THE DEALMAKING STATE: EXECUTIVE POWER IN THE TRUMP ADMINISTRATION

Steven Davidoff Solomon & David Zaring[*]

ABSTRACT

The Trump administration has promised to pursue policy through deals with the private sector, not as an extraordinary response to extraordinary events, but as part and parcel of the ordinary work of government. Jobs would be onshored through a series of deals with employers. Infrastructure would be built through joint ventures where the government would fund but private parties would own and operate public assets.

We evaluate how this dealmaking state would work as a matter of law. Deals were the principal government response to the financial crisis, partly because they offered a just barely legal way around constitutional and administrative barriers to executive action. Moreover, unilateral presidential dealmaking epitomizes the presidentialism celebrated by Justice Elena Kagan, among others. But because it risks dispensing with process, and empowers the executive, we identify ways that it can be controlled through principles of transparency, rules of statutory interpretation, and policymaking best practices such as delay and equivalent treatment of similarly situated private parties.

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INTRODUCTION

The government responded to the financial crisis by using corporate mergers to solve regulatory problems in order to act quickly to stem financial calamity.[1] But what if deals became a principal mechanism for the promulgated of government policy, overseen by an executive who promises to be the dealmaker in chief?[2]

In this article, we analyze dealmaking as an ordinary policymaking tool, and, identify some useful constraints on the practice.

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[1] Steven Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463 (2009).

[2] *See, e.g.*, Jackson Diehl, *The Dealmaker In Chief In A Dangerous World*, WASH. POST, Jan. 22, 2016, https://www.washingtonpost.com/opinions/global-opinions/the-dealmaker-in-chief-in-a-dangerous-world/2017/01/22/ceddd232-de69-11e6-918c-99ede3c8cafa_story.html?utm_term=.6478fd9b2972 ("Those seeking to extract meaning from Donald Trump's foreign policy declarations usually land on the idea that he's planning to make himself dealmaker in chief."); *Bart Chilton: Trump is now the Deal-Maker-in-Chief*, FOX BUSINESS, Dec. 07, 2016, http://www.foxbusiness.com/politics/2016/12/07/bart-chilton-trump-is-now-deal-maker-in-chief.html (quoting Commodities Futures Trading Commissioner Bart Chilton: "He [Trump] sort of did a metamorphosis. It was a monumental metamorphosis in my view. And he has appeared presidential. He's like deal maker-in-chief now.")

We do so because the deals are not going away, even though the emergency is over. With a deal-making president in the White House – an entrepreneur who co-wrote a book titled *The Art Of The Deal*, who uses the language of deals to describe his approach to policy, and who has identified a number of ways the private sector can be utilized to meet his goals – the state looks set for an expansion of dealmaking as an ordinary governance strategy. [3]

In particular, the new administration has vowed to use deals with private companies to advance public policy.[4] Even before being inaugurated, President Trump entered bargaining on a number of issues, designed to cut deals with companies to keep jobs in the United States.[5]

The last time the government pivoted towards dealmaking to realize policymaking objectives was during the financial crisis. Those deals were a form of necessary regulatory arbitrage by government, which is constrained by, among other things, notice and comment obligations, compensation requirements for takings, and principles of shareholder democracy that shield investors from public or private oppression.[6]

The financial crisis deals served as a means to evade these core values, even if they were done with attention to what the law required.[7]

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[3] DONALD J. TRUMP & TONY SCHWARTZ TRUMP: THE ART OF THE DEAL (1987).

[4] As opposed to deals with foreign governments or with the American people. *See, e.g.*, Franklin Delano Roosevelt, *I Pledge You--I Pledge Myself to a New Deal for the American People, Address Before the Democratic National Convention* (July 2, 1932), in 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 657 (1938).

[5] *See* Margaret Hartmann, *Trump Takes Credit for Keeping Ford Factory in U.S. – But It Was Never Moving,* NEW YORK MAGAZINE, Nov. 18, 2016; Nelson D. Schwartz, *Trump Sealed Carrier Deal With Mix of Threat and Incentive*, N.Y. TIMES, Dec. 1, 2016.

[6] Regulatory arbitrage is usually associated with the private sector, but government actors can also make use of the strategy. As Victor Fleischer has explained, "[r]egulatory arbitrage exploits the gap between the economic substance of a transaction and its legal or regulatory treatment, taking advantage of the legal system's intrinsically limited ability to attach formal labels that track the economics of transactions with sufficient precision." Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 229 (2010); *see also* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 70 (2008) (describing a "multiple-regulators problem and the regulatory arbitrage opportunity it creates"); *see also* Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211, 227 (1997) ("Regulatory arbitrage consists of those financial transactions designed specifically to reduce costs or capture profit opportunities created by differential regulations or laws."). For examples, see AT&T Communications of Cal., Inc., v. Pac-West Telecomm, Inc., 651 F.3d 980, 944 (9th Cir. 2011) (discussing how the FCC attempted to restrict regulatory arbitrage by private-sector competitive local exchange carriers); In re Refco Securities Litigation, 892 F.Supp.2d 534, 538 (S.D.N.Y 2012) (describing how subsidiaries of Refco functioned as a form of regulatory arbitrage as offshore brokerages);

[7] Davidoff & Zaring, *supra* note 1, at 466-77. *See also* Richard A. Epstein, *The*

That crisis response and attention to the law did not mean that regulation by deal lacked controversy. Solving regulatory problems through deals creates government-endorsed winners and losers.[8] It is replete with novel process questions and costs, which in some ways are antithetical to the administrative state. And it is justified mostly with reference to the need, in an emergency, for energetic action.

The administration has announced that it will use deals to pursue its policy objectives in two principal ways, and acted through other mechanisms that imply that its governing ethos will be transactional.

First, a dealmaking president can pursue economic policy though deals with particular manufacturers, conditioned on the onshoring of jobs. One of the first economic announcements made by then President-Elect Trump was a deal made to keep an air conditioning firm from moving jobs to Mexico.[9] Local tax breaks were exchanged for a promise not to move the jobs – the effort was characterized in the press "a deal he brokered to keep American jobs in the U.S."[10] Such dealmaking might encompass broader measures such as promises not to retaliate against certain companies in exchange for steps taken to keep or locate jobs in the United States.[11]

Second, a deal-making approach to governance will implement programs through shared ownership contracts with private parties rather than through government programs.[12] The new president has indicated his

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Government Takeover of Fannie Mae and Freddie Mac: Upending Capital Markets with Lax Business and Constitutional Standards, 10 NYU .J.L. & BUS. 379, 408 (2014) (observing that "private shareholders of Fannie and Freddie get nothing in exchange for the cash flow that the government unilaterally took"); Gary Larson, *Burying the Constitution under a TARP*, 33 HARV. J.L. & PUB. POL'Y 55, 58 (calling TARP a "constitutional monstrosity" that violates the nondelegation doctrine and the Appointments Clause, among other problems); Complaint, Rafter v. Dep't of Treasury, No. 14-1404, 2014 WL 4059217 at *1 (D.D.C. Aug. 15, 2014) (shareholders alleging "unlawful and enormous government expropriation" in relation to Freddie Mac and Fannie Mae takeovers); Alley's of Kingsport, Inc. v. U.S., 103 Fed. Cl. 449, 451 (2012) (former automobile dealers alleging uncompensated taking of their property rights under government's application of Troubled Asset Relief Program requiring Chrysler to terminate dealerships); Starr Int'l Co. v. U.S. 121 Fed. Cl. 428, 430 (2015) (shareholders alleging government violation of Takings Clause through its bailout of AIG).

[8] Fairholme Funds, Inc. v. United States, 128 Fed. Cl. 410 (2016).

[9] Daniel Gross, *America Doesn't Need A Dealmaker in Chief*, SLATE, Dec. 1, 2016.

[10] *Id*.

[11] Critics such as Sarah Palin characterized it as "crony capitalism." Sarah Palin, *But… Wait… The Good Guys Won't Win With More Crony Capitalism*, YOUNG CONSERVATIVES (Dec. 2, 2016, 12:52 PM), http://www.youngcons.com/sarah-palin-but-wait-the-good-guys-wont-win-with-more-crony-capitalism/.

[12] Infrastructure projects have, in the past, been implemented by funding agencies to engage in public works. Such funding provided a means to build the works programs of the

support for this method of policymaking with his infrastructure initiative.[13] Under this approach, the government, to meet a public goal, such as stimulating the economy, would act as a partner of private developers who pitch and ultimately win infrastructure projects that they then fund with access to government financing along with private financing. In the end, the private investors receive an ownership stake in the asset. In the case of the Trump administration, $200 billion in tax credits is meant to be leveraged into $1 trillion of infrastructure spending, suggesting that the private ownership stake in the resulting projects will be large.[14]

This sort of public private partnership creates institutions that provide public services but that are owned, operated, or both, by the private sector, a rare thing in the United States.[15] Airports might belong to a company who would make money by charging airlines for gate access, customers for the use of the airport, and vendors for the right to sell products to those customers while they wait for their flights.[16] Road building programs would be reoriented away from freeways and towards toll roads owned and operated by a private party, and financed through toll revenues and the ancillary services provided on the tollway.[17] Other government services can be privatized in this way; already public universities and state internet access programs have looked to these

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Great Depression. *See generally* NICK TAYLOR, AMERICAN-MADE: THE ENDURING LEGACY OF THE WPA: WHEN FDR PUT THE NATION TO WORK (2008); *see also* Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 955 (2000) ("New Deal agencies included key employment agencies, such as the Works Progress Administration"). Even more commonly, a public agency will preside over a bidding process in which companies can participate. For a discussion, see Bynum v. FMC Corp., 770 F.2d 556, 560 (5th Cir. 1985) (providing "a brief overview ... of the [modern government contractor] defense's historic analogues and the reasons provided by federal and state courts for the adoption of the modern defense").

[13] The list of infrastructure projects being mulled by the president have been put on a list that notes whether they have the potential to be privatized. Lynn Horsley, Steve Vockrodt, Walker Orenstein & Lindsay Wise, "*Exclusive: Trump Team Compiles Infrastructure Priority List,* MCCLATCHY DC BUREAU, Jan. 24, 2017, http://www.mcclatchydc.com/news/politics-government/white-house/article128492164.html. We discuss this *infra* at Part II.C.

[14] *See infra* note 92-93, and accompanying text.

[15] Public-private partnerships are not unprecedented. *See infra* notes 16-18, and accompanying text. But as we will see in part II.C, the Trump administration has embraced them in an unprecedented way.

[16] Alternatively, the airport might be the subject of a long term lease to a private sector operator.

[17] *See infra,* notes **Error! Bookmark not defined.-Error! Bookmark not defined.**, and accompanying text.

partnerships to meet their missions.[18]

Finally, approaching the task of governing through a dealmaking lens could affect even those government programs that can be implemented without deals with the private sector. Using deals to do the work of government can become a state of mind – one where foreign policy, for example, is conceived as a set of deals – the "Iran Deal"[19] the "China Deal,"[20] and a free trade deal with Mexico that the president has characterized as the "worst deal ever."[21] The government could be staffed with dealmakers, and dealmaking experience might be deemed a plus for questions of agency leadership.[22] Dealmaking could even be deployed to reduce the deficit – the president has mused about renegotiating the terms of the country's sovereign debt which would also represent a deal – a negotiated workout with creditors, instead of the more arm's length transactions represented by the selling of government debt on licensed exchanges.[23]

We see two implications for regulation by deal; one for administrative procedure, and a second for the separation of powers.

Procedurally, dealmaking in the service of government policy is a way to comply with the law and yet get around its most onerous terms and process requirements.[24] It is a way to manage legality by enacting policy

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[18] *See infra* note 91 and accompanying text.

[19] Sarah Begley, *Read Donald Trump's Speech to AIPAC*, TIME, Mar. 21, 2016, http://time.com/4267058/donald-trump-aipac-speech-transcript/ ("My number-one priority is to dismantle the disastrous deal with Iran.").

[20] Stephen Collinson, *Trump and China on Collison Course*, CNN (Dec. 5, 2016, 9:05 PM), http://www.cnn.com/2016/12/05/politics/donald-trump-china-taiwan-clash/ ("He made clear that he's serious about his vows to wring a new deal from China on trade…").

[21] *On Trump's Coattails*, NEW AMERICAN, 2016 WLNR 39011441 (quoting Trump as characterizing NAFTA as "one of the worst deals ever made of any kind signed by anybody.").

[22] This appears to be occurring in the Trump administration as President Trump appoints experienced dealmakers like Steven Mnuchin as Treasury Secretary and Wilbur Ross as Commerce Secretary. William D. Cohan, *America's New Dealmakers-in-Chief*, POLITICO, Dec. 15, 2016, http://www.politico.com/magazine/story/2016/12/steve-mnuchin-wilbur-ross-donald-trump-treasury-commerce-214529.

[23] *See infra* Part III.C.

[24] *See* Davidoff & Zaring, *supra* note 1, at 466-68. In this sense, it is like guidance, which has long been criticized as an end run around the requirements of the APA. *See* Robert A. Anthony and Michael Asimow, *The Court's Deferences—A Foolish Inconsistency*, 26 ADMIN & REG. L. NEWS 10, 11 (Fall, 2000) (identifying "a powerful incentive for agencies to issue vague regulations, with the thought of creating the operative regulatory substance later through informal interpretations"); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 488-89 (1997) ("by using policy

through unorthodox channels.[25] In this sense it is both consistent with the rule of law, at least to some degree, and a challenge to it. The implications of a widespread embrace of transactions as tools to make government policy will accordingly depend on one's comfort with the administrative state as it currently exists. For those who believe that the administrative state has ossified the ability of the government to make policy, administration by deal is a remedy – an alternative to a notice and comment process that that is slow and a protracted government contracting process.[26] Of course, bureaucracy and burdens can rear their heads in different contexts, such as through the terms of contracts, as those who do deals with the government to assure that jobs are onshored are discovering.[27]

As a constitutional matter, dealmaking privileges an executive

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statements to coerce compliance with a desired standard, an agency can circumvent the safeguards the three branches of government have developed to ensure that the agency's policy is legally, economically, and politically justified"); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L. J. 1311, 1312 (1992) ("To use such nonlegislative documents to bind the public violates the Administrative Procedure Act (APA) and dishonors our system of limited government.").

[25] Most obviously, by relying on private channels to enact policymaking, deals avoid the administrative law requirements imposed on agencies. For the basics on this public private distinction, see Goldberg v. Kelly, 397 U.S. 254, 262 (1970), (concluding about public benefits that "their termination involves state action that adjudicates important rights"); Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), ("private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it."); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1370-73 (2003) ("A foundational premise of our constitutional order is that public and private are distinct spheres, with public agencies and employees being subject to constitutional constraints while private entities and individuals are not… The premise of the public-private divide in constitutional law is that the rules governing private actors should be politically rather than constitutionally determined"); Jody Freeman, *The Private Role in Public Governance,* 75 N.Y.U. L. REV. 543, 576 (2000) (…the Court has consistently narrowed or distinguished its own precedents in order to limit strictly the extension of constitutional constraints to private actors engaged in arguably public activities. The Court remains strongly committed to the public/private distinction on which the doctrine depends.")

[26] Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L. J. 1385, 1386 (1992).

[27] *See* David Freeman Engstrom, *Agencies As Litigation Gatekeepers*, 123 YALE L.J. 616, 712 (2013) (describing the "byzantine set of rules regarding government contracting"). Some of those byzantine rules have contemplated government oppression through contract, offering contractors a measure of relief in such cases. The leading case is *Kalvar Corp. v. United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976) (citing Struck Constr. Co. v. United States, 96 Ct. Cl. 186 (1942) (opining that relief may be had "when confronted by a course of Governmental conduct which was 'designedly oppressive'").

model of governance. We would not argue, as some have, that the executive is or should be unbounded when making deals.[28] But it is fair to say that Congress cannot administer by deal and that the courts are unlikely to be able to review deals. They do not create widespread injury that permit an array of plaintiffs to contest the legality of the deal.[29]

Scholars of varying persuasions have argued that governance is either normatively or descriptively best located in the hands of a powerful executive. Elena Kagan famously argued that administration centered in the presidency was attractive because of the coordinative powers and democratic legitimacy of the White House.[30] Adrian Vermeule and Eric Posner posited that unfettered presidential action was an inevitable consequence of emergencies, and implicitly suggested that this was a good thing.[31] Governance by presidential deal is the logical endpoint of this sort of pro-presidentialist scholarship.

In our view, it has always been better to ensure the importance of

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[28] *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2011).

[29] Governance by deal creates environments where competitors who might be injured by government largesse directed at a peer, and therefore have standing to sue under the competitive injury prong of standing doctrine, might be unwilling to do so because they can seek their own sort of compensation through other deals. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 113 (1986) ("[I]n order to seek injunctive relief under § 16 [of the Clayton Act], a private plaintiff must allege threatened loss or damage of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.") (internal quotation marks and citation omitted); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 319 (1936) (permitting the plaintiffs' suit where they were preferred stockholders who could "show the breach of trust or duty involved in the injurious and illegal action."); *see also* John C. Coates & Guhan Subramanian, *A Buy-Side Model of M&A Lockups: Theory and Evidence*, 53 STAN. L. REV. 307, 369, n.172 (2000) (". . . financial deals normally involve privately held bidders, which in turn are often thought to have lower agency costs than public bidders . . . ."); Paul N. Edwards, *Compelled Termination and Corporate Governance: The Big Picture*, 10 J. CORP. L. 373, 385 n.54 (discussing plaintiff standing and citing *Ashwander*). *See* Seth Kreimer. *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L REV. 1293, 1301-51 (1984) ("While the scope of the state's discretionary authority to allocate benefits has expanded in the modern era, the terms in which the problem of allocational sanctions are analyzed by modern courts are notably reminiscent of the arguments of a century ago.").

[30] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001).

[31] Eric Posner & Adrian Vermeule, *Emergencies and Democratic Failure* 4–5 (University of Chicago Public Law & Legal Theory, Working Paper No. 104, 2005) ("…the costs of judicial mistakes are higher, because judicial invalidation of a policy necessary for national security may have disastrous consequences; and the sheer delay created by vigorous judicial review is more costly as well, because in emergencies time is typically at a premium.").

the institutional constraints imposed by the law. Descriptively, legal constraints drive the implementation of deals, and normatively, using deals to routinely evade government process affects core values and often lowers the quality of governance.[32] It threatens to unbalance the separation of powers as well. More specifically, governance by deal allows the executive to act quickly and decisively in emergencies and can tailor actions to the needed conduct. The downside is a lack of broader participation, and hence a higher chance that the policy incorrectly represents the will of the people in a democratic regime. Acting through legislation means broader consensus but higher transaction costs as the legislative process puts brakes on policy actions.[33] In most areas of domestic law and outside emergencies, we have traditionally accepted the higher transaction costs, but government by deal upsets this balance.

We also think that the government has found legal constraints limiting even when doing deals in emergencies, and we generally welcome those constraints. If a president is going to make deals an important mechanism of policymaking, there is no doubt that he can do so. But governance through dealmaking outside a financial crisis ought to be constrained in a few ways if it is to become an ordinary tool of policymaking, rather than an extraordinary option. Deals should be publicly disclosed, so that they can be scrutinized by the citizenry. They should be executed slowly, rather than quickly, to avoid some of the problems of overhasty mergers and acquisitions and private equity style deals that have bedeviled the government's response to the financial crisis. They should only be permitted when reasonable interpretations of governing law would permit them. And after the deal is done, due process, and perhaps also the Takings Clause, requires that those adversely affected by the deal receive a day in court.

Governance by deal both inside and outside a crisis thus presents thorny legal and constitutional problems for the administrative state. In this article we attempt to delineate what governance by deal is, to place a theoretical model on its use and to discuss parameters for its limitation. As we write this article, the precise contours of the way the administration will pursue governance by deal are uncertain, although the president has been unabashed about praising the advantages of deals in getting work done.

In Part I we define what exactly is government by deal. The US has purchased and sold critical assets as far back as the Louisiana Purchase,

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[32] *See infra, e.g.,* part II.C.2.

[33] *See generally* JOHN H. YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH (2009) (arguing that executive power in emergencies can allow for quick, decisive action as opposed to legislative action).

after all, but the deals of today are ones that, unlike the Louisiana Purchase, rely on the executive alone to act, and are made with the private sector, permitting a consideration of deals in the place of the presidentialist literature. In Part II we take the lessons learned by this past experience, and scholarship on it, to apply them to the new frontier of governance by dealmaking. We examine possible areas where government by deal may occur in the coming years, focusing on the use of deals to build infrastructure – a priority of the Trump administration –and the use of deals with firms to meet some of its headline objectives, including keeping manufacturing jobs on shore. In Part III, we turn to the appropriate and possible parameters on government by deal in order to comport some fundamental principles of administrative law and the constitutional separation of powers. We recommend some internal checks on executive branch decision-making, along with disclosure. A brief conclusion follows.

I. DEFINING GOVERNANCE BY DEAL

A. Governance by Deal Defined

One of Thomas Jefferson's greatest Presidential achievements was a deal.[34] In 1803, the President signed a secret arrangement to purchase from France the Louisiana Purchase, approximately 828,000,000 square miles, including the port of New Orleans.[35] The price was $15 million negotiated up from the $2 million Thomas Jefferson first offered for New Orleans

[34] Admittedly, the deal was a different sort of deal than the ones studied here since it was with a foreign government. In foreign affairs, another example of private dealmaking is the one between the Nixon administration and Japanese car manufacturers known as the voluntary restraint agreement. *See* Chrysler Corp. v. Gen. Motors Corp., 589 F. Supp. 1182, 1189 (D.D.C. 1984) (describing the agreement) Manor Japanese steel manufacturers also agreed to reduce voluntarily their car exports so that the US would not impose trade restrictions. The restraint was challenged in the D.C. Circuit and upheld. *See* Consumers Union v. Kissinger, 506 F.2d 136, 138 (D.C. Cir. 1974); Michael William Lochmann, *The Japanese Voluntary Restraint on Automobile Exports: An Abandonment of the Free Trade Principles of the GATT and the Free Market Principles of United States Antitrust Laws*, 27 HARV. INT'L L.J. 99, 157 (1986) ("To help the domestic steel industry, the U.S. State Department negotiated directly with foreign steel producers and received letters of intent from EEC and Japanese steel manufacturers to limit their exports of steel to the U.S. market."). Another historical example of private dealmaking was when President John F. Kennedy arranged a deal to stop a national steel strike. For a discussion, see Note, *Quasi-Legislative Arbitration Agreements*, 64 COLUM. L. REV. 109, 126 (1964) ("The damage that would result from a nationwide strike in an essential industry").

[35] *The Museum Gazette: The Louisiana Purchase,* NATIONAL PARK SERVICE (Dec. 1991), https://www.nps.gov/jeff/learn/historyculture/upload/louisiana_purchase.pdf.

alone.[36] The purchase was made by treaty and despite criticism that President Jefferson lacked constitutional authority to negotiate the purchase was approved by Congress.[37] The price was at pennies on the acre and has been heralded as one of the "greatest deals in history."[38]

The Louisiana Purchase shows that dealmaking in some form or another has been a feature of U.S. governance since the founding. The most prominent form has been of the type featured in the Louisiana Purchase. These are U.S. dealings with foreign nations through either one off negotiations like the Louisiana Purchase or the Iranian Nuclear deal.[39] Dealmaking among nations has never looked like administrative law, or in many cases law at all. Political scientists study it as international relations, and the legal authorizations for these deals are provided by the Constitution's vesting in the president the authority to conduct foreign relations.[40] Accordingly, in foreign affairs, Presidents have always had wide discretion to strike deals, something that they have used repeatedly.[41]

However, there are other types of Presidential dealmaking, and the new administration has indicated that it plans to use deals to execute on its policy objectives. In this article, we focus on dealmaking involving transactional arrangements with the private sector. This type of dealmaking also has precedents. The rescue of Chrysler back in the 1980s was a deal like this, ratified by Congress.[42] During the financial crisis, the government cut its own deals to save individual financial institutions.[43] But in measure and tone, dealmaking appears to be increasing in scope and number in the new Trump administration.

The epitome of government by deal is a program realized by a series of customized, negotiated outcomes with private actors. This was the case during the financial crisis. As we documented in *Regulation by Deal*, the government dealt with the financial crisis negotiating deals with individual

[36] *Id.*

[37] *Id.* It accordingly was ratified by the Senate.

[38] *Id.*

[39] *See supra* note 21 and accompanying text.

[40] John Bolton & John Yoo, *Paris Climate Conference: Without Congress' Support, Obama's Dealmaking Powers Are Limited*, L.A. TIMES, Dec. 1, 2015. Moreover, when international deals with foreign countries are executed with foreign

[41] Brandice Canes-Wrone, William Howell, and David E. Lewis, *Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis*, 70 CHI. J. OF POL. 1 (2008) (finding that presidents exercise considerably greater influence over foreign policy).

[42] Melissa Block, *Examining Chrysler's 1979 Rescue*, NATIONAL PUBLIC RADIO (Nov. 12, 2008), http://www.npr.org/templates/story/story.php?storyId=96922222.

[43] Davidoff & Zaring, *supra* note 1, at 474-90 (reviewing several of these deals).

actors which often varied in terms.[44] Bear Stearns was saved in a negotiated deal to sell it to JP Morgan with $30 billion in U.S. government support.[45] AIG was rescued with a deal forcing the shareholder to give up their interest in the corporation to the government of the United States.[46] Fannie and Freddie were put into conservatorship, but their stock holders were allowed to retain a part of their stake.[47] The dealmaking extended throughout the financial crisis to include Wachovia, Citigroup, Bank of America, and, through TARP, almost all financial institutions as well as the automakers.[48]

These deals were for the most part bespoke. Terms were negotiated and the government acted like a dealmaker retaining top counsel and documenting terms. When deals no longer worked the government renegotiated them.[49] Deals became the centerpiece of the work of the government to address the financial crisis.

In these deals, the government was acting like a private equity investor. It took positions and negotiated terms, but then let management dictate the operations of the company – the goal was not to make money explicitly but to address government goals of preserving the economy and fostering financial stability.[50]

While the goal was worthy enough, and the investments, as it turned out, generally sound, there were significant due process issues with a dealmaking approach, as well as a seeming counter-narrative to the rise of the administrative state.[51] Regulation by deal seemed to occupy the zone of Presidential power, and exemplified the rush to give authority to the

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[44] Davidoff & Zaring, *supra* note 1, at 484-508.

[45] *See* The Bear Stearns Co., Current Report (Form 8-K) (Mar. 16, 2008), http://www.sec.gov/Archives/edgar/data/777001/000091412108000249/be12284854-8k.txt. *See also Oversight of the Trouble Assets Relief Program*, *Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 111th Cong. 12–13 (2009) (statement of Timothy F. Geithner, Secretary, U.S. Dep't. of Treasury), http://www.banking.senate.gov/public/index.cfm/2009/5/oversight-of-the-troubled-assets-relief-program. *See also* WILLIAM D. COHAN, HOUSE OF CARDS: A TALE OF HUBRIS AND WRETCHED EXCESS ON WALL STREET 47–53 (2009); Andrew Ross Sorkin, *In Sweeping Move, Fed Backs Buyout and Wall St. Loans*, N.Y. TIMES, Mar. 17, 2008, at A1; NYSE Quotes, WALL ST. J., March 8–9, 2008, at B6.

[46] Davidoff & Zaring, *supra* note 1, at 494.

[47] Am. Int'l Group, Inc., Current Report (Form 8-K) (Sept. 18, 2008), http://www.sec.gov/Archives/edgar/data/5272/000095012308011147/y71385e8vk.htm.

[48] *See* Davidoff & Zaring, *supra* note 1, at 508-512.

[49] As in the case of AIG, Citigroup, Bank of America and Fannie and Freddie. Solomon & Zaring, *supra* note 1, at 530-31, 485-90.

[50] Solomon & Zaring, *supra* note 1, at 532-534.

[51] *Id.* at 534

President in an emergency, albeit with deals structured with attention to the law.

In addition, for the most part, there was clarity as the terms negotiated were immediately disclosed and scrutinized. In retrospect, this was because we saw regulation by deal as a creature of the financial crisis, to be used during that time period, but a Presidential tool that would see sparing use once the crisis subsided. However, what has instead happened is that the government's actions in the financial crisis appear to have normalized this conduct. This ethos has been affirmed by the election of President Trump, a man who seems to value dealmaking above the prerequisites of the administrative state.

The new regulation by deal, that is, dealmaking by the administrative state with private actors, make policy through transactions that, if done by rulemaking ordinarily would be subject to the notice and comment period and the administrative requirements of due process, and if by adjudication, a straightforward path to judicial review.[52] It would also be policymaking that would normally apply even-handedly across an industry.[53] But deals can evade this process. Regulation by deal consists of one-off negotiation and arrangements where public comment is limited or non-existent on an ex post facto basis.

The paradigmatic example of this sort of dealmaking is the government's conduct during the financial crisis. Another type of regulation by deal is bespoke agreements with corporations to engage in certain conduct, like onshoring of jobs. A final one would be private/public partnerships on infrastructure. We consider these three alternative types of dealmaking in this article.

B. The Dealmaking Executive

For the past two decades, scholars have sympathized with presidential control of the administrative state. Justice Elena Kagan argued, while she was a law professor, that the law should make room for the centralization of administrative control in the White House;], and suggested that the courts should tolerate efforts by the White House to get around the basics of administrative process in a way that might be thought of as advanced *Chevron* deference when the president has been engaged.[54]

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[52] These requirements are set forth in 5 U.S.C. §553.

[53] *See generally* Jonathan S. Masur & Eric A. Posner, *Against Feasibility Analysis* (John M. Olin Program in Law and Economics, Working Paper No. 480, 2009), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5702&context=uclrev.

[54] Kagan, *supra* note 26, at 2372-80.

To Kagan, executive authority over administration in general is all for the best. She approvingly concluded that a contemporary president should "treat[] the sphere of regulation as his own."[55] The basis for this treatment laid in the traditional arguments about the democratic accountability of the president, who could "convert[] administrative activity into an extension of his own policy and political agenda."[56] Presidentially led administration promised "enhanced government[]" through "executive[] vigor."[57] The idea was that policy would be centralized at the White House, leading to coordinated action by agencies overseen by an accountable executive.[58]

Others have agreed, with differing glosses. Steven Croley has concluded that the White House is and should be, a principle source of bureaucratic initiative.[59] Others have argued that presidential power "inevitably expands," and that this is no bad thing.[60] The idea is that

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[55] *See id.* at 2281.

[56] *Id*. at 2282; *see also* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 201-02 (emphasizing the benefits of decision-making by high-level government officials, rather than low-level bureaucrats).

[57] Kagan, *supra* note 26, at 2342.

[58] *See id.*

[59] Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 883 (2003) ("the White House clearly has used rulemaking review to put its own mark on particular agency rules increasingly often over the course of the past two decades, and at an accelerated pace during the Clinton administration"). As a descriptive matter, Presidents tend to locate (to their minds) the worthy enhancements of the President's role in the domestic administrative state in a series of executive orders. President Reagan's 1981 Executive Order on regulatory review, No. 12,291, which required agencies within the executive branch to run their draft regulations by the White House's Office of Management and the Budget in the White House before promulgating them, as a sea-change in the structure of the federal bureaucracy that marked the beginning of ever greater amounts of Presidential control over it. The Clinton administration's cognate Executive Order, No. 12,866, underscored the need for OMB to review particularly significant regulatory action on a cost-benefit plan, and adopted an annual regulatory planning process. George Bush passed a subsequent executive order that largely retained these elements of Presidential supervision, and brought even more agencies into the planning process.

[60] William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 517 (2008) ("The President's power is also enhanced by the vast military and intelligence capabilities under his command. In his roles as Commander-in-Chief and head of the Executive Branch, the President directly controls the most powerful military in the world and directs clandestine agencies such as the Central Intelligence Agency and National Security Agency. That control provides the President with immensely effective, non-transparent capabilities to further his political agenda…"); *but see* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 70-76 (2006) (offering an empirical perspective qualifying and specifying the influence the White

deference is due to the president, even when acting unorthodoxly, because of the democratic legitimacy offered by the nationally elected executive, and perhaps also the technocratic benefits of policy coordination through a wise White House.[61] Skeptics like Thomas Sargentich have characterized this sort of support for presidentially centered regulation as an example of support for a "Presidential mystique."[62]

A second basis for deference to the president is rooted more in competence and the structure of the government, than it is in legitimacy. Eric Posner and Adrian Vermeule have argued that Congress and the courts must defer to the president in times of crisis, because it is the executive capable of responding to crises.[63] Posner & Vermeule's examples of executive crisis management include the aftermath of 9/11 and the aftermath of the financial crisis.[64] John Yoo has posited that in crisis presidents, indeed the best presidents, push to the limit of their constitutional authority and that they tend to succeed when they do so.[65]

These accounts posit the executive as the "man on horseback "of the modern administrative state, the one who can act, and therefore the one who will enjoy deference when acting.[66] The Posner and Vermeule story,

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House has over EPA policymaking).

[61] Of course, that national election depends upon the electoral college, which means that, as was the case in the last election, the president may win the election while losing the popular vote.

[62] Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 2 (2007); *see also* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2348 (2006) (arguing for the return from an "extremely powerful executive branch" "to a tradition of divided government that has served our country well.");; Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1263 (2006) (arguing that Presidential administration has led to an "unwarranted embrace of an unjustified antiregulatory mission").

[63] Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008* 76 U. Chi. L. Rev. 1613 (2009), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2740&context=journal_articles.

[64] *Id.* at 1637.

[65] JOHN H. YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH (2009).

[66] The "man on horseback" trope traditionally involves the takeover of the government by a military leader, but, given that the President is the commander in chief of the armed forces, perhaps the analogy may be stretched to fit. *See* Michael L. Kramer, *Lawyers On Horseback? Thoughts On Judge Advocates And Civil-Military Relations*, 55 UCLA L. REV. 1407, 1408 (2008) ("Therefore, democratic organizational theory has long held that civilian institutions and personnel must exercise ultimate authority over the military, lest a "man on horseback" wrest control of the State from the citizenry.").

however, only normalizes executive branch excess when it comes to crisis management. The executive wins those fights because it can respond to the emergency at hand. To be sure, Posner and Vermeule see executive power in the federal state to be on an upward trajectory, perhaps an unbreakable one.[67] But their emergency-rooted theory of executive supremacy does not particularly suggest that an executive who uses deals to evade some of the ordinary constraints on executive and bureaucratic action deserves (or will unavoidably receive) deference on its right to do so. In this way, the dealmaking executive represents a logical end point to the Kagan and Posner and Vermeule presidentialist views. Where they endorse presidential leadership in some contexts, deals are mechanisms of policymaking that only the president can endorse. In our view, regulation by deal calls for limits and some constraints, but a dealmaking president who principally acts using the form does not, as things now stand, need to worry much about them.[68]

II. THE NEW LEGAL ENVIRONMENT BY DEAL

The Trump administration has indicated that it can execute on some of its most important policy priorities through deals. It has used deals to keep jobs in the country, and has promised to redevelop American infrastructure by incentivizing the private sector to provide public improvements. The ethos of the administration is transactional, the paradigm governance by dealmaking. In the section we show how a presidency might regulate by deal as a daily matter.

A. Dealmaking by Example

In the Trump presidency it appears that Presidential power is being extended to customized one-off dealmaking, where each private actor is treated differently, outside the normal administrative or legislative process. An example of this type of conduct is the "Carrier Deal" which President Trump personally negotiated. Before he became President, Trump used the Presidential bully-pulpit to negotiate a one-off deal with Carrier, the furnace manufacturer, to save jobs in the United States.

Carrier is owned by the conglomerate United Technologies and the dealmaking began when the President-elect during the campaign began to criticize Carrier for the planned move of 1,400 jobs to Mexico.[69] During the

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[67] *See id.*
[68] *See infra* Part III.
[69] *See* Nelson D. Schwartz, *Trump Sealed Carrier Deal With Mix of Threat and*

Presidential campaign, Trump proposed a 35% tariff on all air conditioners imported into the United States.[70] Once elected, President Elect Trump personally communicated a warning to United Technologies CEO, Gregory Hayes not to move the 2,000 U.S. jobs located at Carrier's plants in Indiana to a new facility in Mexico.[71] He also tweeted about it, stating that he was "working hard, even on Thanksgiving" to cut a deal with Carrier to keep the jobs in Indiana.[72]

Carrier responded by entering into an agreement with the State of Indiana to preserve 800 jobs and invest $16 million in Indiana in exchange for $7 million in tax breaks , a deal which occurred after Mr. Hayes made a personal visit to Trump Tower.[73] The Wall Street Journal referred to it as a "deal", one that was criticized by people on the right and left.[74] Trump tweeted "Big day on Thursday for Indiana and the great workers of that wonderful state. We will keep our companies and jobs in the U.S. Thanks Carrier."[75] Carrier also celebrated, tweeting "We are pleased to have reached a deal with President-elect Trump & VP-elect Pence to keep close to 1,000 jobs in Indy. More details soon."[76] Those details though remain

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Incentive, N.Y. TIMES, Dec. 1, 2016, at A1.

[70] Bryce Covert, *Don't be fooled by Trump's deal to save some Carrier jobs*, THINK PROGRESS (Nov. 30, 2016), https://thinkprogress.org/trump-pence-carrier-deal-65e6bee054c9#.miba0ftja.

[71] *Id.*

[72] Donald Trump (@realDonaldTrump), TWITTER (Nov. 24, 2016, 7:11 AM), https://twitter.com/realDonaldTrump/status/801805564577808385.

[73] *See* Ted Mann, *Carrier Will Receive $7 Million in Tax Breaks to Keep Jobs in Indiana*, WALL ST. J., Dec. 2, 2016, https://www.wsj.com/articles/indiana-gives-7-million-in-tax-breaks-to-keep-carrier-jobs-1480608461.

[74] *Id.* Former Alaska governor Sara Palin called the deal "crony capitalism." Sara Palin, *But… Wait… The Good Guys Won't Win With More Crony Capitalism*, YOUNG CONSERVATIVES, Dec. 2, 2016, http://www.youngcons.com/sarah-palin-but-wait-the-good-guys-wont-win-with-more-crony-capitalism/. She continued that "But know that fundamentally, political intrusion using a stick or carrot to bribe or force one individual business to do what politicians insist, versus establishing policy incentivizing our ENTIRE ethical economic engine to roar back to life, isn't the answer." Senator Bernie Sanders wrote that "[i]nstead of a damn tax, the company will be rewarded with a damn tax cut. Wow! How's that for standing up to corporate greed? How's that for punishing corporations that shut down in the United States and move abroad?" Bernie Sanders, *Carrier Just Showed Corporations How To Beat Donald Trump*, WASH. POST, Dec. 1 2016, https://www.washingtonpost.com/posteverything/wp/2016/12/01/bernie-sanders-carrier-just-showed-corporations-how-to-beat-donald-trump/?tid=sm_tw&utm_term=.1eba80157bb9

[75] @RealDonaldTrump, Twitter (Nov. 29, 2016, 7:40 am), https://twitter.com/realdonaldtrump/status/803808454620094465?lang=en.

[76] @Carrier, Twitter (Nov. 29, 2016, 4:54 PM), https://twitter.com/Carrier/status/803764047300722688?ref_src=twsrc%5Etfw

vague to this day. Carrier's agreement with Indiana will be disclosed and fully vetted. However, there was commentary in the press about other behind the scenes deals which, if true, have never been disclosed.

In truth, the deal was likely a good one for the government in terms of monetary expenditures for state job retention. States regularly enter into retention packages, and the average amount paid per job was [].[77] Carrier announced that it would lose savings of $65 million by forgoing the move. And so the lower state payment was likely due to the terms of the deal negotiated by President Elect Trump and Indiana officials, and simple bargaining power. United Technologies, after all, derives almost half its revenue from government contracts, and negotiating away this point in exchange for preserving its government relationship was likely the motivator for this deal.

The Carrier negotiation was followed by multiple attempts by Trump to bend companies for various other deals. And so on December 6, 2016 he tweeted "Boeing is building a brand new 747 Air Force One for future presidents, but costs are out of control, more than $4 billion. Cancel order!" calling for Boeing to lower the price of Air Force 1.[78] Boeing immediately responded stating that a contract for the planes had yet to be even signed and that pricing was based on preliminary studies.[79]

This type of dealmaking through exertion and badgering extended to the automakers. After a number of tweets by Trump, Ford and General Motors announced the retention of jobs as did Bayer, Alibaba and Lockheed, though there was some dispute as to whether those job announcements were related to pre-existing plans.[80]

In the case of the automakers no quid pro quo was explicitly announced, but presumably the impetus of the automakers was to avoid Presidential scrutiny as well as benefit from proposed trade and tax changes. While it can be debated whether these are in truth actually "deals,"

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[77] Reid Wilson, *Carrier Deal Part Of Growing Trend Of Corporate Tax Giveaways*, THE HILL, Dec. 12, 2016, http://origin-nyi.thehill.com/policy/finance/308349-carrier-deal-part-of-growing-trend-of-corporate-tax-giveaways ("All told, the largest deals tend to cost a state thousands of dollars per job, according to the 2013 Good Jobs First study. The deal to keep Carrier in Indianapolis will cost less than the average mega-deal, about $8,750 per job.")

[78] @RealDonaldTrump, Twitter (Dec. 6 2016, 8:23 am), https://twitter.com/realDonaldTrump/status/806134244384899072?ref_src=twsrc%5Etfw

[79] See Michael D. Shear & Christopher Drew, *'Cancel Order!' Donald Trump Attacks Plans for Upgraded Air Force One*, THE N.Y. TIMES, Dec. 7, 2016, at A1.

[80] Paul A. Einstein, *GM's $1B Investment Is Not Driven by Trump and Likely Dates Back to 2014*, NBC NEWS, Jan. 17 2017, http://www.nbcnews.com/business/autos/gm-s-1b-investment-not-driven-trump-likely-dates-back-n707661

we believe they have the attributes of them. In addition, we again read in the press of other terms to these deals, terms which were not disclosed. In any event, we believe that this type of one-off bargaining, whether it is pursuit of jobs or other administrative goals like increasing U.S. exports are likely to be a hallmark of the Trump administration.

Notably, and like regulation by deal in the financial crisis, there was little if any traditional administrative process to this dealmaking. Unlike government rulemaking, which typically applies to a broad array of parties, the subjects of Trump's dealmaking were picked individually. Moreover, at least initially the focus seems to be on industrial, prominent manufacturers. And so, when Trump met with the technology leaders, he did not mention their massive outsourcing instead stating "[w]e're here to help".[81] The Trump dealmaking thus seemed arbitrary in its focus, devoted more towards political targets than actual effect. A number of commentators were also quick to express the view that Trump's dealmaking was unlikely to preserve jobs without broader action. Given the job flows, it would take a deal a day for several centuries, one commentator pointed out to preserve U.S. jobs.[82]

If dealmaking by the President seemed arbitrary (or at least individualistic) it also generally lacked comment or notice as well as opacity, hallmarks of the individual state. In this regard, this type of bespoke dealmaking can be seen as the antithesis of the administrative state and the zenith of Presidential power which some have advocated. It even goes beyond the financial crisis dealmaking since it is alegal – not looking for a legal hook or otherwise to base Presidential action. The government action is instead based on power rather than the law itself.

B. Dealmaking In Lieu of Administration

If governance by deal in the Trump administration can be seen as idiosyncratic, outside the administrative process in its execution in its singularity of one-off, negotiated deals, it can also be used as a substitute for the administrative state itself. In this subsection we explore the way that

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[81] David Streitfeld, *'I'm Here to Help,' Trump Tells Tech Executives at Meeting*, N.Y.TIMES, Dec. 14, 2016, https://www.nytimes.com/2016/12/14/technology/trump-tech-summit.html?_r=0.

[82] Eric Posner has stated to us that one possible way to categorize this government conduct is as a form of "bribery", that is the government is trying to push people to act a certain way and doing so with a form of compensation or other incentive rather than ordering them to act. This tactic is a product of lack of government authority as well as a way to evade the law as standing rarely exists in the bribery setting. We find this an interesting argument which merits further examination, but tend to see the government's conduct as deregulatory, acting outside the law rather than looking to the law for authority.

the Trump administration can avoid ordinary administrative procedure by using private channels to meet a policy goal: the redevelopment of American infrastructure. These public-private partnerships have some promise and bipartisan support, but are not without risks. The troubling case of Fannie Mae and Freddie Mac exemplifies some of the persistent problems created by public private partnerships. The government takeover of these two entities provides lessons for the appropriate parameters and issues around governance by deal when it is employed. We conclude by drawing some parameters on the frontiers of governance by deal and how it might be employed in unique and perhaps troubling ways.

1. Public Private Partnerships

As Jody Freeman has observed, private participation in government programs is hardly unheard of in the modern state. In governance today, "public and private actors negotiate over policymaking, implementation, and enforcement" and may be "linked by implicit or explicit agreements."[83] The participation is particularly explicit, however, when it comes to relying on private firms to be the vehicles for the achievement of public ends, such as relying on a partnership with the private sector to build public infrastructure.

Public-private partnerships do so by using private investors to finance public improvements, in return for an ownership stake in the asset, the ability to monetize the investment by charging users fees for making use of the public improvement, or both.[84] Such partnerships are not unprecedented – the Department of Transportation even has developed a definition for them: a public-private partnership is a "contractual agreement between public and private sector partners which allows more private sector participation than is traditional."[85]

Infrastructure By Deal The Trump Administration has suggested that it intends to double down on the use of private parties to develop – and, moreover, hold an ownership stake in – public projects.

President Trump has promised to "revitaliz[e] U.S. roads, bridges and airports."[86] His campaign platform on infrastructure included

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[83] Jody Freeman, *The Private Role in Public Governance*, 75 NYU L. REV. 543, 546 (2000).

[84] *See id.*

[85] U.S. Dep't of Transp., Fed. Highway Admin., *Report to Congress on Public-Private Partnerships* viii (2004), https://www.fhwa.dot.gov/reports/pppdec2004/.

[86] Melanie Zanona, *Trump's Infrastructure Plan: What We Know*, THE HILL (Jan. 13, 2017), http://thehill.com/policy/transportation/314095-trumps-infrastructure-plan-what-we-know.

"[l]everag[ing] new revenues and work[ing] with financing authorities, public-private partnerships, and other prudent funding opportunities."[87] As a candidate, he suggested that $137 billion in federal tax credits could be awarded to private investors for transportation projects; he argued that the incentives could lead to $1 trillion worth of infrastructure investment over 10 years.[88]

Many commentators have noted that the details of Trump's infrastructure plans remain unclear,[89] and the way the plan is structured could "portend less actual infrastructure improvement and more private-sector profits."[90]

But the basic scheme is clear enough. Two top Trump advisers, Wilbur Ross, his Commerce Secretary and Peter Navarro, the chair of the White House National Trade Council outlined the structure of Trump's proposed public private partnerships in an October white paper.[91] In the paper, Ross and Navarro lay out Trump's public private partnerships as "tax credit[s] equal to 82% of the equity amount."[92] They state that "this tax credit-assisted program could help finance up to a trillion dollars' worth of projects over a ten-year period."[93] The president has assembled a team lead Richard LeFrak and Steven Roth, two New York real estate developers, to identify promising projects.[94]

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[87] *Infrastructure*, DONALD J. TRUMP FOR PRESIDENT, https://www.donaldjtrump.com/policies/an-americas-infrastructure-first-plan (last visited Jan. 25, 2017).

[88] Melanie Zanona, *Ryan Offers Picture Of Public-Private Spending In Trump's Infrastructure Plan*, THE HILL (Jan. 19, 2017), http://thehill.com/policy/transportation/315110-ryan-offers-picture-of-private-public-spending-in-trumps-infrastructure.

[89] Melanie Zanona, *Five Things To Know About Trump's Infrastructure Plan*, THE HILL (Nov. 20, 2016), http://thehill.com/policy/transportation/306847-five-things-to-know-about-trumps-infrastructure-plan (noting that "the final details of Trump's plan are still in flux"); *see also* Melanie Zanona, *Chao Commits To Multiple Funding Tools For Trump's Infrastructure Plan*, THE HILL, http://thehill.com/policy/transportation/313814-chao-commits-to-multiple-funding-tools-for-trumps-infrastructure-plan (discussing Trump's Transportation Department nominee Elaine Chao's failure to "provide specific details on the scope of Trump's infrastructure package or how it should be paid for.").

[90] Cory Schouten, *A Potential Pothole In Trump's Infrastructure Plan*, CBS NEWS (Nov. 29, 2016), http://www.cbsnews.com/news/donald-trumps-infrastructure-plan-has-a-potential-pothole/.

[91] *See* Rodd, *supra* note **Error! Bookmark not defined.**.

[92] Wilbur Ross & Peter Navarro, *Trump Versus Clinton On Infrastructure* 4 (Oct. 27, 2016), http://peternavarro.com/sitebuildercontent/sitebuilderfiles/infrastructurereport.pdf.

[93] *Id.* at 6.

[94] Melanie Zanona, *Ryan Offers Picture Of Public-Private Spending In Trump's*

The idea of using the private sector to build public works has percolated through the body politic in a minor way for some time. Much of the political fight over an infrastructure program turns on how it would be funded.[95] Congressional Republicans have been willing to use tax breaks to spur private infrastructure investment, but have rejected other forms of federal spending.[96] Senate Minority Leader Schumer stated that "his party could not accept the tax credit mechanism Trump has proposed to fuel the rebuilding of roads, bridges, sewers, airports and other public works."[97]

Public Private Partnerships Before Trump Public private partnerships have been pursued in the past, and have some support across the political spectrum. The remarkable thing about the Trump program, accordingly, is how it would offer pride of place to the privatization of the country's physical plant. Public-private partnerships have been around for some time, but have not yet played an important role in infrastructure spending - less than 1 percent of spending on highways over the past quarter century is attributable to public-private partnerships, accounting for 36 projects, most of which were funded at least in part through tolls.[98]

Nonetheless, many see the partnerships as a solution to a real development problem. The Obama White House identified $3.6 trillion worth of investment it would like to see by 2020 in infrastructure.[99] The American Society of Civil Engineers gave the country's 2013 set up a D+ in its quadrennial report card.[100]

Infrastructure Plan, THE HILL (Jan. 19, 2017), http://thehill.com/policy/transportation/315110-ryan-offers-picture-of-private-public-spending-in-trumps-infrastructure.

[95] *See* Ed O'Keefe & Steven Mufson, *Senate Democrats Unveil A Trump-Size Infrastructure Plan*, WASH. POST, Jan. 24, 2017, https://www.washingtonpost.com/politics/democrats-set-to-unveil-a-trump-style-infrastructure-plan/2017/01/23/332be2dc-e1b3-11e6-a547-5fb9411d332c_story.html?utm_term=.5aae6453828b ("A group of senior Senate Democrats on Tuesday unveiled their own $1 trillion plan to revamp the nation's airports, bridges, roads and seaports, urging President Trump to back their proposal, which they say would create 15 million jobs over 10 years.").

[96] *See* Alexander Bolton, *Dems Unveil Infrastructure Plan, Reach Out To Trump*, THE HILL (Jan. 24, 2017), http://thehill.com/policy/finance/315871-dems-unveil-infrastructure-plan-reach-out-to-trump.; ("Republicans in Congress have embraced the idea of creating tax breaks to spur private infrastructure investment and have warned against any plan that would require massive allocations of federal dollars.").

[97] *Republicans, Democrats Bicker Over Infrastructure Plans*, REUTERS (Jan. 24, 2017), http://www.reuters.com/article/us-usa-congress-infrastructure-idUSKBN1582G7.

[98] Rodd, *supra* note **Error! Bookmark not defined.**.

[99] In coaching the private sector to invest in America's infrastructure the White House January 16, 2015

[100] American Society of Civil Engineers, *Infrastructure Report Card*,

Moreover, public-private partnerships have enjoyed some bipartisan support. Under the Obama Administration, the Department of Transportation created a so-called Build America Transportation Investment Center (BATIC). BATIC was designed to cultivate public-private partnerships by identifying potential sources of federal credit for promoters.[101] The center was also charged with helping promoters make sense of the sometimes elaborate federal procedural and permitting requirements.[102] The 2015 Fixing America's Surface Transportation Act (the "FAST Act"), a bi-partisan measure that passed with large majorities in the House and Senate, permitted states to use federal highway subsidies to open public-private partnership offices.[103] The statute also allowed them to offer compensation to unsuccessful project bidders, who frequently must spend substantial sums to develop proposals for infrastructure investments.[104] The Obama Treasury Department released a report encouraging these partnerships in 2015. The Department characterized the partnerships as a way to "reverse years of under investment in infrastructure."[105]

This political support for public private partnerships, suggests that the use of dealmaking to meet public needs is not the ideological province of one party or another.

This sort of infrastructure built through these types of partnerships

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http://www.infrastructurereportcard.org/ ("The 2013 Report Card grades show we have a significant backlog of overdue maintenance across our infrastructure systems, a pressing need for modernization, and an immense opportunity to create reliable, long-term funding, but they also show that we can improve the current condition of our nation's infrastructure — when investments are made and projects move forward, the grades rise.").

[101] Stephanie Beasley, *DOT Opens 'One-Stop Shop' Transportation Loan Bureau*, BLOOMBERG BNA, Jul 20, 2016, https://www.bna.com/dot-opens-onestop-b73014445082/, U.S. Dept. of Transport., Build America Bureau, *Release of P3 Resources*, https://www.transportation.gov/buildamerica.

[102] U.S. Dept. of Transport., Build America Bureau, *About The Build America Bureau*, https://www.transportation.gov/policy-initiatives/build-america/about ("The Bureau addresses the procedural, permitting and financial barriers to increased infrastructure investment and development by …[a]ctively helping sponsors navigate and accelerate the often complex federal permitting and procedural requirements").

[103] Pub. L. No. 114-94, 129 Stat. 1312 (Dec. 4, 2015).

[104] Price Waterhouse Coopers, *Public-Private Partnerships In The U.S.: The State Of The Market And The Road Ahead*, Nov. 2016, at 8, http://www.pwc.com/us/en/capital-projects-infrastructure/publications/public-private-partnerships.html.

[105] U.S Dep't of the Treasury, Office of Economic Policy, *Expanding Our Nation's Infrastructure through Innovative Financing*, at 1, https://www.treasury.gov/resource-center/economic-policy/Documents/3_Expanding%20our%20Nation's%20Infrastructure%20through%20Innovative%20Financing.pdf.

has in the past mostly been varieties of surface transportation, in particular toll roads.[106] But recently other kinds of government institutions have explored the possibility of using such partnerships to, for example, build student housing and other campus amenities in state universities.[107] The City of Long Beach built a civic auditorium through such a partnership.[108] Miami-Dade County has used the partnerships to construct waste and water projects.[109]

Partnerships lie "somewhere between standard public provision and full privatization of infrastructure."[110] They take various forms, and can be

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[106] Minneapolis Federal Reserve Bank, *Public-Private Partnerships: For Whom the Road Tolls?* June 1, 2009, https://www.minneapolisfed.org/publications/the-region/publicprivate-partnerships-for-whom-the-road-tolls (last visited Feb. 5, 2017) ("Since 2005, long-term concession toll roads have been either proposed or closed on in at least 13 states, according to the FHWA."). Nor is the enthusiasm for PPPs solely an American one. The World Bank has also encouraged public-private partnerships in developing countries and countries like the United Kingdom have used private firms to take over and operate a broad array of formerly government-run infrastructure including the British Rail Service. World Bank Group, *Public-Private Partnerships In Airports*, https://ppp.worldbank.org/public-private-partnership/sector/transportation/airports (last visited Feb. 5, 2017).

[107] *See, e.g.*, Ronda Kaysen, *Public College, Private Dorm*, N.Y. TIMES, Jan. 24, 2012, http://www.nytimes.com/2012/01/25/realestate/commercial/public-college-private-dorm.html (discussing a variety of public private partnerships designed to increase the supply of student housing); Daniel I. Bernstein, *Public-Private Partnerships: It's The Right Time*, http://www.nacubo.org/Business_Officer_Magazine/Business_Officer_Plus/Bonus_Material/Public-Private_Partnerships_It%E2%80%99s_the_Right_Time.html (last visited Feb. 5, 2017) (describing ways that educational institutions could make use of public private partnerships in guidance for National Association of College and University Business Officers).

[108] *See* Keeley Webster, *Long Beach Using P3 For New City Hall, Library*, BOND BUYER, Jan. 14, 2016, http://www.bondbuyer.com/news/regionalnews/long-beach-using-p3-for-new-city-hall-library-1093988-1.html.

[109] Miami-Dade County, *Public-Private Partnerships (P3s)*, available at http://www.miamidade.gov/water/public-private-partnerships.asp (last visited Feb. 7, 2017) ("The Miami-Dade Water and Sewer Department is currently in the process of implementing a comprehensive Capital Improvement Plan (CIP) for numerous water and wastewater infrastructure projects"); Miami-Dade County, *Infrastructure Projects*, http://www.miamidade.gov/water/other-capital-improvement-projects.asp (last visited Feb. 7, 2017) (listing various water and sewer improvement projects that might be susceptible to a public-private partnership); Price Waterhouse Coopers, *Public-Private Partnerships In The U.S.: The State Of The Market And The Road Ahead*, Nov. 2016, at 2, http://www.pwc.com/us/en/capital-projects-infrastructure/publications/public-private-partnerships.html. (discussing the Miami public private partnerships).

[110] Josh Bivens & Hunter Blair, *Trump's infrastructure plan is not a simple public-private partnership plan, and won't lead to much new investment*, ECONOMIC POLICY INSTITUTE WORKING ECONOMICS BLOG (Nov. 22, 2016, 12:38 PM),

funded by tax breaks and the promise of future revenue streams such as user fees, or through other means.[111] For example, "availability payment" agreements finance projects by finding a private investor to take on most of the debt for a project up front, in return for a stream of payments from the government during its construction.[112] An infrastructure bank and even corporate tax reform have been mooted as potential ways to use private means to realize public ends.[113] An example of public private partnerships outside the context of highways and roads is the remodel of LaGuardia Airport, which is being funded by investors who will make money from airline and passenger fees.[114]

Public Private Partnerships as Deals By definition, public-private partnerships offer risk sharing between taxpayers and businesses. The revenue stream promised by an infrastructure project is often appealing for the private sector, while the upfront costs to the public may be ameliorated by their participation.

Proponents of public-private partnerships have advanced a number of reasons why they might be attractive uses of taxpayer money. Some argue that the partnerships are efficient, that they can be cost effective because of the interest in the private participants in keeping costs down.[115] Given the right sort of contracting, there may be speed advantages to proceeding with the assistance of the private sector; private parties can pay stiff penalties if they fall behind schedule on contracts; similar incentives are less likely to animate government agencies.[116]

But the partnerships often fail. While partnerships have often

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http://www.epi.org/blog/trumps infrastructure-plan-is-not-a-simple-public-private-partnership-plan-and-wont-lead-to-much-new-investment/ ("the private entities also receive a revenue stream of some kind . . . . Often this is an explicit user fee, like a toll for using a road").

[111] *Id.*

[112] Scott Rodd, *Infrastructure Strategy Touted by Trump Has Produced Uneven Results*, PEW (Dec. 14, 2016), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/12/14/infrastructure-strategy-touted-by-trump-has-produced-uneven-results.

[113] Paula Dwyer, *How a Trump Infrastructure Bank Could Soak Taxpayers*, BLOOMBERG (Nov. 23, 2016), https://www.bloomberg.com/view/articles/2016-11-23/how-a-trump-infrastructure-bank-could-soak-taxpayers ("Other ways to pursue P3s "could be corporate tax reform . . . . [or] an infrastructure bank . . .").

[114] Virginia Postrel, *How Trump Can Build the Best Airports and Roads*, BLOOMBERG (Dec. 16, 2016), https://www.bloomberg.com/view/articles/2016-12-16/how-trump-can-build-the-best-airports-and-roads ("Commercial partners will make money from fees charged to airlines and passengers – and from maximizing revenue from shops and restaurants").

[115] *See id.*

[116] *Id.*

depended on basic user fee approaches, whose application to toll roads has been straightforward, governments have begun exploring different ways of sharing the risk between the public and private sector in the wake of the financial difficulties faced by the operators of toll roads in Indiana and Illinois.[117] In particular, governments have worried about making the private sector exclusively responsible for the demand risk - the amount of user fees generated by the project – for an infrastructure investment once that investment is completed and the piece of infrastructure is open.[118]

Moreover, the turn to the private sector is without controversy. Some critics worry that the government does not always get value for the assets that it privatizes; the Public Interest Research Group has speculated that it can mean a loss of control over policy – in transportation,

> [p]rivate road concessions in particular result in a more fragmented road network, less ability to prevent toll traffic from being diverted into local communities, and often the requirement to compensate private operators for actions that reduce traffic on the road, such as constructing or upgrading a nearby competing transportation facility.[119]

Finally, financing these projects through private mechanisms is not obviously necessary. Interest rates are currently close to the lowest they have ever been, making the financing of projects through debt an attractive alternative.[120] It is not clear that governments need to appeal to the private

[117] Some toll roads have experienced financial strain because demand for them was lower than projected including the Indiana toll road, Texas SH130, and the South Bay Expressway in San Diego. *See* William J. Mallet *Indiana Toll Road Bankruptcy Chills Climate For Public-Private Partnerships*, CONGRESSIONAL RESEARCH INSIGHTS 2014, http://www.ncppp.org/wp-content/uploads/2013/02/CRS-Insights-Indiana-Toll-Road-Bankruptcy-Chills-Climate-for-P3s.pdf.

[118] *See id.*

[119] U.S. PIRG Education Fund, *Private Roads, Public Costs: The Facts About Toll Road Privatization and How to Protect the Public*, http://www.uspirg.org/sites/pirg/files/reports/Private-Roads-Public-Costs-Updated_1.pdf at 2-3 (2009).

[120] *See* Giovanni Russonello, *How the Fed's Interest Rate Increase Can Affect You*, N.Y. TIMES, Dec. 14, 2016, https://www.nytimes.com/2016/12/14/business/economy/how-the-feds-interest-rate-increase-can-affect-you.html (describing a likely future of "what will be a slow, upward climb for what's known as the federal funds rate. … Because the rate has been close to zero since 2008, as part of the Fed's strategy to bring the nation out of a recession, there's hardly anywhere for it to go but up."). It is even more attractive the further down you go in the federal pyramid: states and municipalities also always finance projects by issuing tax exempt bonds that are cheap to offer, and still somewhat attractive to investors interested in their tax advantaged status. *See, e.g.*, .Nicole S. Dandridge, André B. Dandridge, *Community Economic Development Conspectus Valuable Tool for Advocates, Lawyers, and Policymakers*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L.,

sector to make cost-effective improvements, especially now.

More fundamentally, a government that relies on deals with the private sector to make this sort of building happen is a government that has abandoned some functions it ordinarily used to serve. It is a government that has embraced a vision not of government competence, but rather on reliance on the private sector.

By the same token, the administration of these projects change. When agencies operate or oversee the project, they must comply with the basics of administrative procedure, and must comply with rules that may serve some other goals, such as affirmative action requirements.[121] Corporate overseers may not make room for those more publicly-minded initiatives.

Governance by deal does reflect a trend away from supposedly ossified government projects towards putatively more efficient privately-run projects.[122] If regulation by deal during the financial crisis meant the use of transactions as a mechanism for skirting legal requirements and moving quickly when slow government action was thought to be ineffective, using deals to build out public infrastructure reflects something even deeper. It suggests a lack of faith that the public sector can accomplish necessary

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2012, at 167, 173 ("Tax-exempt bonds usually have a fixed interest rate and longer terms than conventional financing; an added attraction for some investors is that interest payments are generally exempt from federal taxes.").

[121] Affirmative action broadly features in infrastructure programs, though they are policed by the courts. For a discussion, Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 46 (1995) ("any racial classification by any level of government must meet strict scrutiny (that is, be narrowly tailored to a compelling government interest) was affirmed in Adarand with unmistakable emphasis.").

[122] This ossification thesis is associated with Thomas McGarity, who worried that procedural burdens on agencies prevent them from implementing the rules necessary to vindicate their substantive responsibilities. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1386 (1992) ("The informal rulemaking process of the 1990s is so heavily laden with additional procedures, analytical requirements, and external review mechanisms that its superiority to case-by-case adjudication is not as apparent now as it was before it came into heavy use."); *see also* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000) (expressing concern about the bursons of judicial review on informal rulemaking); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995) (proposing solutions to ossification); Paul R. Verkuil, *Comment: Rulemaking Ossification--A Modest Proposal*, 47 ADMIN. L. REV. 453 (1995) (head of the Administrative Conference of the United States suggesting a way around ossification); *but see* Jason Webb Yackee & Susan Webb Yackee, Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990, 80 Geo. Wash. L. Rev. 1414, 1492 (2012) (concluding that the evidence in favor of ossification is lacking).

goals even when it has the time and resources to take time to finish the job.

To us, that is the most important implications of the development of the Trump administration's infrastructure privatization program. But other scholars of worried about that program for other reasons. Many of these objections are less salient when it comes to using deals to build infrastructure than they would be for matters of, say, public education or the operation of prisons. But for all such partnerships, as Martha Minow has observed, "the appearance of private motives in a public domain can undermine respect for government and even generate doubt whether the government is sincerely pursuing public purposes."[123] Moreover, there is a sense that "privatization of facilities and services decreases both accountability and transparency," partly because private providers "need not consider the public interest in all cases," which can be disturbing.[124]

Moreover, it is difficult for the public to monitor the contracting involved in privatization projects, including make whole provisions that require the state to reimburse private contractors for lost anticipated revenues in the event of compensation events, non-competition provisions, and adverse action or stabilization clauses.[125] Contracting with private parties to provide government services thus has a first order transparency consequence: APA rules do not apply, or do not apply to much of the work the private owner does on the project as the very least. But it has a second order transparency consequence as well, making it difficult to monitor complicated deals.

Finally, public private partnerships do not have a strong track record of efficiency. Ron Daniels and Michael Trebilcock have noted that the advantages of private sector participation "can easily be offset by losses that derive from faulty design of both the selection process and the contractual arrangements used for implementation."[126] Moreover, these problems of contracting are not only matters of inexperienced government dealmakers being exploited by the private sector. Partnerships presents risks for private capital as much as it does for government investment. As Daniels and Trebilcock observe, "governments can abrogate contractual undertakings

[123] Martha Minow, *Public and Private Partnerships: Accounting for the New Religion,* 116 HARV. L. REV. 1229, 1235 (2003).

[124] Kelsey Hogan, *Protecting the Public in Public Private Partnerships: Strategy for Ensuring Adaptability in Concession Contracts,* 2014 COLUM. BUS. L.REV. 420, 425.

[125] Ellen Dannin, *Crumbling Infrastructure Crumbling Democracy: Infrastructure Privatization Contracts and Their Effects on State and Local Governance,* 6 NW. J. L. & SOC. POL'Y 47, 55 (2011).

[126] Ronald Daniels & Michael Trebilcock *Private Provision of Public Infrastructure: An Organizational Analysis of the Next Privatization Frontier*, 46 U TORONTO L.J. 375, 379 (1996).

without having to compensate parties for the loss of their expectation profits" which "places understandable limits on the willing of private sector developers to invest risk capital."[127]

Public private partnerships, in short, have consequences that affect the ordinary administration of the state. They operate differently, and with less transparency and process, than ordinary administrative law.

2. The Troubling Precedent of Fannie Mae and Freddie Mac

The issues of opacity and due process in public/private model can be delineated by examining further the government's dealmaking with Fannie and Freddie during and after the financial crisis. This course of conduct exemplifies some of the perils of governance by deal, as the Treasury Department has, after a deal designed to save the institutions, held a controlling ownership stake in a putatively private pair of businesses designed to serve a policy goal – to stabilize and subsidize the housing market.[128] It is currently the country's largest public private partnership, although the public investors who still hold Fannie and Freddie stock have repeatedly sued the government over its treatment of them. We look closely at Fannie and Freddie because they offer some lessons to those who would commit to contracting by deal, namely, that quickly executed transactions can lead to problematic contractual relations in the future, that government and private investors often do not get along, even when investing in the same enterprise, and that courts can usefully help untangle public private partnerships that do come a cropper, provide they can get jurisdiction over the dispute. That has been the case for Fannie and Freddie, but it is not necessarily the case for regulating by deal.

On July 24, 2008, the government passed the Housing and Economic Recovery Act of 2008 (HERA),[129] an attempt to address the housing crisis. HERA provided, in theory, $300 billion in aid to subprime

[127] *Id*.

[128] Economists often criticize this role, but it is an indisputably popular one politically. John H. Cochrane, *Challenges for Cost-Benefit Analysis of Financial Regulation*, 43 J. LEGAL STUD. S63, S73 (2014) (Cochrane is an economist at the University of Chicago; he argued that "Fannie Mae and Freddie Mac, which went under in summer 2008, were hardly creations of the free market,").; John A. Allison, Wayne A. Abernathy, *The Financial Crisis and the Free Market Cure: A Conversation with John A. Allison*, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 43, 44 (2013) ("Freddie and Fannie would never exist in the free market. They only existed because their debt was guaranteed by the U.S. government, and they were leveraged 1,000:1.").

[129] Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654, (to be codified at 42 U.S.C. § 4501 note).

housing buyers (if they could qualify for it) and also set the GSEs as principal actors in engineering a housing recovery.[130] The bill increased the regulatory oversight of the two GSEs and expanded the conservatorship powers of the federal government over the entities.[131] At the time of the passage of this Act, Secretary Paulson, commenting on the conservatorship powers the HERA Act provided the new Federal Housing Administration (FHA), stated that "[i]f you've got a bazooka, and people know you have it, then you may not have to take it out."[132]

The bazooka was used just over one month later. Fannie and Freddie lost the government's confidence the weekend of September 5, 2008. First, government auditors discovered that the accounting records of Fannie and Freddie significantly overstated their capital.[133] According to these accounting reevaluations, the GSEs, thinly capitalized in the best of times, were technically insolvent. Second, the government concluded that whatever efforts the GSEs were making to recapitalize were failing. Treasury resolved to seize the enterprises on September 7, pursuant to its authority under HERA,

In connection with the conservatorship, the Treasury also received a warrant to purchase 79.9% of the outstanding common stock of each of Fannie and Freddie. The warrant was exercisable for a twenty-year period and had a nominal exercise price of $0.00001 per share.[134] Through this mechanism, the government effected a transaction to significantly, but not completely, dilute the holders of these securities and significantly reduce their value.

The partial ownership of Fannie Mae and Freddie Mac was only a tentative matter as the government twice reworked its deal to take over the GSE's as circumstances changed. In August 2012, Treasury and FHFA entered into a third amendment to the stock purchase agreements (the *Third Amendment*), putting into place a "net worth sweep" where Treasury would receive a dividend equal to the total assets of each company less total liabilities, so long as that amount was more than zero.[135] At the time,

[130] *Id.* at § 1311.

[131] *Id.*

[132] Stephen Labaton & David M. Herszenhorn, *A Rescue for Fannie and Freddie Kindles Opposition and Political Duels*, N.Y. TIMES, July 16, 2008, at C1.

[133] *See* Gretchen Morgenson & Charles Duhigg, *Mortgage Giant Overstated Size of Capital Base*, N.Y. TIMES, Sept. 7, 2008, at A1.

~~, at 2.~~

[135] *See* FANNIE MAE THIRD AMENDMENT TO AMENDED AND RESTATED SENIOR PREFERRED STOCK PURCHASE AGREEMENT, t, https://www.treasury.gov/press-center/press-releases/Documents/Fannie.Mae.Amendement.pdf ; FREDDIE MAC THIRD AMENDMENT TO AMENDED AND RESTATED SENIOR PREFERRED STOCK PURCHASE

Michael Stegman, Counselor to the Secretary of the Treasury for Housing Finance Policy, stated that Treasury was "taking the next step toward responsibly winding down Fannie Mae and Freddie Mac, while continuing to support the necessary process of repair and recovery in the housing market."[136] Treasury explicitly stated at the time that the goal of this revision was to make "sure that every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers for their investment in those firms."[137] Another way to put these actions is that the government effectively nationalized Fannie and Freddie.

Treasury's actions were intended to ensure that the common and junior preferred stock in Fannie and Freddie Mac still outstanding after the quasi-nationalization never received dividends from the firms, regardless of how profitable that became. Because a share is a company is only worth the claim it has on the future profits made by that company, the Third Amendment rendered these investments worthless.[138] Left untouched were debt holders of Fannie and Freddie, which, due to the government intervention, have been paid 100 cents on the dollar.[139]

By the time of the Third Amendment, the housing markets had stabilized, and the firms became profitable in 2012.[140] In the second quarter

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AGREEMENT,https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2012-8-17_SPSPA_FreddieMac_Amendment3_N508.pdf. *See also* Press Release, Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012), *available at* http://www.treasury.gov/press-center/press-releases/Pages/tg1684.aspx (announcing the Third Amendment as a step to "help expedite the wind down of Fannie Mae and Freddie Mac, make sure that every dollar of earnings each firm generates is used to benefit taxpayers, and support the continued flow of mortgage credit during a responsible transition to a reformed housing finance market") .

[136] *Id. See also* Federal Housing Finance Agency Press Release, *Statement of FHFA Acting Director Edward J. DeMarco on Changes to Fannie Mae and Freddie Mac Preferred Stock Purchase Agreements* (Aug. 17, 2012).

[137] *Id*.

[138] *See* Robert J. Shiller, *From Efficient Markets Theory to Behavioral Finance*, 17 J. ECON. PERSP. 83, 84-85 (2003). ("The efficient markets model can be stated as asserting that the price Pt of a share . . . equals the mathematical expectation, conditional on all information available at the time, of the present value P*t of actual subsequent dividends accruing to that share. P*t is not known at time t and has to be forecasted. Efficient markets say that price equals the optimal forecast of it.")

[139] *See* Cong. Res. Svc., *Fannie Mae and Freddie Mac in Conservatorship*, at 2, dated Sept. 15, 2008 available at http://fpc.state.gov/documents/organization/110097.pdf.

[140] *See* Cheyenne Hopkins & Clea Benson, *U.S. Revises Payment Terms for Fannie Mae, Freddie Mac*, BLOOMBERG (Aug. 17, 2012, 9:28 PM), http://www.bloomberg.com/news/2012-08-17/treasury-accelerates-withdrawal-of-fannie-freddie-backing.html (noting that at the time of the Third Amendment, Fannie Mae and Freddie Mac had both reported profits for the quarter sufficient to pay the 10% dividend to Treasury without further drawing on the capital commitment).

of 2012, the net worth sweep dividends soon exceeded the 10% dividend contemplated by the terms of the original takeover, leaving plenty of profits that under the initial stock purchase agreements could have been paid to Fannie and Freddie shareholders who had retained their stakes in the seized firms.[141] The firms have paid Treasury $182.4 billion in net worth sweep dividends since the Third Amendment, an amount almost equal to the capital commitment provided by Treasury.[142]

For this reason, multiple complaints against both the Treasury Department and FHFA have been filed in the United States District Court for the District of Columbia and the Court of Federal Claims by both junior preferred stockholders and common stockholders over the actions of the government in connection with the Third Amendment. The idea is that the net worth sweep discriminates against minority shareholders and in favor of the Treasury Department. As Judge Janice Rogers Brown put, "even in a time of exigency, a nation governed by the rule of law cannot transfer broad and unreviewable power to a government entity to do whatsoever it wishes with the assets" of privately held companies.[143]

The complaints break into three categories: a set brought by hedge funds, including Perry Capital, Pershing Square Capital Management, Fairholme Funds and others who have, subsequent to the conservatorship of Fannie and Freddie purchased preferred or common shares on the open market. A second set have been brought as shareholder class actions on behalf of all the preferred and common shareholders at the time of the Third Amendment in the same court.[144] Finally, some, but not all, of the hedge

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[141] See, Kevin M. Coleman, *Are the Feds Forcing Fannie and Freddie into Early Retirement?* 19 FORDHAM J. CORP. & FIN. L. 489, 509 (2014).

[142] In 2013 alone, the two firms paid Treasury $132.4 billion in net worth sweep dividends. *See* Freddie Mac, Annual Report (Form 10K), at 226 (Feb. 27, 2014), *available at* http://www.freddiemac.com/investors/er/pdf/10k_022714.pdf; Fannie Mae, Annual Report (Form 10K), at 10-11 (Feb. 27, 2014), *available at* http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2013/10k_2013.pdf; Press Release, Fannie Mae Reports Comprehensive Income of $84.8 Billion for 2013 and $6.6 Billion for Fourth Quarter 2013 (Feb. 21, 2014), *available at* http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2013/q42013_release.pdf.

[143] Perry Capital, LLC v. Mnuchin, __ F.3d ___ (D.C. Cir. Feb. 21, 2017) (Brown, J., dissenting at 2-3), https://www.cadc.uscourts.gov/internet/opinions.nsf/66A4E1FEF4BB8401852580CE005620C3/$file/14-5243-1662090.pdf.

[144] Consolidated Amended Class Action and Derivative Complaint at ¶ 21, In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litig., No. 13-mc-1288 (D.D.C. Dec. 3, 2013) [hereinafter Shareholder Class Action Complaint].

funds have brought takings claims in the Court of Federal Claims.[145]

The complaints allege violations of the APA with respect to the Third Amendment on the grounds that it violated HERA and was in any event an "arbitrary and capricious" action.[146] The shareholder class action and the Fairholme complaint go farther and also allege that the Third Amendment constituted a breach of the terms of the common and preferred stock and the fiduciary duties of Treasury and FHFA with respect to Fannie Mae.[147] The shareholder class action and the Pershing Square Complaint also alleges that the Third Amendment deprived shareholders of dividends in violation of the due process clause contained in the Fifth Amendment.[148] The Pershing Square Complaint also alleges a derivative breach of implied contract between the FHFA and the GSAs, that FHFA failed to "preserve the Companies' assets and properties" in conservatorship.[149]

The Court of Federal Claims has allowed the plaintiffs to proceed to discovery on their claims. However, on September 30, 2014, the district court in Washington dismissed the shareholder complaints consolidated before it. The basis for the court's ruling was three-pronged. First, the court held that the government's seizure of Fannie's and Freddie's profits did not violate the APA's prohibition on "arbitrary and capricious" conduct. It also found that HERA barred shareholders of Fannie and Freddie from bringing breach of fiduciary duty suits against the boards of the companies and that the government's seizure of profits was not an unconstitutional "taking."[150] The plaintiffs appealed this dismissal to the D.C. Circuit Court of Appeals.[151] In an opinion released on February 21, 2017, that court dismissed most of the claims of the shareholders, concluding that the

[145] *See* Complaint, Fairholme Funds, et al. v. United States, No. 1:13-cv-00465-MMS (C.F.C. Sep. 7, 2013).

[146] *See, e.g., id.* at ¶ 14; Class Action Complaint, Joseph Cacciapelle v. Federal National Mortgage Association, No. 1:13CV01149, 2013 WL 3878466 (D.D.C. July 29, 2013), at ¶ 7a; Shareholder Class Action Complaint, *supra* note _, at ¶22.

[147] *See, e.g., id.* at ¶ 14; Class Action Complaint, Joseph Cacciapelle v. Federal National Mortgage Association, No. 1:13CV01149, 2013 WL 3878466 (D.D.C. July 29, 2013), at ¶ 7a; Shareholder Class Action Complaint, *supra* note _, at ¶22.

[148] *See* Shareholder Class Action Complaint, *supra* note___, at ¶ ___.

[149] Complaint at ¶ 113, Rafter v. United States, No. 14-cv-1404 (D.D.C. Aug. 15, 2014).

[150] Memorandum Opinion, Perry Capital v. Lew, No. 13-cv-1025 (D.D.C. Sept. 30, 2014); *see also* David Zaring & Steven Davidoff Solomon, *Fannie-Freddie Case Shows Messy Nature of Deal-Making in a Panic*, N.Y. TIMES DEALBOOK (Oct. 2, 2014, 4:00 PM), http://dealbook.nytimes.com/2014/10/02/fannie-freddie-case-shows-messy-nature-of-deal-making-in-a-panic.

[151] Notice of Appeal, Perry Capital v. Lew, No. 13-cv-1025 (D.D.C. Oct. 2, 2014); Notice of Appeal, Perry Capital v. Lew, No. 14-253 (D.C. Cir. Oct. 8, 2014).

takeover of Fannie and Freddie gave the government unfettered discretion to decide what to do with the revenues of both firms, over a fiery dissent protesting that the treatment of investors that "might serve in a banana republic will not do in a constitutional one."[152] The appellate court did, however, permit the shareholders to continue to press a variety of state law claims, ensuring that the disputes between government and investors will continue.[153]

One thing that these disputes have revealed is that Fannie and Freddie have become a public private partnership riven with disputes. As we have shown, a good part of the reason for the problems is the fact that the government took over the firms on the quick and without much reflection, leading to a governance arrangement that it surely now wishes it had never been burdened with, and that it has had to try to resolve in the courts.

C. The Frontiers of Governance by Deal

We conclude by considering some frontiers of governance by deal, frontiers that the Trump administration has looked ready to explore. Transactional governance can become a way of life. We have reviewed the way the government kicked off a new era of regulation by deal through financial crisis mergers and acquisitions, and how it has looked to expand the implementation of policy priorities through negotiated arrangements with the private sector through high-profile deals to onshore jobs to using contracts to improve American infrastructure.

1. Dealmaking as an Ethos

In this article, we have defined governance through transaction narrowly, to include agreements with firms to implement policy. It is, however, worth noting that dealmaking can amount to even more than this – it can affect how leaders think about government programs. Robert Litan

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[152] Perry Capital, LLC v. Mnuchin, __ F.3d ___ (D.C. Cir. Feb. 21, 2017) (Brown, J., dissenting at 29), https://www.cadc.uscourts.gov/internet/opinions.nsf/66A4E1FEF4BB8401852580CE005620C3/$file/14-5243-1662090.pdf.

[153] Perry Capital, LLC v. Mnuchin, __ F.3d ___ (D.C. Cir. Feb. 21, 2017) (Op. at 5) (remanding claims "contract-based claims regarding liquidation preferences and dividend rights" to the district court for further proceedings), https://www.cadc.uscourts.gov/internet/opinions.nsf/66A4E1FEF4BB8401852580CE005620C3/$file/14-5243-1662090.pdf.

has observed that "Mr. Trump makes a virtue out of his deal making."[154] The frontiers of governance by deal can be employed beyond private sector deals to include matters of diplomacy and personnel management. It can also be used to restructure the most fundamental relationship any government has with investors – the relationship between the payer on, and the holders of, government debt. President Trump has suggested that he will hire, conduct foreign relations, and perhaps even take on the country's debt burden, through a dealmaking lens.

In fact, the president appears to want to make dealmaking a governing philosophy, whereby the governing agenda is "the agenda of a dealmaker, one who seems inclined to take a transactional, ad hoc approach to economic policy — offering some help to this company, perhaps directing a warning to others."[155] Dealmaking experience could be used as a factor in making personnel decisions. James Oliphant and Emily Stevenson have noted that "Donald Trump's cabinet appears much like the president-elect himself: mostly older, white males, many of them wealthy, who see themselves as risk-takers and deal-makers and prize action over deliberation."[156]

And, of course, dealmaking can be a way of conducting foreign policy. The president has frequently couched interactions with foreign sovereigns as a set of deals to be renegotiated. "I could give you the names of ten to twenty of the greatest dealmakers in the world who live in this country. These great negotiators could go up against China or Iran and work out a fabulous deal for the United States,"[157] he has said. He has explained that "we're going to negotiate and renegotiate trade deals, military deals,

[154] Robert E. Litan, *In Clinton vs. Trump, Americans Play Let's Make a Deal*, WALL ST. J., Feb. 23, 2016; http://www.cfr.org/elections/clinton-vs-trump-americans-play-lets-make-deal/p37572. One observer has suggested that he can imagine a "scenario for the Trump presidency, based on extrapolating his deal-making background." *See* Tyler Cowen, *Expect the Unexpected from Trump the Deal Maker*, BLOOMBERG, Dec. 12, 2016, https://www.bloomberg.com/view/articles/2016-12-12/expect-the-unexpected-from-trump-the-deal-maker.

[155] Josh Boak, *For Now, Trump Bears Signs of a Dealmaker, Not a Policymaker*, ASSOCIATED PRESS, Dec. 4, 2014, *available at* http://bigstory.ap.org/article/c111cd6a43c04db7b2a16699544c5e69/now-trump-bears-signs-dealmaker-not-policymaker.

[156] James Oliphant & Emily Stephenson, *Trump Builds Team of Bosses to Shake Up Washington*, REUTERS, Dec. 17, 2016, *available at* http://www.reuters.com/article/us-usa-trump-bosses-analysis-idUSKBN1452PX.

[157] *Donald Trump on Foreign Policy*, ONTHEISSUES.ORG, http://www.ontheissues.org/2016/Donald_Trump_Foreign_Policy.htm (last visited Jan. 30, 2017).http://www.ontheissues.org/2016/Donald_Trump_Foreign_Policy.htm (last visited Jan. 30, 2017).

many other deals that's going to get the cost down for running our country very significantly."[158] The idea is that dealmaking experts are more likely to deliver better policy outcomes than would those versed more in other subjects.[159]

2. The Dealmaking Governance Extreme: Renegotiating Sovereign Debt

The ultimate example of governance by deal would be to put deal making in the service of monetary policy. Here, too, the incoming administration has made noises about doing precisely that. President Trump said during the campaign that he would be included to look at the possibility of renegotiating the terms on which the Treasury Department has issued sovereign debt. "I could see renegotiations where we borrow at long term at very low rates," he said during the campaign, observing that he frequently renegotiated debt terms while in business.[160] "I would borrow, knowing that if the economy crashed, you could make a deal."[161]

Such a renegotiation would be unprecedented for the United States, which famously never missed an interest payment in all its history, but sovereign debt renegotiations are, of course, common among other countries, particularly those in the developing world.[162]

The idea behind the deal is that creditors of the United States could be pushed to take write-downs on their holdings of sovereign debt, possibly by simply forgiving some of the debt, or by agreeing to extended payment terms on already issued debt. To be quite clear, this renegotiation would count as a default on the debt, and would therefore be unprecedented. Any

[158] David Francis, *Trump Says He'll Upend These Two Cornerstones of U.S. Foreign Policy*, FOREIGN POLICY, Sept. 28, 2015, http://foreignpolicy.com/2015/09/28/trump-says-hell-upend-these-two-cornerstones-of-u-s-foreign-policy.

[159] Donald J. Trump (@realDonaldTrump), Twitter (Oct. 5, 2015, 1:46 PM), https://twitter.com/realdonaldtrump/status/651136309029834752 ("TPP is a terrible deal."). For a discussion, see *United States and Eleven Other Nations Conclude Trans-Pacific Partnership*, 110 AM. J. INT'L L. 384, 385 (Kristina Daugirdas & Julian Davis Mortenson, eds., 2016).

[160] *Trump Floats U.S. Debt Renegotiation if Economy Sours*, BLOOMBERG, May 5, 2016, https://www.bloomberg.com/politics/trackers/2016-05-05/trump-floats-u-s-debt-renegotiation-if-economy-sours.

[161] Liz McCormick, *Trump's Comments on U.S. Debt Seen as Non-Starter by Bond Market*, BLOOMBERG, May 6, 2016, https://www.bloomberg.com/news/articles/2016-05-06/trump-s-comments-on-u-s-debt-seen-as-non-starter-by-bond-market.

[162] *See generally* Odette Lienau, RETHINKING SOVEREIGN DEBT: POLITICS, REPUTATION, AND LEGITIMACY IN MODERN FINANCE (2014) (reviewing some of the history of these defaults).

change in the payment terms of bond obligations would ordinarily be interpreted by investors in such a way.

Could the President with the assistance of the Treasury Secretary approach sovereign debt holders and seek to change the terms on which the United States repaid its debt? The possibility might seem farfetched, but sovereign debt restructurings are hardly unprecedented. Scholars such as Anna Gelpern and Mitu Gulati,[163] and Odette Lienau,[164] for example, suggest that they are almost normal; there are thriving New York legal practices dedicated to representing sovereigns in debt renegotiations.[165]

The reasons for a renegotiations by the United States are apparent, even if the possibility that a country with such a sterling credit rating might consider such a step would be unprecedented. But the United States has a sizable national debt and runs a deficit every year – the result has been borrowings that now amounts to thousands of dollars for every man, woman and child within the United States. Extending the repayment term of those trillions certainly could not hurt. Moreover, an administration inclined to pursue this sort of debt renegotiation might be intrigued by the geopolitical ramifications of it. Some of the largest holders of American sovereign debt are foreign countries who might find it difficult to resist an effort to change payment terms. China, for example, holds huge quantities of the stuff. That country might not be in a position to resist some form of restructuring. It might be inclined to pursue restructuring in exchange for other trade concessions.

Any country like China – those likely to be net beneficiaries of the terms of trade with the United States might agree to a deal to renegotiate sovereign debt terms. It might be seen as a way for America to even up the terms of those trade. Moreover the in real terms reduced deficit would permit the administration to pursue things like infrastructure projects without bumping up against the debt ceiling or a Congress unwilling to appropriate new funds for economic development.

All of this, for now, lies in the realm of conjecture. It has never been cheaper to borrow, and so therefore a renegotiation of the terms of the borrowing might seem to be unnecessary. Sovereign debt default carries

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[163] *See* Lee C. Buchheit et. al., *Revisiting Sovereign Bankruptcy*, COMMITTEE ON INTERNATIONAL ECONOMIC POLICY AND REFORM 5, 29 (Oct. 2013), *available at* http://scholarship.law.duke.edu/faculty_scholarship/3163/

[164] *See* Ross P. Buckley, *Why Are Developing Nations So Slow to Play the Default Card in Renegotiating Their Sovereign Indebtedness?,* 6 CHI. J. INT'L L. 345 (2005) ("Before 1982 sovereign debtors regularly defaulted on their debts. Since the debt crisis that commenced in that year, sovereign defaults have been rare").

[165] *See, e.g.*, Jessica Pressler, *Debt Head*, NEW YORK MAGAZINE, Jun. 17, 2012, http://nymag.com/news/business/themoney/lee-buchheit-2012-6.

great consequences – at a minimum, it would likely increase the cost of borrowing in the future, and that would, in turn, make it harder not just for the government to manage its finances, but for businesses to obtain the capital they need in the debt markets.[166] The Treasury Secretary has not indicated an appetite for a sovereign debt renegotiation, perhaps for these reasons.[167] But because a sovereign debt restructuring would constitute the epitome of governance by deal – a threatened unprecedented default put in the service of forcing investors to offer more generous repayment terms – and because the president has considered it, it is worth setting forth as perhaps the final stage of governance by deal.

III. THE DESIRABLE LIMITATIONS OF GOVERNANCE BY DEAL

The inevitability of regulation by deal in a Trump administration and likely future Presidency raises two questions: Can governance by deal be limited even if it cannot be eliminated and if so is it desirable to do so? The second question dictates in part the answer to the first. To the extent that governance by deal is desirable it should not be limited. The question of course is when can governance by deal be good for net social welfare?

A. The Financial Crisis Paradigm

The recent financial crisis gives us one paradigm for examining the desirability of regulation by deal and answering these question. During the financial crisis regulation by deal reigned, but it did so effectively. The government's losses from its investments, at one time estimated at over a trillion dollars, have been slim; indeed the deals may have been profitable (though it is by no means clear that they were profitable on a "risk-weighted" basis that is, accounting for the possibility that the investments would fail).[168] Similarly, the economy though not fully recovered, has

[166] *See, e.g.,* Steven L. Schwarcz, *Sovereign Debt Restructuring Options: An Analytical Comparison*, 2 HARV. BUS. L. REV. 95, 97–98 (2012) ("The problem of sovereign debt constantly reoccurs …-sometimes with devastating consequences for the defaulting nation and sometimes for the world.")

[167] As finance chair of the Trump campaign, the current Treasury Secretary responded to the prospect of a debt renegotiation by stating that "[o]bviously, the government has to honor its debts." *Links for May 5-6, 2016,* ECONOMIST'S VIEW, May 6, 2016, http://economistsview.typepad.com/economistsview/2016/05/links-for-05-06-16.html.

[168] *Compare* Wayne Duggan, *Financial Crisis Bailouts Have Earned Taxpayers Billions;* CNNMONEY, Jan. 19, 2017, at 9:15 a.m. http://money.usnews.com/investing/articles/2017-01-19/financial-crisis-bailouts-have-earned-taxpayers-billions ("In total, $623 billion in taxpayer money was dispersed via

recovered more than other jurisdictions such as Europe.[169]

Regulation by deal worked, but it worked perhaps because it was used in the financial crisis when the government had maximum latitude to stretch the law. As the financial crisis receded, the government was left with hastily struck arrangements which sometimes did not function as expected.[170] This occurred in the context of Fannie and Freddie and the government's continued renegotiations of its bail-out arrangements culminating in the Third Amendment.[171] While shareholders have not sued on the initial Fannie and Freddie bail-outs due to its firm statutory firmament, the post bail-out has been the subject of litigation, mainly because of the government's continued pursuit of a regulation by deal approach.[172]

This jibes with the thamautrope of judicial law.[173] During the financial crisis judicial authority was at its weakest as courts refused to intervene to question the legality of the government's regulation by deal. Both Delaware and New York courts for example refused to intervene when the government arranged the sale of the failing investment bank Bear Stearns to JPMorgan.[174] But once the crisis faded the rule of law became stronger and courts became more willing to intervene. The AIG and Fannie and Freddie litigation illustrates this theory. Because of the flex in law which occurs in a financial crisis, the desirability of regulation by deal is

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bailouts and roughly $698 billion has come back via dividend revenue, interest, fees and asset sales. It doesn't take a math genius to see the bailouts ultimately earned taxpayers more than $75 billion in profit, and that number is still growing."), *with* Paul Kiel, *The Bailout: By The Actual Numbers*, PROPUBLICA, Sep. 6, 2012, 7:16 a.m., http://projects.propublica.org/bailout/list (reviewing various government investments in 2012, as of January 30, 2017, estimating a return of $75.8 billion) (last visited Feb 7, 2017)

[169] *See, e.g.*, *Infographic: U.S. vs. Europe: There's a clear economic winner*, CNNMONEY, OCT.,, 21, 2014, http://money.cnn.com/infographic/news/economy/us-versus-europe-economy/ (showing the the US, among other things, had stronger gross domestic product growth, and lower employment than did Europe in 2014).

[170] *See supra* notes 55-60 and accompanying text.

[171] *See supra* notes 129-137 and accompanying text.

[172] *See supra* notes 144-**Error! Bookmark not defined.** and accompanying text.

[173] Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 7 (2005) ("Good faith, I argue, is simply the application of the thaumatrope to the duties of care and loyalty. Spinning the two together, the composite image--of a poor decisionmaking process mixed with hints of conflicting interest--may trigger liability under something the judiciary now calls 'good faith.'").

[174] In re Bear Stearns Litigation, 870 N.Y.S.2d 709 (Sup. Ct. 2008), available at 2008 WL 5220514 (dismissing New York litigation by Bear Stearns shareholders aggrieved by government seizure and sale of the firm to JPMorgan); In re Bear Stearns Cos. Shareholder Litigation, C.A. NO. 3643-VCP, 2008 WL 959992, at *8 (Del. Ch. Apr. 9, 2008). (same outcome for Delaware litigants).

best sited during the financial crisis when it is also most beneficial. Thereafter as time is restored and urgency fades the usual dictates of legislation and administrative process as well as judicial oversight should reapply. This leads to a secondary conclusion, which is that regulation by deal when negotiated during a crisis should provide flexibility to the government to encompass changing circumstances post-financial crisis when it will become harder to renegotiate these transactions without the strictures of administrative law and due process.[175]

We are accordingly skeptical about attempts to limit regulation by deal during the midst of financial crisis. During this time the rule of law will be relaxed (though not broken) as courts hesitate to interfere and the executive branch acts decisively. It is simply impossible to know what will be the form and remedy for the next financial crisis beyond vague notions that a liquidity provider will be required.[176] Because of this limiting regulation by deal will be impossible, and channeling its efforts as Dodd-Frank attempts to do merely result in undue restraint on the government or leading the government to more extremes to justify its legal position. Regulation by deal is inevitable in a financial crisis and limiting it substantially seems to us, impossible.

Moreover, regulation by deal during the financial crisis can be placed into a transaction cost paradigm. Typically, the costs of legislative or administrative action are high.[177] The requisites of the legislative or administrative process must be observed imposing time limitation as well as the ability to achieve a result. Regulation by deal eliminates these costs, a particularly valuable outcome during a financial crisis when speed and authority are at paramount.

But there are costs to regulation by deal. The democratic process is subverted as are Constitutional principles of notice and comment as well as due process. There are also costs in terms of input from the Congressional branch and administrative agencies. These subvert the democratic principles which undergird our society. There are also idiosyncratic costs as regulation by deal can create rigid arrangements and haste can meet that these arrangements are less than appropriate as circumstances change. In

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[175] Steven M. Davidoff, *Uncomfortable Embrace: Federal Corporate Ownership in the Midst of the Financial Crisis*, 95 MINN. L. REV. 1733, 1736 (2011) (observing that "the practical reality that future government ownership is likely to adopt similarly heterogeneous patterns as each crisis is its own unique entity shaped by political, market, and legal realities").

[176] *See* David Zaring, *The Next Financial Crisis*, working paper on file with author.

[177] Moreover, "[t]he problem with high process costs as a passive barrier is that they are themselves likely to expend much of the surplus they create." Jonathan S. Masur, *Costly Screens and Patent Examination*, 2 J. LEGAL ANALYSIS 687, 724 (2010)

times of financial crisis though, the benefits of quick and decisive action often outweigh the costs.

B. Regulation by Deal Outside a Financial Crisis

The case of dealmaking outside a financial crisis or other emergency raises more acute issues and a different set of challenges. It moves regulation by deal from an emergency tool used to respond to crises to a central role in governance. Rather than pursuing government programs through notice and comment or broad regulation applied across an entire industry, with the same standards for all, governance by deal looks to particular transactions to effectuate government policy. They will not involve notice, comments or the due process standards that we ordinarily expect from public administration.

1. The Policy Behind Trump and Non-crisis Regulation by Deal

To some degree, this might look appealing to those who think that the regulatory state has been calcified by bureaucracy. Many proponents of the so-called ossification thesis have argued that the onerousness of judicial review proceeded by lengthy paper requirements, has made it difficult for government policy to get made.[178] These observers might welcome a dealmaking approach to policymaking.

In our view, creating government obligations for private businesses could result in an equally inefficient private sector regulated by contract or burdened by permanent intertwinement with the government. The example of Fannie Mae and Freddie Mac are again instructive.[179] The process of nationalizing the two privately held firms during the crises was probably necessary, even if it was done without much attention to corporate form or administrative nuance. But the rapid nature of the transaction mean that the government made mistakes, and the continued problems created for Fannie and Freddy stakeholders has been significant, while the government's investment in the firm has proven to be impossible to exit, or to reform through legislation.[180]

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[178] *See, e.g.*, JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 254-71 (1990) (ciriticizing courts for adding constitutionally required procedures to administrative policymaking). , McGarity, *supra* note 122 at 1186.

[179] *See supra* part II.C.2.

[180] Joe Light, *Fannie and Freddie Should Exit Government Grip, Mnuchin Says*, BLOOMBERG, NOV. 30, 2016, 5:57 PM https://www.bloomberg.com/news/articles/2016-11-30/fannie-and-freddie-should-exit-government-s-grip-mnuchin-says ("The Obama administration for the past eight years has said that Congress should pass legislation to

Providing government services through public private partnerships, or extracting deals to onshore foreign workers, might look like a slimming down of the public sector through reliance on private businesses to carry out policy objectives. But it would also intertwine the public and private in a way which could be burdensome both for business and neglectful of the public values that we associate with ordinary public governance. The deregulatory component of governance through deals lies in the way that the deals evade judicial review in a way that ordinary regulatory law would not. Deals struck with companies will also avoid the notice and comment and open governance requirements of the APA.[181]

The private sector nonetheless may feel quite burdened by the resulting corporate-regulatory set of contracts imposing onshoring and other requirements on the firms that assist the government in its policy goals. Permanently relying on deals to make government policy accordingly seems neither clearly effective nor consistent with a vision of task specialization, which leaves some responsibilities in the hand of government when public rights and values are at stake and others in the hands of the private sector where they are not. Moreover, the prospect of reprisal may make it difficult for these institutions to sue.[182]

2. The Legality of Regulation by Deal

Regulation by deal during the financial crisis was not open government, and it rejected some of the usual values of administrative law, such as pre-decision notice to affected parties and public and comment-ventilated policymaking. The government, for example, did not divulge the deals it was doing until those deals were concluded. There was no opportunity for ex ante objection. That created flexibility in a system that

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reform the housing-finance system. The last big push for legislation was in 2014 and failed to reach the Senate floor.").

[181] *See* 5 U.S.C. § 552, Pub. L. No. 89-487, 80 Stat. 250 (open government, commonly known as the Freedom of Information Act), 553 (providing for notice and comment rulemaking).

[182] *See* Del Stiltner Dameron & Robert J. Sherry, *Son of* Scanwell: *Antitrust Challenges to Government Contract Awards and Related Actions*, 92 DICK. L. REV. 281, 281; 311 (1988) (noting that while "[u]nsuccessful bidders and offerors for government contracts traditionally have had a number of available forums to challenge the award, or proposed award, of a particular contract to another party[,]" only a "relatively small number of challenges [] have been brought in this manner . . . ."); *see also* Sanford A. Church, Note, *A Defense of the 'Zone of Interests' Standing Test*, 1983 DUKE L.J. 447, 454 n.39 ("Moreover, the courts do not always apply the [zone of interests] test in competitor suits. For example, at least five of the federal courts of appeals have limited their inquiry to injury in fact in cases brought by unsuccessful bidders for government contracts.").

lacks it, suggesting that governing through deals is consistent with a presidency interested in deregulation but unable to roll back bureaucracy through legislation.[183] Governance by deal also does away with the ability of the public to comment on an action and perhaps induce a change of course by the government – the deals are not published as proposals in the Federal Register and followed by a ventilation by the public interested in the government action.[184]

Observers like John Yoo have worried that the president could be "viewing the government as the enemy;" using deals for policymaking gets around the bureaucracy, the courts, and congress –a trifecta when it comes to matters of the separation of powers.[185]

This defies the current tenor of administrative law scholarship, which argues that government actions should be transparent and subject to public notice and inspection. Indeed, Cass Sunstein led OIRA in the wake of the financial crisis with a push for a more thorough regulatory approach to administration.[186] It is done in secret. It is negotiated by lawyers acting in the government's interest, not necessarily the public's (though of course these interests should theoretically align). It is done by parties who are not subject to judicial or administrative review, let alone OIRA.

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[183] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (reversing effort to eliminate seatbelt and airbag requirements imposed on auto manufacturers).

[184] *See* 5 U.S.C. § 553 (2012) (setting forth those requirements for notice and comment rulemaking). This ability to monitor government programs is, of course, one of the fundamental values of administrative law. *See, e.g*, Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1162 (2009) ("We note that administrative agencies in the United States are some of the most extensively monitored government actors in the world. Almost all policy decisions an agency makes must be published in the Federal Register for all to see. Even informal policies that are not legally binding are publicly available. Most legally binding agency rules require notice and an opportunity for public comment by any affected interests—comments to which the agency must adequately respond. With some notable exceptions, final policy decisions by federal agencies in the United States are stunningly visible, even if the internal decisionmaking process of agencies is not entirely transparent"); Weyerhaeuser Co. v. Costle, F2d 1011, 1027–28 (D.C. Cir. 1978) ("Our reliance on careful procedural review, moreover, derives from an expectation that [] the Agency, in carrying out its "essentially legislative task," has infused the administrative process with the degree of openness, explanation, and participatory democracy required by the APA…").

[185] *See* John Yoo, *Executive Power Run Amok*, N,Y. TIMES, Feb. 6, 2017, https://www.nytimes.com/2017/02/06/opinion/executive-power-run-amok.html (arguing that the president "should share Hamilton's vision of an energetic president leading the executive branch in a unified direction, … He should realize that the Constitution channels the president toward … cooperating with Congress on matters at home.").

[186]

This does not mean that regulation by deal is illegal under the APA or other procedural statutes. The *sine qua non* of regulation by deal is finding a legal hook which does not require an administrative comment and notice. Instead the action is done quickly and without court oversight as a singular deal, a legal arrangement negotiated by sophisticated, outside lawyers designed to meet the problem with a transactional approach.

3. Separation of Powers

This all fits nicely within Eric Posner and Adrian Vermeule's view of the world.[187] The two theorize that in a crisis power flows without regard to law to the Executive branch by necessity.[188] Neither the judiciary nor Congress are capable of dealing with the situation effectively in large part due to the bureaucratic nature of such solutions. In *Regulation by Deal* we agreed with Posner and Vermeule's assessment but also noted the statutory basis the government repeatedly cited for its actions.[189] To us, it was better to say that the government looked for statutory hooks for its actions that defied the usual dictates of administrative law. The government wanted to show that it was acting legally even if it was not doing so in a traditional administrative law sense, and certainly doing so without public input.

Yet, outside a crisis and in the Trump administration as it coalesces, there often appears to be less of a legal hook. Instead, it appears that one-off dealmaking is more about back-door terms, forceful results and unequal application of standards, to the extent they exist at all. The legal hook is often an ex post facto justification based on the terms reached rather than on the action itself.

We also believe that there are serious legal concerns about bedrock principles of Presidential constitutional power as a Trump administration may seek to govern by deal. One way to think of this is through the case of Harry S. Truman and the nationalization of the steel industry. In 1952

[187] "In the modern administrative state, it is practically inevitable that legislators, judges, and the public will entrust the executive branch with sweeping power to manage serious crises of this sort." Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1614 (2009).

[188] *Id.* ("Political conditions and constraints, including demands for swift action by an aroused public, massive uncertainty, and awareness of their own ignorance leave rational legislators and judges no real choice but to hand the reins to the executive and hope for the best.").

[189] "We are not persuaded that the government's response marks the irrelevance of legal constraint in a crisis." Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis,* 61 ADMIN. L. REV. 463, 537 (2009)

President Harry S. Truman ordered his Secretary of Commerce to nationalize and operate most of the nation's steel mills in order to effectively end a strike by the United Steelworkers of America.[190] The owners of the mills sued and the Supreme Court 6-3 ruled the seizure unconstitutional and upheld a preliminary injunction blocking the seizure.[191]

The grounds were spelled out in six concurring opinions. In the main opinion Justice Black held that the seizure was illegal under a strict construction of Presidential power that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here."[192] This theme generally went through all the concurring opinions though some like Justice Jackson though Truman's actions directly contradictory to the law. *Youngstown* thus stands for the proposition of not only judicial review of Presidential action, but limitations on that conduct where there is no congressional or constitutional authorization.

While *Youngstown* stands for the limitation of Presidential power when authority is absent, the recent Ninth Circuity opinion on the temporary restraining order against Trump's immigration order represents a more statutory and Constitutionalist approach.[193] The opinion upheld the temporary restraining order under the ground that it deprived various constituencies of due process rights.[194] More importantly however, the court took a broad view of standing, allowing the State of Washington standing due to the deprivation of immigrants to its universities.[195]

This broad view of standing is perhaps another way to ensure that the dealmaking of Presidents is subject to judicial review for due process. Looking at the wider impact of such actions and broadly granting standing to affected parties is likely to ensure not just comportment with the requisites of due process, but the more sober principle of steadied decision making.

4. Costs and Benefits of Regulation by Deal Outside a Financial Crisis

[190] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[191] Id. at 583, 588–89.
[192] *Id.* at 585.
[193] State of Washington, et al. v. Donald J. Trump, et al., No. 17-35105 (9th Cir. Feb. 9, 2017).
[194] *See id.*
[195] *See id.* at __ ("Thus, as the operators of state universities, the States may assert not only their own rights to the extent affected by the Executive Order but may also assert the rights of their students and faculty members.").

Outside a financial crisis the costs and benefit calculus of regulation by deal changes. Whereas in a financial crisis, the benefits of quick and decisive action often outweigh the costs, in the case of non-financial crisis making this may not be the case. In such paradigms the purpose of regulation by deal is not quick action but deregulatory. It is to sidestep the legislative and administrative process to reach "deals" that may not be achievable within the regulatory state.

Because of the deregulatory nature of a presidency devoted to dealmaking as a norm, we are less sanguine about the benefits outweighing the costs. Instead, in these circumstances presidential power will act in subversion to democratic norms and the careful regulatory state that has been built up. While the benefits of such a conduct in individual circumstances may warrant dealmaking, in other cases it may lead to an erosion of constitutional power in the judiciary and legislative branch as well as in basic bedrock rights under the constitution.

5. Regulating Regulation by Deal

We accordingly approach the enshrinement of deal making in ordinary American governance with some skepticism. But if it is the path the administration will take outside of a financial crisis situation, we can identify some basic steps that should be taken to balance the desire to privatize some functions that could be provided by the government and some technocratic values that we expect from government.

- For example, there must be a public disclosure component to governance by deal. The contracts should be publicly available for the discerning evaluation of anyone interested and assuring a form of public review if not participation in the deal making process that it struck.
- Secondly, we would urge the government if it wishes to act by deal, to take it slow. That is deal making done in a hurry has as the financial crises revealed being deal making with some mixed consequences. If deals are to be a principle mechanism for government policy making in nonemergency times, then the government should take care to think through these deals before rushing them through.
- Third, we think that governance by deal should at least have some explicit legality and Presidential authority consistent with the main opinion in *Youngstown*. For example, in the Carrier deal, the subsidies provided to Carrier were based on Indiana law. The right approach to the level of legality required should be through the

Chevron doctrine. An interpretation of a governing statute that concluded that it permits the government to act through deal rather than some other form of regulation should be reasonable to be entitled to deference in court.

- Finally, we think there should be equivalency. In essence this is due process, but a lighter form of due process which says that there should generally be equal treatment of similarly situated actors.

We recognize that these are soft principles, actions which may not be required of the Presidency by a court of law or even legislative action. However, these principles are consistent with the goals of administrative law. They also provide a basis for Presidential comportment itself.

We also believe that if these bare dictates are not followed in a non-financial crisis situation that courts should be prepared to intervene. We believe that there is a sound basis in due process for such an action. The Constitution's requirement that citizens, including corporations, not be deprived of their property without due process is also implicated by governance by deal, which simply does not feature the procedural protections of, say, ordinary rulemaking, and constitutes an individualized imposition or benefit on the class of people or companies affected by the deal. The problem is not hard to discern: as policymaking through deal affects the property interests of American firms and citizens, those parties might expect to have a pre-deprivation notice of the scheme and "some sort of hearing."[196]

Determining the kind of process due in these cases usually requires a look at the oft-invoked three-factor test in *Mathews v. Eldridge*:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or

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196 The pre-deprivation notice and "some kind of hearing" requirements are usually traced to *Goldberg v. Kelly*, 397 U.S. 254 (1970) (dealing with the deprivation of government welfare benefits). As Henry Friendly discussed:

> Since [the *Goldberg* decision], we have witnessed a due process explosion in which the Court has carried the hearing requirement from one new area of government action to another, an explosion which gives rise to many questions of major importance to our society. Should the executive be placed in a position where it can take no action affecting a citizen without a hearing? When a hearing is required, what kind of hearing must it be? Specifically, how closely must it conform to the judicial model?

Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975).

> substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[197]

In American administrative law jurisprudence *Mathews* is invoked to protect citizens faced with individualized determinations of their rights and duties—and much of the sovereignty mismatch problem involves rules affecting the many, rather than adjudications affecting the few.

The value of additional process in deals that cost some of the affected party's property is one of the reasons for a slower deal process, when emergency does not require more speed.

Of course, there is the related issue of whether subject companies and other private actors would bring suit to complain. Here, we understand that resisting the full force of the government may be difficult. Companies may simply prefer to deal rather than fight any government action in court.

To address this point, we also believe that the Freedom of Information Act could be applied to presidentially directed deals. Currently, the White House is largely, but not entirely, exempt from this statute.[198] This is a result of actions by the Obama administration to remove The Office of Administration from the purview of the Act.[199] The remainder of the White House mostly exempt, but some parts of the Executive Office of the President are duty bound to comply with the open records law.[200] A crafted approach, internally placing presidentially directed deals through the Office of Administration or the Office of Management and Budget, might allow a FOIA request for any action

197 424 U.S. 319, 335 (1976) (citing *Goldberg*, 397 U.S. at 263–71).

198 The Supreme Court has held that the APA, including FOIA, does not apply to presidential decision making. Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992). Nonetheless, various offices within the Executive Office of the President are subject to the open records law, including the Council on Environmental Quality; Office of Administration; Office of Management and Budget; Office of National Drug Control Policy; Office of Science and Technology Policy; and the Office of the United States Trade Representative. For a discussion, see Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 760 (2007)

199 *See* Citizens for Responsibility & Ethics in Washington v. Office of Admin., 566 F.3d 219 (D.C. Cir. 2009) (holding that the Office of Administration within the Executive Office of the President is not subject to FOIA, absent White House consent); Megan R. Wilson, *White House Formally Exempts Office From FOIA Regs*, THE HILL, Mar. 16, 2015, 10:12 PM, http://thehill.com/homenews/administration/235900-white-house-exempts-office-from-foia-regs (describing a rule to "exempt the Office of Administration" from FOIA) .

200 *See* Strauss, supra note 198.

directed specifically at an individual entity might be sufficient to preserve a measure of transparency on these transactions.

In this regard, we ultimately feel that the trend towards regulation by deal, particularly in the Trump Administration is an inevitable result of the powerful executive and the rise of the administrative state and the need to avoid its strictures at times. We believe that without some basic procedures, and at a minimum transparency, regulation by deal outside the financial crisis will lack a social welfare increasing component, the sine qua non of regulation by deal's appropriateness. Instead it will simply provide randomness and uncertainty.

Conclusion

The Trump Administration and its unique approach to governing have created uncertainty in the parameters and strictures of the administrative state. Our research shows however that the modus operandi of the administration – governance by deal – has deep historical origins and was most recently employed on a wide-spread basis during the financial crisis. The difference perhaps is that now dealmaking is becoming a norm outside of crisis times. This is not unexpected. Those who have advocated for Presidential power like now-Supreme Court Justice Elena Kagan have built the blocks for this type of governance. Indeed, governance by deal may be a valuable way to circumvent an ossified administrative process. But as we show outside a financial crisis, governance by deal raises issues of both transparency and due process. Even if it is a deregulatory tool, guiding principles and court oversight are necessary to ensure that governance by deal adheres to core principles of the modern day administrative state.