presidential requests turn on the distinction between oversight and directive authority, it is far from obvious that all or even most employees would be so passionately invested in the distinction. Structural changes can therefore help a president limit the significance of formal distinctions between oversight and directive authority. Accordingly, because separation of powers doctrine only makes sense if it encompasses some limits on presidential power and structural arrangements are a key determinant of such power, courts should (other things being equal) prudently but closely scrutinize structural changes pursued by the White House. In fact, courts policing the extent of executive power will likely have to look closely at the extent of structural power the president *in fact* has been able to accrue, rather than merely relying on a formal examination of whether the president has made claims of authority that improperly violate the distinction between oversight and directive authority.²⁶⁶

²⁶⁴ 295 U.S. 602 (1935).

²⁶⁵ See, e.g., Peter L. Strauss, *Overseer or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

²⁶⁶ In some respects, the doctrinal progression in this domain reflects at least some attention to the position of sustained but prudent scrutiny of presidential control of structure. Such attention is evidenced in the adoption of an increasingly functionalist separation of powers jurisprudence that acknowledges dynamic

Second, the president's relationship with the FSA after reorganization shows how key practices sometimes treated as legal innovations – such as close White House and agency collaboration in the development of regulatory rules, presidential credit-claiming for agency initiatives, and efforts to build alliances with career staff – have a longer history than commonly supposed.²⁶⁷ Roosevelt doggedly sought reorganization authority at a time when the federal government was growing massively. The political stakes in controlling new regulatory bureaucracies were high, and the ratio of White House employees to total federal employees was declining. With Congress and the Supreme Court blocking the methods Roosevelt had earlier sought to use (appointments control and expansion of the White House staff),²⁶⁸ the Administration turned to structure as a powerful substitute. Having fashioned a new arrangement at the FSA, the White House used a mix of techniques including approval and announcements of grants (which Roosevelt instructed FSA Administrator McNutt to clear with the White House), setting regulatory priorities (which White House staff monitored with bureau personnel at the Social Security Board and the FDA), and controlling the flow of bureaucratic and financial resources (which the White House staff did through its new Bureau of the Budget).²⁶⁹

Third, the now longstanding presidential turn to structure plainly apparent in the late 1930s, and running through the entire history of the FSA and its transformation into the Department of Health and Human Services – is consistent with a nuanced and complicated, if realistic, view of separation of powers as a set of standards rather than rules. In that view, the branches are necessarily entangled because they are co-dependent. Sensibly – perhaps inevitably – the Court recognized structural issues as being so central to the overall architecture of the federal state that it required power-sharing.²⁷⁰ Facing these doctrinal trends, the President pushed back in two ways amply illustrated by the story of the FSA: by grabbing as much power over structure as possible (something that required compromise with the legislature), and by insisting that “security” required structural reform (e.g., to strengthen the performance of bureaus with missions relating to security, and to enhance the nation's geostrategic security against external threats. The pattern continues to this day, with President Bush's insistence on security as the fundamental rationale for re-forging a massive chunk of the federal government into DHS – with power over domains ranging from re-importation to refugees – while simultaneously proposing a sharp expansion of presidential power over the agency's myriad bureaus.²⁷¹

changes, a somewhat more flexible standing jurisprudence including, in *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), the recognition of “procedural” injuries that might encompass the executive branch's failure to honor lawmakers' decisions to vest authority in particular inferior officers rather than the president, and a concern with placing limits on reservoirs of presidential power to affect the structure of government by pressing the limits of agency authority.

²⁶⁷ See, e.g., Kagan, *supra* note 53, at ___.

²⁶⁸ See *supra* Part I.

²⁶⁹ See *supra* Part III.

²⁷⁰ This is what cases such as *Myers*, *Humphrey's Executor*, and *Weiner* are ultimately about. If they're not about the sharing of power, they make no sense at all.

²⁷¹ See Cohen et al, *supra* note 25, at ___ (reviewing executive branch security-focused justifications for creating DHS).

Because presidents enjoy residual power over the difficult-to-observe details of quotidian executive branch management, austere restrictions of presidential power over structure (going beyond restrictions on powers arguably peripheral to core executive branch functions, such as those at issue in *Humphrey's Executor*, and those in traditional cabinet-level departments) can be hard to achieve – and if achieved, they might prove damaging to the president's ability to function as expected. On the other hand, blocking Congress from participation in this key domain is a plain recipe for staggering imbalance. Arguments could be made that too much branch blurring can complicate accountability (e.g., the public assignment of responsibility) in a world of information-poor, cognitively constrained voters.²⁷² But absent convincing arguments in this regard, power over structure should be properly subject to sharing by branches that have learned, over time, to treat structure as a powerful tool to shape current law implementation, future agency trajectories, and public expectations of what government does. In effect, blocking the sharing of power over structure inevitably disrupts an arrangement of separated powers.

The continuing competition over control of structure in the wake of the Court's decision to split power over bureaucratic structure sheds a different light on the presidentially-inclined arguments of the Brownlow Committee. In particular, the efficiency rationales offered by the Brownlow Committee, promoted by Roosevelt, and then offered again by the Hoover Commission during the Truman Administration, were consistently under-theorized, even as they probably reflected the reality of presidential competition for control in a system of separated powers.²⁷³ The efficiency rationales didn't take into account the elements of separation of powers jurisprudence designed to complicate rather than facilitate policymaking. They didn't consider the transition costs. They didn't take into account the potential benefits of decentralization.²⁷⁴ And in part perhaps because of that, key players understood at least some of the highly political stakes in reorganization – which is why both Truman and Roosevelt ran into so much political trouble when they pursued it. These observations raise a number of questions, of course, but they should lead us to be skeptical of claims by proponents of the unitary executive thesis that reorganization efforts support their claims of broad historical acknowledgement of the need for substantial executive power relative to Congress.²⁷⁵

D. The Complexities of Security.

The Roosevelt Administration found in the concept of security a vehicle for engineering an expanded federal state. It did not, however, take the concept of security as a given. Given their apparent success reframing the work of what was supposed to be

²⁷² Cf. E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT (1942)(arguing that explicit party control of government was a critical component of citizens' opportunity to meaningfully engage in democratic politics). *But see* ARTHUR PULIA AND MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? (1998)(marshaling experimental evidence and theoretical arguments to bolster their case that a variety of institutional mechanisms simplify the public's task in making meaningful political decisions).

²⁷³ See *supra* Part III.a.

²⁷⁴ Here again, parallels to the creation of DHS abound. See generally Cohen et al., *supra* note 25, at ___ (discussing the relative absence of congressional or executive-branch discussion reviewing the costs of greater centralization).

²⁷⁵ For such a view, see Christopher Yoo, Steven G. Calabresi, and Laurence D. Nee, *The Unitary Executive During the Third Half-Century*, 80 NOTRE DAME L. REV. 1 (2004).

a “Department of Public Welfare and Health,” the Administration’s tactics illustrate two important points about the modern state. By the early 20th century, citizens had come to expect the state to provide for their security. During the 1930s, many (though not all) uses of the term were commonly associated with social welfare programs designed to promote economic security. Many observers at the time might have understood a “security state” to imply not a government focused on deterring geostrategic military and terrorist threats, but one endeavoring to cushion its citizens against economic and natural calamities.²⁷⁶

Yet then as now, the concept of security proves to be inherently malleable, raising questions about the viability of approaches to legal interpretation that assume a tidy distinction between geostrategic national security and other types of safety and security. Although the term “security” was not unknown in military contexts at the time, the Roosevelt Administration’s strategy seemed premised on the idea that the concept could nonetheless comfortably encompass government activities that would benefit civilians and the military alike. As the Cold War picked up speed, the FSA gave birth to staples of modern government with defense and civilian applications, such as an expanded National Institutes of Health and Centers for Disease Control. The transformation of the term continued, to a point where the more salient association is with manmade violence and government officials actually question the extent to which FEMA’s disaster relief responsibilities are appropriately understood to encompass “security.”²⁷⁷

In retrospect, the determination on the part of FSA and Administration officials to convey their views to the public showcases the overlapping terms of the rhetorically powerful yet fundamentally contestable concept of “security,” which politicians can deploy strategically to advance a host of domestic and international goals. For example, the agency’s trajectory suggests the term can implicate health and welfare services providing personal social and economic security. Perhaps the term also evokes the notion that the provision of health and welfare services can help forestall domestic unrest and more radical political change (the critique of revisionist New Deal historians). The work of the FSA can also be understood to have a sort of externality effect on national security, traditionally-understood: war adjustment services, education for war production, bioweapons research, and facilitating the removal of individuals considered dangerous from the West Coast. Finally, the most ambitious conception of security is one that the Roosevelt Administration seemed occasionally bent on promoting, though history reveals that it never entirely succeeded: security as an all-encompassing freedom from fear and want – whether its source be domestic insurrection, external aggression, disease, or economic deprivation. One of the many eloquent public statements in support of this particularly expansive version of the “security” concept is found in the second annual report of the FSA:

The security of America has always rested upon a foundation of cooperative effort. From our earliest days when struggling colonies on the seaboard faced the ever-present threats of famine, cold, and hostile tribes; from the days of the Revolution when all the colonies banded together to assure their economic survival; down through the years to more recent times when the Nation’s only enemies were internal ones – mass joblessness, poverty,

²⁷⁶ See *supra* Part III.b.

²⁷⁷ See *supra* Part I.d.

and suffering—Americans have come together, jointly to consider and solve their mutual problems. The active role assumed by the Federal Government in the last decade in helping the individual to find security is as natural and inevitable in the American scheme of things as early barn-raising and corn-huskings. In early years, cooperative effort to assure individual security was possible on a voluntary scale, but gradually the changes in economy and the amazing growth of this Nation geographically and numerically have made government action necessary – first, by local units and, as time went on, by larger and ever-larger governmental units until the Federal Government entered the picture. But today, as in colonial days, collective action provides only the foundation and the opportunity for each man to build his own security.²⁷⁸

If the story of the FSA shows that such a conception did not take permanent root in American law and politics (given today's more rigid separation between national security and economic security, for example), it does show that politicians saw it as a coherent concept worth advancing with the public. And even today, this "thick" version of security finds resonance in the concerns of international organizations, advocates, and governance reformers with "human security," as an alternative to narrowly-tailored conceptions of physical security.²⁷⁹

The reality of external conflict was an important change in the FSA's context. Impending war made it easier for the Administration to blur the distinction between physical security and the more expansive variation on the theme. War made it far simpler for McNutt and his subordinates, in countless conferences and public speeches, to demonstrate how public health infrastructures, placement services for jobseekers, and education grants could serve the war effort. This aspect of the account should not be surprising. It fits with the notion, associated most strongly with Charles Tilly, that "war makes the state." The threat of war helped make the FSA, which spawned the modern federal bureaucracies that powerfully affect major aspects of our lives today.

But the implications of the FSA for the analysis of "security" go beyond the notion that war can spur state-building.²⁸⁰ As it happens, the FSA's relentless campaign to yoke its mission to national security proves to be more than a public relations effort. The campaign was, in some sense, providing an apt description of certain realities of the FSA's day-to-day activity. Some examples: the work of the Public Health Service in limiting disease and providing services to civilians, the military, and those among civilians who would eventually join the armed forces; the role of physical education programs in preparing youths to join the armed forces; the role of the FDA in assuring a safe food supply and pharmaceutical products to both the public and the military; and the agency's role in training individuals for service in war-related industries and placing them there.²⁸¹

Although Roosevelt's expansive security ideas may have had a darker side, there is nothing inherently strained about the Roosevelt Administration's elastic rendering of the "security" mantle. It seems at least as plausible that the FSA's amalgam of administrative and regulatory activity would contribute to a compelling definition safety

²⁷⁸ Federal Security Agency, Annual Report 1 (1941).

²⁷⁹ See S. NEIL MACFARLANE, HUMAN SECURITY AND THE UN: A CRITICAL HISTORY (2006).

²⁸⁰ Cf. Tilly, *supra* note __, at __ (discussing the role of war and armed conflict in state-building).

²⁸¹ See Tilly, *supra* note __.

and security as it is to expect that the projection of naval force abroad would contribute to security. As M.S. Robertson, an official of the National Education Association (and admittedly someone with a vested interest) explained in a letter to the White House:

Wrote to the president re reports to the effect that secret agencies are working among the negro population in the South, urging the negroes to show their sympathies to the enemies of the U.S. because of discriminations which exist in the South against negroes... Asks that the President place his influence behind legislative efforts to solve these problems.²⁸²

Choosing to leave aside questions about the factual plausibility of Robertson's concern about subversives among African Americans, the President's response suggested at least an appreciation of the ultimate stakes involved in the performance of administrative and regulatory programs he had so aggressively sought to better control. The official correspondence record notes:

The President replied June 4, saying he is in complete sympathy with efforts in the south or elsewhere in the country to improve educational opportunities for all children and to equalize educational facilities among all groups in our population. He said it is his belief that we have made and are making great social progress, and that he recognizes the importance of adult education in solving the problems Mr. Robertson mentions, and hopes everything possible may be done, in keeping with our defense efforts, to assure the full cooperation of everyone in the present crisis.²⁸³

Perhaps the President's response was simply a political sop. History has shown, however, that politicians – whether democrats or dictators – disregard its essential insight at their peril.²⁸⁴ If war makes the state, it is also true that bureaucratic capacity allowing the state to regulate, to protect critical infrastructures, and to quell the raw edge of political dissent through redistribution programs, play a central role in nearly any plausible account of national defense.

Indeed, the current concerns with homeland security have increasingly come to encompass infrastructures and public health mechanisms easily framed by some lawmakers or scholarly observers as critical to national life. Although the creation of a Department of Homeland Security appears to have fomented cuts in domestic regulatory mandates, such a development does not necessarily signal the demise of “security” as an organizing principle for promoting domestic regulatory and administrative activity. It is worth noting that both the rhetoric and the underlying substantive concerns advanced by some observers and policy entrepreneurs in the homeland security arena bear more than a passing resemblance to the FSA's mandates more than six decades ago. Their basic message as simple as it is reminiscent of McNutt's and Roosevelt's speeches: a narrow focus on violent, manmade, geostrategic threats is a poor recipe for security; and even

²⁸² Internal White House Memo, Summarizing Correspondence with M.S. Robertson, President, Dep't of Adult Education, national Education Association (Baton Rouge, La.)(correspondence May 14, 1941, memo circa June 3, 1941), avail. at Franklin D. Roosevelt Presidential Library, Official File 3700 (Federal Security Agency)(1941 folder).

²⁸³ *Id.*

²⁸⁴ *Cf.* SAMUEL POPKIN, *THE RATIONAL PEASANT* (1979); BARRINGTON MOORE, *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD* (1966), ADAM PRZEWORSKI, *DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA* (1991).

when the focus remains on those more conventional threats to national defense, success depends heavily on the nation's human and regulatory infrastructure. In the national experience with the FSA, policy entrepreneurs may find hints about the viability of political coalitions supporting the development of bureaucratic capacity to achieve a blend of regulatory, redistributive, and more conventionally-understood geostrategic national security goals.²⁸⁵

Yet amidst such underlying complexity about the nation-state's core responsibility to its citizens, only the barest hint seems to register in the emerging domain of legal practice and scholarship now defined as "national security law." Instead, that domain is primarily defined by attention to surveillance and investigation,²⁸⁶ coercive authority to detain or use force,²⁸⁷ and presidential power over emergencies or foreign affairs.²⁸⁸ These topics are unquestionably important, but they leave aside two areas that national security scholars and practitioners take for granted at their peril: First, what individuals or interests *actually* secure control of bureaucracies with complex, overlapping international security and domestic regulatory functions? The new institutional architecture defining FSA not only advanced Roosevelt's own brand of security as a rationale for legal change. It also left the White House in a stronger position to control a major spigot of federal grants and align the bureaus' priorities with those of the Administration.²⁸⁹ Similarly, the impact of creating DHS decades later advanced the Bush Administration's own version of a (counter-terrorism focused) security agenda,²⁹⁰ but also recast the statutory authority governing the immense department's bureaus and left the Secretary with greater power over them.²⁹¹ The creation of the Energy Department²⁹² and passage of the Goldwater-Nichols defense restructuring act²⁹³ also showcase how statutory changes putatively designed to achieve sensible prescriptive goals in national security inevitably also operate to reallocate control over central functions of the nation-state.

²⁸⁵ See Cohen et al., *supra* note 25, at ___ (cuts in regulatory mandates). See also STEPHEN FLYNN, AMERICA THE VULNERABLE (2004)(advocating a conception of security that encompasses critical infrastructure protection, public health, and natural disaster mitigation and relief).

²⁸⁶ See, e.g., Heidi Kitrosser, "Macro-Transparency" as Structural Directive: A Look at the NSA Surveillance Controversy, 91 MINN. L. REV. 1163 (2007).

²⁸⁷ See, e.g., Robert Chesney and Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008).

²⁸⁸ See, e.g., David Golove, *The Bush Administration's "War on Terrorism" in the Supreme Court*, 3 INT'L J. CONST. L. 128 (2005).

²⁸⁹ See *supra* Part II.a.

²⁹⁰ See Cohen et al., *supra* note 25, at 681 n.24 (discussing the Bush Administration's focus on conventional counter-terrorism as the defining element of its security agenda).

²⁹¹ See *id.* at 697 n.95 (discussing the Homeland Security Act's provisions vesting in the Secretary the power to decide precisely how agencies should balance legacy mandates and counter-terrorism).

²⁹² See Terrence R. Fehner and Jack M. Holl, *Department of Energy 1977-1994: A Summary History*, U.S. DEPT OF ENERGY – ENERGY HISTORY SERIES 9-15 (Nov. 1994)(on file with author)(describing the nuclear security and national defense organizational functions transferred to the newly-created Department of Energy during the Carter Administration); Edward Cowan, *Who Needs the Energy Agency*, N.Y. TIMES 81 (May 30, 1976)(discussing the changes in bureau control that the creation of a new department would entail).

²⁹³ See AMY B. ZEGART, *FLWAED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC 131-163* (1999)(discussing the political conflicts over bureaucratic control associated with crafting the Goldwater-Nichols legislation, and the changes in authority associated with the bill's passage).

Second, how are the limits of security even defined? With the FSA and DHS the question holds relevance in the intersecting domain where the agencies simultaneously interpret their underlying statutory authorization while explaining their mission to a larger public capable of ultimately affecting the agencies' political context. The question holds even more direct significance in a host of adjudicatory contexts, ranging from presidential regulatory and surveillance powers²⁹⁴ to immigration.²⁹⁵ Without greater engagement with these domains, the more traditional elements of national security law will fail to provide a full picture of how law, security, and the nation-state continually define each other in a world of fluid – both bureaucratic and national – boundaries and alliances.

CONCLUSION

The wartime experiences of this Agency, which form so large a part of its background as a unified Agency to date, demonstrate the practicability and clarified the validity of wholesome cooperation and intelligent integration of the several security programs. The challenge facing the Federal Security Agency as it enters fiscal 1947, its first year in a peacetime world, is: Can the unstinting efforts so freely joined to help assure victory in a world at war be mobilized to help assure to the people of the United States a fuller life in a world at peace?²⁹⁶

On June 7, 2002, President George W. Bush announced a major initiative reshaping the architecture of the federal government to promote greater security for the American people.²⁹⁷ DHS was the result. Unmistakable parallels link that initiative to Roosevelt's creation of the FSA sixty-three years earlier. Like Roosevelt, President Bush faced a national electorate growing increasingly concerned about international threats. The early twenty-first century White House, like its predecessor in the 1930s, harbored an ambitious domestic policy agenda that would be affected by the reorganization. Both Administrations faced hostility over their accumulation of presidential power,²⁹⁸ and nonetheless sought to use reorganization to enhance their control over how laws are implemented in a sprawling regulatory state. Both ultimately succeeded in achieving their respective reorganizations.

Where each Administration differed sharply is in how it defined the concept of security that the newly strengthened legal architecture of government was supposed to serve. In Bush's case, the reference to security implicated primarily the management of

²⁹⁴ See e.g., *Youngstown Sheet & Tube Co. et al. v. Sawyer*, 343 U.S. 579, 665 (1952)(discussing the powers granted to the President in the Selective Service Act of 1940 to engage in certain regulatory actions when he or she determines that it is "in the interest of national security").

²⁹⁵ See IMMIGRATION AND NATIONALITY ACT, ch. 477, 66 Stat. 163 (1952). Before 1990, the Act defined subversives subject to removal to include, among other categories, aliens whom the Attorney General believes entered the United States principally to incidentally to engage in activities endangering the national security of the nation. See S. REP. NO. 1515, 81st Cong., 2d Sess. 798 (1950)(discussing the legislative history of these provisions).

²⁹⁶ FEDERAL SECURITY AGENCY, ANNUAL REPORT, *Foreword*, xvi (1946).

²⁹⁷ See Cohen et al., *supra* note 25, at 692-693.

²⁹⁸ Compare Mariano-Florentino Cuéllar, *The Untold Story of Al-Qaeda's Administrative Law Dilemmas*, 91 MINN. L. REV. 1302, 1304-1305 (2007)(describing controversies regarding legal decisionmaking in the Bush Administration) with Polenberg, *supra* note 17, at 55 (discussing criticisms of Roosevelt's alleged overreaching in bolstering executive power).

risks from terrorism or geostrategic threats, a narrowly-focused mandate sharply conflicting with transferred bureaus' broader missions and helping create conditions making DHS perennially troubled.²⁹⁹ In Roosevelt's case, the term security was meant to evoke a flexible conception of risk reduction that spread – like the FSA's jurisdiction eventually did – across the now-segregated domains of public health regulation, social welfare policy, and national defense. Against that backdrop, early FSA officials managed to create an environment supporting their bureaus' legal functions and adding to their resources rather than one calling for drastic reforms in agency priorities amidst sharp resource constraints.³⁰⁰ Even after Roosevelt's death, FSA Administrator Oscar Ewing continued articulating the same notion of security as “a sure knowledge that we shall not want for the basic necessities of life, no matter what Fate may have in store,”³⁰¹ one that eerily parallels the views of some observers who criticize DHS for not being more steadily focused on the full range of risks facing Americans today.³⁰² What exactly it means to secure the nation remains a foundational question defining the law's evolution.

But despite some unique features of the FSA, the larger picture appears to be one of continuity across the legal and organizational landscape of the last century. From DHS to social security to immigration and foreign affairs, time and again the ultimate impact of public law depends on who secures control of the nation's bureaucracy, and (in turn) on how organization is used to define the contested concept of the nation's security. What the story of the FSA shows – and that of DHS echoes³⁰³ – is how these dynamics are interrelated. On the one hand, major actors in controlling public law – including key lawmakers, the White House, and courts – assign exceedingly high importance to the question of who controls the national bureaucracy. In the short-run, control of the organizations carrying out legal functions translates into control over the interpretation and implementation of law. Organizational control of the bureaucracy shapes the architecture of public law in the longer-run, because bureaucracies shape the legislative agenda, impact public perceptions, and develop degrees of autonomy or particular cultures affecting how legal powers are actually used. On the other hand, political actors expend considerable effort to define *what* security means, whether the question of the relationship between health and national defense, the role of natural disaster response in national strategy, or the precise significance of immigration policy to some conception of security. Often, such efforts pivot on securing control of the bureaucratic entities carrying out government functions and therefore capable, at the margin, of affecting public perceptions of government activity.

These dynamics arise in part because organizational changes appear capable of exerting a more powerful influence than previously realized on the law's evolution. In

²⁹⁹ See Cohen et al., *supra* note 25, at __ (discussing the preeminent focus of Bush Administration homeland security policy on counter-terrorism and geostrategic threats).

³⁰⁰ Compare *id.*, at __ (discussing the combined impact of revenue neutrality and new missions) with *infra* Part III (discussing how the FSA's broader security mission and layer of political officials contributed to capacity-building).

³⁰¹ See Ewing, *supra* note __ (*American Magazine* article).

³⁰² See, e.g., STEPHEN FLYNN, *THE EDGE OF DISASTER: REBUILDING A RESILIENT NATION* (2007).

³⁰³ See Cohen et al., *supra* note 25, at __ (discussing the relationship between bureaucratic control and the definition of 'security' in the DHS context).

the case of the FSA reorganization helped a cluster of health, research, human services, and education agencies envision a common purpose and expand their bureaucratic mandate during a politically-risky time. They set in motion the growth of much of the modern federal government, helping fragile administrative and regulatory bureaucracies develop coalitions of political supporters and organizational cultures -- qualities would have been difficult to forge had these entities remained stuck as marginal bureaus in departments with discordant overarching missions (e.g. the Public Health Service at Treasury, or Education at Interior), or remained lone bureaus bereft of an organizational structure implying a larger project or purpose.

The organizational structure embodying the FSA further provided these bureaus with a mechanism for political and legal advocacy: facilitating relations with Congress, coordinating bureaus' activities, and allowing for the development of new legal interpretations and policy proposals. Nearly every major change in American regulatory policy that followed the New Deal during the 20th century – from social security expansion and Medicare, to the original clean air regulatory framework, to the modern infrastructure for pharmaceutical, food, and consumer products regulation – initially involved the FSA or its successor agency. Had Roosevelt failed to create a bureaucratic mechanism for proposing, advocating, and implementing these policies, such initiatives would almost certainly have faced a less hospitable political environment. By the same token, opponents of national health insurance pointedly opposed the FSA's elevation to cabinet status while insisting that such a change would strengthen Truman's bureaucratic resources for pursuing the goal of broadening health coverage.³⁰⁴

As a complement to these changes in the hierarchical machinery of the federal bureaucracy, agency architecture helped reshape the public imagination about the concept of security. Specifically, the agency's legal architecture emphasized how education and public health research could promote war production and civil defense. It was a rhetorical dynamic emphasized at every turn by both the FSA's leadership and the White House. The reorganization also helped the White House nurture, protect, and control some of its most prized administrative and regulatory programs at a time when the Administration's political capital was on the wane, critics were pointing to the panoply of disaggregated independent agencies as a reason to shrink government, and White House staff resources to monitor and control administrative developments were almost nonexistent. These developments did not ensure that all subsequent legal and political battles on behalf of the FSA's subcomponents were won. On the other hand, the events surrounding the creation and evolution of the FSA left their mark in terms of the connection between defense and health in modern government bureaucracies, and the relative centralization of regulatory power in just a few entities that indelibly shape American life.

³⁰⁴ Opponents seem to have feared two things: the public attention that such an elevation would have brought to the health issue at a time when Truman was eagerly seeking to turn it into a major subject of national debate; and the further bureaucratic resources (in terms of additional political appointees) Truman would gain, which in turn could facilitate efforts to use the agency's analytical and advocacy resources to promote the drive for national health insurance. *See supra note* 109 (discussing opposition to cabinet status for the FSA by the AMA during the Truman Administration).

That centralization process yields two final, broader implications for public law. First, because of the elevated stakes involved in organizing agencies, separation of powers disputes will continue to turn on how lawmakers and the White House split the power to structure (and restructure) the bureaucracy. Messy as the modern separation of powers doctrine has become,³⁰⁵ with its functional concerns over branch aggrandizement and its basic acknowledgement of shared power in a host of domains, finding an alternative may be exceedingly difficult. Crisp rules are elusive here, and neither history nor the basic logic of the relevant law support the unitary executive theories rejected in *Humphrey's Executor*. If accepted, such theories would run the risk of leaving the president with enough power to achieve through practical control of the bureaucracy anything that she could not achieve through direct, ostensibly legally binding instructions contradicting statutory commands. In the end, structural control over hiring, firing, budgets, and regulatory power works as a substitute and complement for formal legal power achieved through interpretations of traditional separation of powers doctrine (witness the reaction to *Humphrey's Executor*).

Second, the fight over security's multiple strands sheds light on lingering questions about the role of incrementalism in achieving legal and social change. Conceptual questions about the scope of security ran together with practical choices about how – and how rapidly – to alter existing legal arrangements. The answers to these questions at the agency's origin emphasize the unique and sometimes discontinuous impact of political strategy. An incremental approach to building a “Department of Public Welfare” was not what Roosevelt first envisioned when he sought to secure greater control of the nation's bureaucracy. But then, the mechanics through which the Social Security program had itself been turned into legislation a half-decade earlier were themselves an excruciating exercise in compromise. Making deals with House and Senate tax-writing committees, the Administration had simultaneously limited the program's scope but also expanded its base of support among moderate and even conservative lawmakers on Capitol Hill. Much the same was true of the security-related reorganization that engendered the FSA. Had the Roosevelt Administration succeeded in obtaining the sweeping reorganization powers it sought under the original bill, the President would almost certainly have proposed more – and more far-reaching – reorganization plans.

Instead, Roosevelt was forced to consider more carefully the nature of congressional opposition. There is something distinctive about Roosevelt's moves and the sprawling agency it produced. Although the concept of security may be inherently capable of encompassing a broad range of policies associated with social well-being and national strength, it was the Roosevelt Administration's determined reaction – even in the face of congressional defeat – that transformed that broad concept into a viable bureaucratic structure. To do so, he was forced to choose more palatable reorganization strategies focusing on what was then a uniquely flexible version of national security. Frustrated though he was at the time, the legislative backlash may have coaxed Roosevelt in a direction that minimized opposition to the new agency at the time when it was most vulnerable. By settling for limited reorganization powers, the Roosevelt Administration

³⁰⁵ See, e.g., M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PENN. L. REV. 603 (2001).

likely placed the FSA's bureaus in a more viable long-term position, one that combined incremental growth with a politically valuable blend of national security and domestic policy rationales. With the evolution of the FSA thus set in motion, Roosevelt demonstrated yet again the irony of how politics, to be commanded, must be obeyed.