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Someone Who'll Watch Over Me

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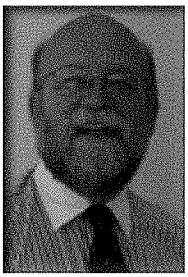
Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 **Yale L. J.** 1836 (2015).



Pat Gudridge

Gillian Metzger is convinced of "[t]he central importance of supervision." "Supervision and other systemic features of governmental administration with which it overlaps … are fundamental in shaping how an agency operates and its success in meeting its … responsibilities." (P. 1840.) Nonetheless "constitutional law stands largely aloft from the reality of administrative governance, with the Supreme Court refusing to subject systemic features of government operations to constitutional scrutiny." (P. 1841.) This dissonance preoccupies Metzger's article.

Available lines of thought, we know, lie right at hand. The Article II Take Care Clause jumps out as one beginning. Anti-delegation worries, originating in structural preoccupations, suggest another accessible constitutional skein. Metzger's observations drawing out these threads make for easy reading. (Pp. 1874-1904.) The problem, she thinks, lies largely with courts and their adjudicative inhibitions. In both administrative and constitutional law, ideas of review, "cases" and "controversies," parties to disputes, resolution and finality, and so on—all work against thinking through matters of system, supervision, "rightful hierarchy," and so on. Judges are inclined to start with—are prone to hesitating absent—investigations of individual instances. Although she maps possible occasions for taking up questions of supervision directly, Professor Metzger acknowledges that there's not much chance of provoking large-scale change in judicial orientations (and maybe shouldn't be). Her several discussions, here too, are searching and extensive, thoughtful and clear. (P. 1859-70, 1904-09, 1914-18.)

The article is nonetheless not a ninety-page shrug. Law works itself out, of course, in processes other than adjudication. Metzger identifies good reasons for executive officials and legislators to take firmer hold of the duty to supervise. (P. 1927-32.) But it may also be enough constitutionally, her readers are led to understand, if judges working within administrative and constitutional law put to use the idea of the duty to supervise as something like an "aside" (not Metzger's own word; see the new compilation edited by Jason Potts and Daniel Stout, *Theory Aside*). Professor Metzger writes with quiet, dry wit:

> Administrative law … offers an important means by which courts could require agencies to pay greater attention to their supervisory obligations without assuming responsibility for enforcing those obligations in the first instance. The vehicle would be the standard APA challenge to agency action as arbitrary and capricious…. (P. 1919.)

Appearance and action, she thinks, do not always (and seemingly need not) proceed in parallel in administrative law:

> …[A]n administrative law approach to the duty to supervise would require changes in current administrative law doctrines…. Notably, however, courts often appear to respond to presidential involvement in their application of administrative law scrutiny without being open about doing so or offering a justification for their approach. As a result, although acknowledging the duty to supervise might entail changes in stated doctrine with respect to presidential administration, it may not require much change in current administrative-law practice. (P. 1926.)

Even given all this indirection, even if little would change in administrative law in practice, Metzger stresses that "acknowledging" the duty to supervise would be a marked change. "[I]ncorporating a duty to supervise into administrative law could produce a fundamental reorientation of judicial review of agency action. … Rather than targeting specific decisions or actions, judicial review would scrutinize programmatic structures and broader aspects of agency policy and functioning." (P. 1920.) But this change would be notable mostly from the constitutional perspective.

> Failure to articulate administrative law's constitutional underpinnings leads to a false perception of constitutional law as separate and distinct from other forms of law and of agencies having little role as independent constitutional enforcers. Failure to acknowledge the complicated interplay among courts and agencies with respect to constitutional enforcement also makes it difficult to develop an account of the proper bounds of this relationship. (1912)

It is not just that making explicit the constitutional law duty to supervise would alter the face of administrative law. Our sense of what constitutional law "is" reshapes itself too.

> Constitutional law in the modern administrative state does not have hard edges allowing for a clear demarcation between that which is constitutional and that which is not. Rather, constitutional law today is a porous entity. Constitutional requirements mingle with numerous forms of subconstitutional law, often functioning more as background norms than as direct commands. This means that constitutional implementation will centrally involve other government institutions. It also means that courts will inevitably engage in law creation as they seek to enforce constitutional concerns indirectly. (P. 1933.)

Water music! What wonderfully baroque minimalism! But there is also substantial practical fall-out, Professor Metzger suggests, providing a notable headline example:

> Precluding prospective and categorical articulation of immigration enforcement policy and priorities is tantamount to insisting that nonenforcement decisions be made by lower-level officials…. Acknowledging a constitutional duty to supervise thus indicates that presidential efforts to direct nonenforcement on a categorical, prospective, and transparent basis can have strong constitutional roots. …[E]xecutive-branch implementation of the duty to supervise seems likely to result in greater and more overt instances of presidential direction. (P. 1929.)

The President as "Great Helmsman" *a la* Mao? Bolingbroke's "Patriot King"? Not quite, of course: "Given that a core part of the duty to supervise is insuring legal accountability, such presidential policies must accord with governing statutory requirements or have a basis in the President's constitutional authority." (P. 1929.) We

glimpse here especially clearly the deep complexity resonating throughout Metzger's discussion. There is not just administrative law and constitutional law; not just administrative legal form and practice; not just direct and indirect constitutional law; but also an always present duality within constitutional law in substance—the duty to supervise always coexists with, is always in interplay with, other constitutional texts and concerns.

"The Constitutional Duty to Supervise" is—notwithstanding its length and intricacy—a proof of concept exercise. There is much therefore that is left out. For example, administrative law figures only very generally: there is no close look at its own jurisprudential controversies, no sense of its reformations and counter-reformations, no attention to long-running doctrinal perplexities like *Chevron*. There is not much attention to how, within constitutional law itself, the Fourteenth Amendment—its "due process of law" and "equal protection of the law" formulas—might interact with the duty to supervise in state and local law settings (for example, not much attention to *DeShaney* or *Castle Rock*); not much sense of supervision as a key problem with respect to police, prisons, etc.; no sense of how deep history—race, gender, and other profound "asides"—might press hard on ideas of what "right supervision" should be. With respect to the federal scene, moreover, there is not much attention to competing models: OMB insistence on cost-benefit analysis as an ever-present rationality maybe reducing the need for presidential supervision as such (surprisingly little discussion also of Cass Sunstein 's remarkably ambitious, inter-related works and pomps); statutory administrative pluralism as introducing a medium for judicial review grounded in versions of subject-matter jurisdiction, pretty much independent of administrative law per se, permitting apt matching of problems and agencies, again *inter alia*.

Not criticism—not really. In the end, rather, *this*: Gillian Metzger has attempted and landed a long jump.

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