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## Legislation That Isn't – Attending to Rulemaking's "Democracy Deficit"

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# Legislation that Isn't—Attending to Rulemaking's "Democracy Deficit"

Peter L. Strauss†

*In the end this may seem merely a fiat, but that is always true, whatever the disguise.*<sup>1</sup>

## INTRODUCTION

Philip Frickey's commitment to practical legal studies won my admiration early on in his career. In this welcome celebration of his extraordinary career, it seems fitting to essay something "practical"—to attempt a constructive approach to an enduring problem—that has some bearing on his lifelong attention to the problem of "interpretation." If it will not make the problem go away, perhaps it will provide a basis for understanding its inevitable tensions, and in that way will help us step past theoretical exegeses suggesting the possibility of simple answers.

## I

### IS THERE A "DEMOCRACY DEFICIT" TO AGENCY RULEMAKING?

The enduring problem for a democracy I address here concerns the legitimacy of permitting unelected officials to create binding legal texts. This is a problem for judges (at least the unelected ones) as well as regulators, a problem heightened by the American invention of constitutionality review.<sup>2</sup> For

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† Betts Professor of Law, Columbia University. Thanks are due to my fellow panelists and the attendees at the Frickey Festschrift for reactions helpful in shaping this Essay, as to Keith Bradley, Cynthia Farina, Nina Mendelson, Todd Rakoff and Kathryn Watts for their readings, and Andrew Amend, '08, for remarkable research assistance. Any errors are just my own. The piece is current to mid-summer, 2009. I deeply mourn Professor Frickey's untimely death, and so regret that he could not have lived long enough to see the publication of this volume in his honor.

1. *Sinram v. Pa. R.R. Co.*, 61 F.2d 767, 771 (2d Cir. 1932) (Hand, J.) (concluding a lengthy opinion explaining a determination about the seaworthiness of a coal barge).

2. See, e.g., JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

judges, at least in the statutory context, we deal with this problem by pretending that they are only involved in interpretation, not law-making. While the judges themselves frequently write under the apparent illusion that they have in fact “made law” by their statutory “interpretation,”<sup>3</sup> one can at least say that the text of a judicial decision, in and of itself, and unlike the text of a statute or regulation, does not have legally binding force for any but the parties to the case. For regulations, however, as for statutes, the situation is different. For example, violation of the Secretary of Agriculture’s rules governing the grazing of sheep in national forests, unlike violation of the Rule in Shelley’s Case, is in and of itself a basis for sending someone to jail.<sup>4</sup> This Essay is about the problem created by giving administrative regulations the force of law; the judicial problem is well-enough plowed.

The problem is hardly unique to us. The literature about the European Union often invokes a “democracy deficit” in discussing the regulation-like “implementing measures” that emerge there as tertiary legislative instruments that correspond to agency regulations here. These measures are two levels below the EU’s constitutive treaties and one below its statute-like “secondary”<sup>5</sup> measures—regulations and directives adopted by its Parliament and Council.<sup>6</sup> Their enacted regulations and directives acquire legitimacy through the involvement of the European Parliament (and, to a lesser extent, a Council composed of persons who are politically responsible on a national level), as well as the public manner in which they are considered.<sup>7</sup> “Implementing

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3. Compare the super-strong presumption that once an interpretation has been rendered, courts must “adhere to [that] ruling under the doctrine of *stare decisis*, and . . . assess an agency’s later interpretation of the statute against that settled law . . . . Congress, not this Court, has the responsibility for revising its statutes.” *Neal v. United States*, 516 U.S. 284, 295–96 (1996), with

To the French, . . . to universalize the Anglo-American presupposition that “cases” make “law” is to fall into two crass assumptions. First, it assumes that just because judges exercise significant normative control, this control must qualify as lawmaking . . . [which is] to fail to acknowledge that while a few legal systems have decided to exalt the judge by treating his work product as Law, most have not, preferring to reserve this special status to legislative enactments. Secondly . . . [o]ne need hardly call judicial decisionmaking “law” in order to stress that judges must make normative choices . . . . To do so . . . produces . . . potentially negative side-effects, such as the glorification of the judiciary and a concomitant tendency to compromise popular control through legislative, administrative, grass-roots, or other processes . . . . Thus Gény explains that “it is important to note: it is not that the *jurisprudence* constitutes an independent source of law, any more than it constitutes a custom *sui generis*.” It is only an “authority,” a “*propulsion device*,” or “initiator of custom.”

MITCHELL DE S.-O.-L’E. LASSER, JUDICIAL DELIBERATIONS 172–73 (2004).

4. *United States v. Grimaud*, 220 U.S. 506 (1911).

5. Americans do not think of legislation as “secondary,” but if one takes the Constitution as our primary source of governing law—as the European Union’s constitutive treaties are—then this European usage becomes understandable. This is why the administrative agency rules we are prone to characterize as secondary legislation are, for them, tertiary.

6. See, e.g., PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW – TEXT, CASES, AND MATERIALS 134 (4th ed. 2008); Giandomenico Majone, *Europe’s ‘Democracy Deficit’: The Question of Standards*, 4 EUR. L.J. 5 (1998).

7. DAVID BEETHAM & CHRISTOPHER LORD, LEGITIMACY AND THE EU (1998). An

measures,” on the other hand, emerge from the shadowy process of “comitology,” a hidden and bureaucratic process whose very name suggests arcane mysteries and possible intrigue.<sup>8</sup> Hence the “democracy deficit.”

In a parliamentary democracy like England, the problem may be papered over through arrangements by which “statutory instruments” (i.e., regulations) are actually, or at least constructively, laid before Parliament. They are in theory available for question or debate, although that may rarely happen. In addition, characteristics of the parliamentary system may also mask the intensity of the democracy deficit. The election of the responsible minister, controlling the work of his department; the vulnerability of the government as a whole to having to undertake a new election at any moment should confidence in it be lost; the possibility, if not actuality, of a vote on the measure in question—all these tend to settle concerns about possible democracy deficits, even if the realities revealed by thoughtful inquiry suggest that, on the whole, the bureaucrats and not the minister (and certainly not the Parliament) are effectively in charge of most statutory instruments that become law.<sup>9</sup>

Even in parliamentary democracies, the problems inherent in devolving the *political* authority people have given their elected representatives upon other authorities were early and forcefully stated:

The power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.<sup>10</sup>

But, of course, such transfers are commonplace in all democracies. The difficulty, as Professor Ed Rubin persuasively characterized for us two decades ago,<sup>11</sup> is that the complexities of contemporary society, and our understanding of the resulting needs for social order, make placing the power to create law in other hands inevitable. There is simply too much to do for an elected body of

American reader should perhaps be warned of the confusing (to Americans) European usage, in which acts of the European Parliament and Council, that we would characterize as statutes, are denominated either “directives” or “regulations,” depending whether they themselves operate with the force of law on individuals, or rather require further action by member states to create legally binding obligations on citizens that are to be enforced as a matter of (EU-required) national law. See generally CRAIG & DE BÚRCA, *supra* note 6.

8. On these processes generally, see Peter L. Strauss, Turner T. Smith, Jr. & Lucas Bergkamp, *Rulemaking*, in *ADMINISTRATIVE LAW OF THE EUROPEAN UNION* (George Bermann et al. eds., 2008).

9. The English scholar Edward C. Page has published widely on this subject, basing his work on wide-ranging interviews concerning an understudied subject. See, e.g., EDWARD C. PAGE & BILL JENKINS, *POLICY BUREAUCRACY: GOVERNMENT WITH A CAST OF THOUSANDS* (2005); EDWARD C. PAGE, *GOVERNING BY NUMBERS* (2001); Edward C. Page, *How Policy Is Really Made* (2006), <http://personal.lse.ac.uk/Page/Papers/PMPA%20Ed%20Page%202006-2.pdf>.

10. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, bk. II, ch. XI, § 141 (1690).

11. Edward Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989).

generalists to accomplish. Although we might think elected politicians should decide whether and under what procedures we ought to have a legal regime to encourage the provision of safe drinking water (*inter alia*), in general, we would not think that assessing precisely what levels of arsenic make drinking water acceptably safe<sup>12</sup> is appropriate for determination as a matter of political will. Such a determination *requires* an act of judgment, informed by good science. Consequently, much legislation, like the Safe Drinking Water Act, is intransitive—creating a body with the authority to set binding legal standards as an act of judgment. Such judgments are measured against their success in applying legislatively framed standards indicating the factors to be considered in reaching them.

A legislature may be entitled to have the general sufficiency of its work-product assessed, if it is assessed at all, as the product of political will. American courts essentially acknowledge as much. Outside the framework of protected individual rights or fundamental issues of governmental structure, American courts limit constitutional review of economic measures to the barest notions of rationality.<sup>13</sup> But would we say the same about rulemaking?<sup>14</sup> The very circumstances that so often effectively require intransitivity in legislation carry with them the implication that political will alone cannot suffice to validate regulations, that acts of reasoned judgment along legislatively prescribed lines are required.

## II

### THE PROBLEM OF EXECUTIVE AND AGENCY “DISCRETION”

If one agrees that politics alone cannot validate regulations, one begins to see the difficulties with the strong “unitary” view of presidential authority in relation to these acts. To be sure, we have recognized from the earliest days of the Republic that sometimes “politics” is the only effective measure of, and constraint on, presidential (and also congressional) decision making. As an element of his iconic opinion in *Marbury v. Madison*, Chief Justice Marshall asserted the sufficiency of political will, rather than judicially assessed judgment, for those matters committed to the President’s discretion:

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12. Arsenic, a colorless, tasteless poison, is an inevitable pollutant of some water supplies, as a result both of natural deposits and of human interventions. Setting a threshold level, however minute, has been found adequate to protect the public from the effects of long-term, chronic exposure to it. See EPA, Arsenic in Drinking Water, <http://www.epa.gov/safewater/arsenic/index.html> (last visited Apr. 9, 2009).

13. See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

14. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983) (“The Department of Transportation suggests that the arbitrary-and-capricious standard requires no more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause. We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.”).

[The Secretary of State, in administering foreign affairs] is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can *never* be examinable by the courts.

....

... [W]here the heads of departments are . . . to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are *only* politically examinable . . . .

....

The province of the courts is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can *never* be made in this court.<sup>15</sup>

While it regularly reviews agency decisions for abuse of discretion, the Supreme Court has found in commitment of authority to the President a reason to decline review.<sup>16</sup> The President is not an “agency” for the purposes of the Administrative Procedure Act (APA); if he were, the unreviewable discretion Chief Justice Marshall is describing (hereafter, **DISCRETION!!!**)<sup>17</sup> would be found to fit the APA’s explicit exclusion of matters committed to “agency discretion” from judicial review.<sup>18</sup>

But when agencies exercise “discretion” in the form of executive agency rulemaking, on the other hand, judicial review of its reasonableness is the very coin of its legitimacy.<sup>19</sup> While the initial section of the APA’s chapter on judicial review, § 701, excludes any matter from judicial review to the extent it is committed to agency discretion, § 706—which could not be reached if the

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15. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166, 170 (1803) (emphasis added).

16. *See, e.g., Dalton v. Spector*, 511 U.S. 462 (1994).

17. For this Essay, the term discretion is presented as binary, as if it had either law-less or law-full meanings. **DISCRETION!!!** is the former, which Chief Justice Marshall insisted could “never” be challenged in court and as to which the obligation of a federal officer was to serve as the President’s faithful messenger. Discretion is the latter, subject to full, even exacting, review by the courts. As my casebook colleague Cynthia Farina points out, discretion that is constrained by law comes in many shades influencing the degree of judicial review available—the discretion involved in denying a petition for rulemaking, the discretion of a hearer about credibility issues, the discretion made tolerable by the reassurance of professional role, *cf. Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305 (1985), as well as that which is deployed by the EPA in deciding just what level of SO<sub>2</sub> is tolerable in power plants emissions.

18. 5 U.S.C. § 701(a) (2006) (“This chapter applies, according to the provisions thereof, except to the extent that . . . (2) agency action is committed to agency discretion by law.”).

19. *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring) (“In the case of agency decision-making the courts have an additional responsibility set by Congress. Congress has been willing to delegate its legislative powers broadly—and courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.”).

"plain meaning" of § 701 were followed—explicitly provides for review for "abuse of discretion."<sup>20</sup> The Court has squared this circle by characterizing as the realm of unreviewable **DISCRETION!!!** those settings in which there is "no law to apply."<sup>21</sup> Where the law does set standards—as it must where agencies are authorized to act with the force of law—one finds, rather "discretion," a setting in which the courts must abjure substituting their judgment for the agency's, yet nonetheless are to engage in "searching and careful," if "narrow," review.<sup>22</sup>

Indeed, for agency judgments, unlike for presidential ones, the empowering statutes generally *require* review—sometimes paradoxically using the "substantial evidence" test the APA reserves for the most formal of administrative procedures, which notice and comment rulemaking is not.<sup>23</sup> The judicial understanding of § 706 effectively echoes this requirement that the creation of binding legal texts by unelected officials be the demonstrable product of "judgment," not "will."<sup>24</sup> Reviewing courts assess the adequacy of those judgments by inquiries quite severe in their demands for rationality.<sup>25</sup> And for more than three decades, some have celebrated this development as a means for giving "those who care about well-documented and well-reasoned decision making a lever with which to move those who do not."<sup>26</sup>

It may be worth a brief excursion to connect the dots among the questions of discretion-type, reviewability and delegation. In practice, the delegation doctrine has had decisive force only in contexts in which an agency's exercise of authority appeared to involve **DISCRETION!!!** and not discretion. That was the apparent characteristic of the two notable delegation cases of the Supreme Court in the 1930s.<sup>27</sup> More recently, in the Eighth Circuit, a government lawyer argued that because a statute conferred **DISCRETION!!!** on the Secretary of the Interior in relation to certain decisions respecting Native American affairs, § 701 made his decision unreviewable. The court found that the statute conferring that discretion was an unlawful delegation of power.<sup>28</sup> Subsequently, and I have always imagined this happened after he had horse-shedded the

20. 5 U.S.C. § 706 (2006) ("The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, *an abuse of discretion*, or otherwise not in accordance with law . . .") (emphasis added).

21. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

22. *Id.* at 416 ("Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.").

23. *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 337 (D.C. Cir. 1968).

24. *Cf. THE FEDERALIST* No. 78 (Alexander Hamilton).

25. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

26. William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 *YALE L.J.* 38, 60 (1975).

27. *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935); see Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 11 *TEL AVIV U. STUD. L.* 9, 21–24 (1992).

28. *South Dakota v. U.S. Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996).

Secretary, the Solicitor General informed the Supreme Court that the Secretary on mature reconsideration had realized that judicial review of his decision was possible—that there was “law to apply” in assessing its correctness. The Court, as he requested, vacated the judgment below and remanded the matter for the merits review the Secretary was now seeking.<sup>29</sup> Judge Harold Leventhal’s opinion in *Ethyl Corp. v. EPA* ties abuse-of-discretion review to the delegation question with particular force:

In the case of agency decision-making the courts have an additional responsibility set by Congress. Congress has been willing to delegate its legislative powers broadly—and courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory. Nor is that envisioned judicial role ephemeral, as *Overton Park* makes clear.<sup>30</sup>

The legitimacy of delegated discretionary authority, that is, is tied directly to the possibility of judicial review for the rationality of its exercise. For delegated “discretion,” the judicial review issue is at 180 degrees from Chief Justice Marshall’s denial that there was any proper possibility for judicial review of exercises of **DISCRETION!!!**. Agencies may exercise delegated authority if and only if they are prepared to demonstrate its legality to a reviewing court.

At least one court has gone so far as to question whether it is ever permissible to empower an administrative agency to make openly political decisions. In *Boreali v. Axelrod*,<sup>31</sup> the New York Public Health Service (PHS) had adopted a rule about second-hand smoke that contained exemptions for small establishments. The agency explained the exemptions essentially in political trade-off/economic terms, not in terms of public health. This, the New York Court of Appeals ruled, was improper. The New York legislature could empower the PHS to resolve issues of public health, even ones that required considerable exercise of judgment in the face of spongy facts. But it could not empower the PHS to make political decisions, to exercise will rather than judgment. Legislatures can do that; our votes empower them to. But agencies cannot. One might think a similar concern implicit in *Whitman v. American Trucking Ass’n*, in which the Supreme Court repudiated “cost” as an element the Clear Air Act permitted the EPA to consider in setting clean air standards.<sup>32</sup>

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29. U.S. Dep’t of the Interior v. South Dakota, 519 U.S. 919 (1996). The Court did not say just what the standards were, but subsequent courts, including the Eighth Circuit on remand, have proceeded as if they could be found. See *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30–33 (D.C. Cir. 2008); *Carcieri v. Norton*, 398 F.3d 22, 29 (1st Cir. 2005); *South Dakota v. U.S. Dep’t of the Interior*, 423 F.3d at 795–96; *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999). Judge Brown of the D.C. Circuit, in *Michigan Gambling Opposition v. Kempthorne*, strongly stated the opposing view. 525 F.3d at 34.

30. *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (footnotes omitted).

31. 517 N.E.2d 1350 (N.Y. 1987).

32. 531 U.S. 457, 471 (2001).



Had the Court permitted such a wide-ranging set of decisional factors, it would have underscored the enormity of the power conferred on the agency.

Such considerations seem often to have moved the Court when, ostensibly rejecting delegation arguments, it nonetheless reads statutes so as to cabin granted authority.<sup>33</sup> Consider, for example, *Massachusetts v. EPA*.<sup>34</sup> The majority rejected the EPA's invocation of foreign relations concerns to explain its refusal to engage in rulemaking respecting carbon dioxide as a greenhouse pollutant. The Court reasoned:

[This] alternative basis for EPA's decision—that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time—rests on reasoning divorced from the statutory text . . . . [T]he use of the word “judgment” is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits . . . . [O]nce EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.<sup>35</sup>

In *Entergy Corp. v. Riverkeeper Inc.*,<sup>36</sup> decided just four weeks before this conference, the Court majority found “cost” permissible as a consideration in Clean Water Act administration, but insisted that this was because Congress had so provided. Professor Frickey would find the three *Entergy* opinions addressing the statutory issue fascinating for their tension among the usually textualist and more-willing-to-look-at-the-entrails Justices. With apparent reason, Professor Rick Hills immediately questioned whether Justice Scalia, looking neither left nor right at what had happened in Congress, had not abandoned textualism for the *Chevron*<sup>37</sup> deference he had previously asserted textualists are much less likely to find called for.<sup>38</sup> But the important thing to

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33. Thus, Justice Scalia, who in other contexts has inveighed against finding elephants in mouseholes, see *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994), wrote for the *Whitman* majority that “While Congress need not provide any direction to the EPA regarding the manner in which it is to define ‘country elevators’ [exempted from ordinarily applicable grain elevator standards] . . . it must provide substantial guidance on setting air standards that affect the entire national economy.” 531 U.S. at 475.

34. 549 U.S. 497 (2007).

35. *Id.* at 532–33.

36. 129 S. Ct. 1498 (2009).

37. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

38. See Posting of Rick Hills to PrawfsBlawg, <http://prawfsblawg.blogs.com/prawfsblawg/2009/04/does-scalia-abandon-textualism-in-entergy-corp-v-riverkeeper.html> (Apr. 1, 2009, 10:40 PM) (“Does Scalia abandon textualism in *Entergy Corp. v. Riverkeeper*? I think so. If I am right, then *Entergy Corp.*, handed down today, is a significant defeat for textualism at the hands of

note for our purposes is that all nine Justices addressed the issue as a question of what Congress had provided. And with regard to *Chevron*, all carefully framed the decision processes involved, first, as the EPA's decision processes (not the White House's); and second, as processes that had involved the exercise of reviewable judgment, not will.

### III

#### PRESIDENTIAL OVERSIGHT

Of course the tension between technocratic and political views of agency action is not new. While "expertise" may have been the hallmark of New Deal thinking about administrative action, any thought of rationalizing administration as *simply* the exercise of expertise—as if the necessary judgments could be reached by calculation and without the intrusion of values—has vanished. But is agency action, then, *just* politics?<sup>39</sup> And if it is, rather, *necessarily* an admixture—if we refuse to accept the arbitrariness of "just politics" and yet must also concede it impossible to achieve "a government of laws and not of men" *strictu sensu*—how do we keep the law side in significant operation?

The development of aggressively centralized presidential oversight, even control, of executive agency rulemaking has given this question new prominence. A quarter century ago, as presidential oversight mechanisms were gathering momentum, the Supreme Court delivered two judgments within months of each other that may appear to look in opposite directions. In *State Farm*,<sup>40</sup> it reiterated and expanded the formulae for judicial review of the exercise of executive discretion under law that it had voiced in *Citizens to Preserve Overton Park Inc. v. Volpe*.<sup>41</sup> It did so in a manner commonly taken as embracing of the D.C. Circuit's development of "hard look review" in important rulemakings. And then in *Chevron*,<sup>42</sup> the Court accepted the possibility that Congress would often confer effective lawmaking (interpretive)

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its most zealous proponent."); cf. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.").

39. "Politics," like "discretion," is a word of contrasting meanings, as Robert Post so thoughtfully shows in his contribution to this symposium. See Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319 (2010). People may operate from the friend/enemy perspective, with loyalty as the central measure, or understand politics to embrace a collective reaching toward an acceptable judgment with celebration of open disagreement as the means of getting there. Presidents will vary how they understand it, as is so dramatically illustrated by the stances of our present and next-previous Presidents, see *infra* note 84 and accompanying text. The problem of "will" is that it must accept the friend/enemy view as possibly driving the judgment that can "never" be made in court.

40. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

41. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

42. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

roles on agencies within the ambiguous interstices of the statutes they were responsible to administer. It thus celebrated what Professor, now Justice, Breyer sharply criticized as an inappropriate limitation of the judicial role on review,<sup>43</sup> approvingly noting the President's political influence over matters of an essentially policy-making character, that are not a proper element of judicial judgment.

Succeeding years have witnessed an ever-increasing presidential command of the agency rulemaking apparatus, and increasing politicization of the executive agency bureaucracy.<sup>44</sup> Adherents of the strong view of the "unitary executive" celebrate the trend, finding in the Constitution's Article II an essential right of the President to command all executive action.<sup>45</sup> They would, in effect, extend to EPA rulemaking Chief Justice Marshall's characterization of the Secretary of State's foreign affairs function, as a realm in which the officer "is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated."<sup>46</sup> They do not seem to notice the unreviewability that Chief Justice Marshall said would follow from this proposition, or its tension with the ideas of § 706, *Overton Park*, and *State Farm*. Their point, I suppose, is that the President's election cures any "democracy deficit."

Berkeley Law Dean Christopher Edley, after working with President Carter's domestic policy staff, was among the first to note how some intrusion of politics into rulemaking is inevitable *and appropriate*.<sup>47</sup> Notice, though, how much more problematic dependency on the President's election is for the United States than the practice of parliamentary responsibility is for parliamentary democracies. In parliamentary democracies, many or all

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43. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

44. See David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1123–25 (2008), noting that the number of "political" positions in administration controlled by the White House, outside the Civil Service (including its politically somewhat vulnerable Senior Executive Service), and not requiring Senate confirmation, exceeds 2,500. Persons living in parliamentary systems built over permanent civil service bodies find this level of politically astounding. The Senate-confirmed positions are much less numerous, and notoriously slow to be filled. On April 14, 2009, the Library of Congress's Thomas website reported 127 presidential nominations as having been received for Senate consideration, for civilian positions (i.e., excluding Military, Foreign Service, NOAA, Public Health), and a number of these positions were nominations to judgeships in the federal or District of Columbia courts. See THOMAS, The Library of Congress, <http://thomas.loc.gov/> (last visited Apr. 29, 2009).

45. See generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); but see Peter L. Strauss, *Overseer or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

46. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

47. CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 169–206 (1990) (discussing doctrinal reforms that would promote the sound accommodation of politics within administrative law).

ministers may be elected (that is, they have an independent electoral responsibility) and all must answer directly to the Parliament. The government may fail at any moment, and if it does everyone will be on the hustings. It will be the cabinet, not the Prime Minister alone, that collegially rejects (or accepts) a minister's proposal for what we call rulemaking.<sup>48</sup> If a statutory instrument seems mistaken, the government can force its consideration by the Parliament and, at least in the lower House (thus raising visibility even if the upper House is "independent"), effectively control the enactment of a corrective measure.

Our Cabinet Secretaries, in contrast, answer only to the President and White House staff. Congress can require their presence at hearings and refuse desired boons, statutory or budgetary, but its resources are slim.<sup>49</sup> Our government never "fails" in the parliamentary sense; our election dates are firmly fixed into the next millennium and (except as the presidential election might be characterized that way) we never, as such, elect the government. And then there are the influences of what Phil and his casebook colleagues have so persuasively pointed to as "vetogates."<sup>50</sup> Should Congress learn that the President has blocked a rule, Congress could put the blocked rule's proposition in place only by overcoming all those hurdles—most importantly, only by mustering the super-majority necessary to overcome the veto he would surely then cast.

Similarly, should a simple majority of Congress conclude that a rule the President *avored* politically was undesirable, any attempt to reverse the rule would fail. Simple majorities in both houses and presidential assent *are* required to enact or alter statutes—usually to be tested in court, as earlier remarked, merely as acts of "will." But if the President favors a rule one of his agencies has adopted, super-majorities would have to be mustered to overcome his expectable veto of a congressional act disapproving it. Instant governmental failure is not in the cards. That is, whatever the President does, voter disapproval must await a subsequent election. He will be a candidate in that election no more often than once in every two. Moreover, it is hard to imagine that the outcome even of that election would ever turn on the possibility that he

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48. Consider these thoughts, put to me by Keith Bradley:

I propose that we think of the difference between political and administrative discretion not in terms of how politics influences the making of a decision, but rather in terms of how one reverses a decision. . . . British politics [is] more democratic, in this sense, because so many decisions are made by ministers, and because the life of governments is undetermined. Even though ministers are appointed without confirmation by a powerful prime minister, a motivated citizen who wants to reverse a ministerial decision knows exactly what he has to do, and it entirely involves working to change the political personnel.

Email from Keith Bradley to Peter L. Strauss (July 8, 2009) (on file with author).

49. Cf. THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH* (2006).

50. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY* 66–68 (4th ed. 2007).

has coerced some administrator's ostensible decision. The idea that politics will control the President's actions, then, is remarkably remote.

My casebook colleague Todd Rakoff, reading an early draft of these remarks, suggested noting that our two dominant political parties are based on very broad coalitions, such that each represents (albeit to differing degrees) most of the views found on public policy. Over the years, American political parties have enforced much less rigorous discipline, particularly in Congress, than is characteristic of parties in parliamentary democracies. Absent much party discipline or feeling that it ought to prevail, even executive administration becomes quite diverse. As President Truman famously remarked when President Eisenhower, a former general, had been elected to succeed him, "He'll sit here . . . and he'll say, 'Do this! Do that!' *And nothing will happen.* Poor Ike—it won't be a bit like the Army. He'll find it very frustrating."<sup>51</sup> If presidential power is understood as the power to *persuade*—if those with whom he interacts understand that duties lie with them, that loyalty is not the *primum bonum* of holding executive office, and that the diversity of political view within their party creates wiggle room for them in performing their duties—then one might argue that the 2,500 or so presidential administrative appointments made without the benefit of Senate confirmation will still predictably represent, in some crude but real sense, the disparate views of a majority of the population. Introduce the emphasis on loyalty and effective party discipline that characterized the Republican Party in recent years, however, in Congress as well as in the White House, and this reassurance disappears.<sup>52</sup> The governing ethic of those taking the strong "unitary executive" view is that the first duties of civilian heads of departments, like generals of the Army, are loyalty and obedience. Truman again: "Whenever you have an efficient government you have a dictatorship."<sup>53</sup>

Presidential control over rulemaking, then, is no simple answer to the problem of the "democracy deficit." Indeed, given both the privacy screen<sup>54</sup> behind which it is (understandably enough) exercised, and the extraordinary range of measures that might be subject to it, one could conclude that presidential control makes the democracy deficit not better but worse. It invites political "will" to be exercised in a manner that may be undisclosed and essentially uncorrectable. One begins to understand here another of the tensions that pervade American ideas about government and the separation of powers. On the one hand, the President's executive authority precludes the proposition that he is to be a lawmaker;<sup>55</sup> on the other, we unhesitatingly embrace agency

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51. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 10 (1991).

52. Cf. Post, *supra* note 39.

53. Harry S. Truman, *Lecture at Columbia University* (Apr. 28, 1959), available at <http://www.quotationspage.com/quote/27058.html>.

54. See *infra* text accompanying notes 68–70, 76–78.

55. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (Black, J.) ("[T]he

rulemaking—indeed, as a practical matter, we must. Professor Rakoff, in a published analysis, sought to contrast these propositions as grounded, for the President, in reluctance to accept an office both omnipotent and omni-competent.<sup>56</sup> But agencies entrusted with focused authority, and subordinate to Congress and Court as well as to the President, may adopt rules (and adjudicate and enforce), yet have a limited field of action (i.e. they are not omni-competent) and they answer to more than one overseer. Professor Rakoff's suggestion works, of course, *only* if we accept that the President's role is one of oversight and persuasion, not control.

#### IV

##### JUDICIAL OVERSIGHT

I have discussed at some length elsewhere<sup>57</sup> how considerations such as these lead me to find in the President's constitutional obligation to take care that the laws "be faithfully executed"<sup>58</sup> a responsibility to accept that Congress has conferred on *others* duties that *they* are to exercise, and to exercise not as a matter of will, but as acts of judgment. The courts, that is, must have a role in relation to rulemaking, and that role cannot be an empty one. In the opinions that have, to date, most openly accepted the intrusion of political considerations, this proposition has been instinct. In *Entergy*, the Court split 5–4 over whether "cost" was an acceptable element of EPA decisions under the Clean Water Act. The disagreement was perhaps a reflection of the secondary impact of "delegation" concerns—made ironic, as the dissent noted, by the majority author's usual and apparently delegation-motivated indisposition to find "elephants in mouseholes."<sup>59</sup> But the opinions were *unanimous* in their presumption that the decision was the EPA's, that cost-benefit analysis would be proper if (as the majority reasoned) cost were a permissible factor for the EPA to consider, and that the EPA's decision would be assessed by the usual standards of judicial review of agency action.

When judges recognize the place of politics in administrative agency decision making, they do not invoke **DISCRETION!!!** in doing so. Judge Patricia Wald's canonical decision in *Sierra Club v. Costle* spends 103 pages closely attending to the EPA's reasoning supporting its early rule requiring scrubbing and other measures to control sulphur dioxide emissions by electric power plants, before reaching (and putting aside) the possibility that unrecorded presidential and congressional counseling might have influenced

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President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker").

56. Rakoff, *supra* note 27.

57. Strauss, *supra* note 45.

58. U.S. CONST. art. II, § 3.

59. *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1517 (2009) (Stevens, J., dissenting) (internal quotation marks omitted).

the EPA Administrator in choosing among the several possibilities the record would support.<sup>60</sup> This rigorous analysis makes clear that she was reviewing the EPA Administrator's decision and doing so with intensity:

We reach our decision after interminable record searching (and considerable soul searching). We have read the record with as hard a look as mortal judges can probably give its thousands of pages.<sup>540</sup> We have adopted a simple and straight-forward standard of review, probed the agency's rationale, studied its references (and those of appellants), endeavored to understand them where they were intelligible (parts were simply impenetrable), and on close questions given the agency the benefit of the doubt out of deference for the terrible complexity of its job. We are not engineers, computer modelers, economists or statisticians, although many of the documents in this record require such expertise—and more.

Cases like this highlight the critical responsibilities Congress has entrusted to the courts in proceedings of such length, complexity and disorder. Conflicting interests play fiercely for enormous stakes, advocates are prolific and agile, obfuscation runs high, common sense correspondingly low, the public interest is often obscured.

We cannot redo the agency's job; Congress has told us, at least in proceedings under this Act, that it will not brook reversal for small procedural errors; *Vermont Yankee* reinforces the admonition. So in the end we can only make our best effort to understand, to see if the result makes sense, and to assure that nothing unlawful or irrational has taken place. In this case, we have taken a long while to come to a short conclusion: the rule is reasonable.<sup>61</sup>

Whatever the conversation with the President may have been, Judge Wald understood that the decision was the administrator's and one to be closely reviewed following the administrator's reasons.

To be sure, as Bruce Ackerman and William Hassler plangently argued in their book, *Clean Coal, Dirty Air*,<sup>62</sup> the rule Judge Wald upheld had the markers of political compromise, and there was ample circumstantial evidence that one had occurred. If persuaded that the decision had been reached on the basis of factors the statute did not make relevant—as alleged, getting votes to support an important (and unconnected) treaty, and protecting the economic livelihood of West Virginia coal miners—she acknowledged that she would have had to vacate the EPA rule. But the issue was the EPA's persuasive rationalization in terms of the factors made relevant by statute and the record

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60. *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981). The opinion begins at page 298, and discussion of the *ex parte* issue begins on page 400; excluding its appendices, the opinion ends on page 410.

61. *Id.* at 410 (footnote omitted). Though footnote 540 was omitted, do note its number, in itself a signal of the intensity of the exercise.

62. BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* 79–103 (1981).

the agency had built. Kevin Stack has persuasively explained this outcome in the most fundamental of separation of powers terms, grounded in the long-standing administrative law proposition, established by *SEC v. Chenery Corp.*,<sup>63</sup> and predating the APA, that agency decisions must be justified in the terms used by the agency.<sup>64</sup> While some have criticized the Court's decision in *State Farm* in the terms suggested by Justice Rehnquist's partial dissent, for having ignored the political factors suggested by the recent election of a new President, the *Chenery* proposition amply explains it. The agency attempted no such explanation (and might have had to reach outside the factors permitted by its statute if it had, inviting judicial censure).<sup>65</sup> The Court, then, could not be criticized, even implicitly, for finding the challenged rule deficient in the terms the agency had used to explain it or for failing to reach an explanation the agency had not given; and Justice Rehnquist *can* be criticized.

What if the agency gave an explanation of its reasoning that included political considerations, perhaps ones impressed upon it by the President? If they were not factors Congress had authorized the agency to consider—that is, if the agency interjected them simply on the President's authority—*Massachusetts v. EPA* holds that such reasoning would be unavailing.<sup>66</sup> Permission to use those factors would take us straight into the quagmire suggested by *Youngstown Sheet & Tube, Chenery, Marbury*, and the stated dependency of valid delegations on demonstrable legality. In an influential article published shortly after she left the Clinton White House,<sup>67</sup> Elena Kagan suggested one possible means of dealing with the question of presidential authority. Just as courts presume that congressional delegations to an agency of the authority to act with legal force entails the agency's primary responsibility to resolve interstitial questions of statutory meaning and application fairly left open by statutory language, she argued, courts should presume that delegations permit presidential guidance grounded in factors which are understandable in rational policy terms and are not explicitly precluded to the agency. Thus, her suggestion was, congressional silence should be taken as a concession of presidential authority. The Court's recent *Entergy* decision might be thought to suggest such an assumption about *agency* authority; for the majority, silence did not suffice to defeat the proposition that the EPA had been given an authority that might have been thought one of those elephants in a mousehole, both distant from the agency's focal expertise and redolent of political will. But, as to factors suggested by the President, *Massachusetts v. EPA* looks the

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63. 318 U.S. 80 (1943).

64. Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 956–57 (2007) (“At its core, the *Chenery* principle directs judicial scrutiny toward what the agency has said on behalf of its action, not simply toward the permissibility or rationality of its ultimate decision; *Chenery* links permissibility to the agency's articulation of the grounds for its action.”).

65. Stephen F. Williams, *The Roots of Deference*, 100 YALE L.J. 1103, 1107–08 (1991).

66. See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

67. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).



other way.

## V

### BRINGING PRESIDENTIAL OVERSIGHT INTO THE OPEN

Might the judicial role on review include any attention to *presidential* political reasons that are expressed as elements of the reasoning underlying rulemaking? If Professor, now Solicitor General, Kagan's argument about implicit delegation (parallel to *Chevron*) offers us a way past the non-delegation/*Youngstown/Marbury* problem, mustn't that be on a basis that can be reconciled with *Overton Park/State Farm/Sierra Club* and the like—a basis that excludes raw politics, requires public explanation, acknowledges formal agency responsibility for decision, and permits judicial review?

In preparing these remarks for the Festschrift, I found two very recent contributions to the literature, not yet in the law reviews at that time, but already posted on SSRN, that point interestingly in just this direction. The first was Michigan Law Professor Nina Mendelson's article *Disclosing "Political" Oversight of Agency Decision Making*,<sup>68</sup> which has since appeared in a revised form in the *Michigan Law Review*. Professor Mendelson found it striking—and wouldn't we all agree?—that after more than three decades of formal presidential oversight of agency rulemaking,<sup>69</sup> openly stressing the importance of analyses and factors that make eminent political sense but are rarely explicit elements of agency mandates, her diligent research could unearth virtually no trace of its influence in agency rulemaking. Statements of basis and purpose just don't mention, much less explain, changes that Office of Information and Regulatory Affairs (OIRA) review may have induced.<sup>70</sup> Of course, this fits with *State Farm*—that is, the agency explains the rule in terms supportable on its record and the factors it is directly charged to consider—but at a cost in candor that may make "hard look review" seem no better than a shell game. One is reminded of what was once said about the writing of Civil Aeronautics Board decisions allocating airline service: its opinion-writing staff would be told what the Board had decided, that Delta would get the route from Atlanta to Chicago, say, but no more. It was for them to figure out why giving the service to Delta and not to United or American

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68. The piece has since been published as Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010).

69. See generally Kagan, *supra* note 67, at 2272–319 (describing presidential efforts to standardize and centralize administrative practices).

70. Mendelson, *supra* note 68, at 1146–59. Professor Mendelson also noted opacity with respect to information *required* to be put in the rulemaking record. Under Executive Order 12,866, 3 C.F.R. 638 (1993), reprinted as amended in 5 U.S.C.A. § 601 (2006), which governs White House oversight of rulemaking via OIRA, agencies must identify OIRA-induced changes and make available documents exchanged between OIRA and the agency. However, Professor Mendelson reported great difficulty in locating these items in agency dockets. See Mendelson, *supra* note 68, at 1157 & n.160; see also *id.* at 1164–65 ("[T]he disclosure requirements of Executive Order 12,866 have been honored in the breach.").

best served the public convenience and necessity. Like doing the Sunday crossword puzzle, this could be challenging mental gymnastics, but it was entirely artificial. And so, Professor Mendelson asked, would we not be better served by statements that acknowledge the White House's input and the resulting changes, in ways that permit the continuing, rationalizing constraints of judicial review?

Not two weeks later, barely three weeks before our conference, I found the abstract of Professor Kathryn Watts's article *Proposing a Place for Politics in Arbitrary and Capricious Review*, that has since appeared in the *Yale Law Journal*.<sup>71</sup> This piece differs from Professor Mendelson's by focusing on the lack of transparency at the judicial review stage rather than at earlier points in the rulemaking process.<sup>72</sup> But as the title tells you, it is cut from the same cloth.<sup>73</sup>

The non-delegation/*Youngstown/Marbury* side of the tension provoking this Essay is reflected in the attention both Mendelson and Watts give to where that decision must be made, and to the problem of injecting factors that cannot be attributed, even presumptively, to congressional authorization.<sup>74</sup> What is most important about their two articles is not just their realism about the inevitable, indeed appropriate place of politics in agency decision making, but also their insistence—echoing Dean Edley—that this must be visible and rationalized. Rather than reflecting obedience to political instructions from one whose “will” could never be questioned in court, the use of “politics” (perhaps, better, “policy”) must be in a form that permits explanation and invites review. As Professor Watts puts it, arbitrary and capricious review should encompass “political influences *that an agency transparently discloses and relies upon in its rulemaking record.*”<sup>75</sup> Professor Mendelson, too, makes “transparency” key to the regime she urges; both (properly) assume we are talking about “discretion,” not **DISCRETION!!!**, making the problems of standards and of factors proper for the agency to consider into central questions.

The difficulty with this argument (as with transparency arguments Fly) is that it gets caught up with the frequent interdependence of candor and

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71. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009).

72. The two authors accordingly offer different solutions: Professor Watts proposes allowing agencies to defend actions against judicial challenge by identifying political influences consistent with relevant public values or policy choices, whereas Professor Mendelson advocates requiring agencies to include in rulemaking documents summaries of interactions with political actors.

73. Indeed, this is what one might expect of pieces scrutinizing justifications given by agencies in, respectively, the Federal Register and the courts; under *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), the rationales supplied in each forum must be the same.

74. Thus, both acknowledge that an agency should not be allowed to support its action by adverting to, say, the President's desire to help an industry that contributes substantial campaign funds.

75. Watts, *supra* note 71, at 2 (emphasis added).

confidentiality. Returning to President Truman's wisdom for a moment: "The President cannot function without advisers or without advice, written or oral. But just as soon as he is required to show what kind of advice he has had, who said what to him, or what kind of records he has, the advice he receives will become worthless."<sup>76</sup> It is no accident that improving transparency has been so constant and difficult a theme in the administration of Executive Order 12,866<sup>77</sup> and its predecessors, that "executive privilege" is so often invoked in defense against congressional oversight.<sup>78</sup>

Both Mendelson and Watts also acknowledge that revealing and reviewing the results of White House inputs will prove easier for courts—and perhaps also for Presidents—in some settings than in others. Although repudiated by the majority in *Massachusetts v. EPA*,<sup>79</sup> one might think an important distinction exists between presidential communications directing (even controlling) an agency's *general* priorities, and communications telling it exactly what to do; Justice Scalia's dissent in that case strongly so argued.<sup>80</sup> A directive, "It is more important, in my judgment, for you to work on X than Y, and I instruct you to tackle that problem first," has a different character than, "In relation to your project X, where you could find in a range between 0.5 and 0.75, choose 0.75." The second, much more obviously than the first, purports to exercise a "duty" that Congress has assigned to the agency. And every Justice in the case endorsed Justice Scalia's concession that "[w]hen the Administrator makes a judgment whether to regulate greenhouse gases, that judgment must relate to whether they are air pollutants that 'cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.'"<sup>81</sup>

A presidential directive to reach a particular result entails getting into the details, where political authority is less persuasive. It violates all the norms of efficiency that cause us generally to prefer standards over rules when we are addressing the regulation of private behavior. It has long seemed to me that the potentially most valuable contribution of Executive Order 12,866, both to political responsibility and to good government, lies in its Section 4 provision; that section requires each agency to coordinate an annual regulatory plan with

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76. 2 HARRY S. TRUMAN, MEMOIRS: YEARS OF TRIAL AND HOPE 454 (1956).

77. See *supra* note 70.

78. See generally *Sierra Club v. Costle*, 657 F.2d 298, 405, 405 n.522 (D.C. Cir. 1981) ("To ensure the President's control and supervision over the Executive Branch, the Constitution—and its judicial gloss—vests him with . . . the right to invoke executive privilege to protect consultative privacy."). For examples of reliance on executive privilege by, respectively, the Reagan and first Bush administrations, see Steven T. Kargman, Note, *OMB Intervention in Agency Rulemaking: The Case for Broadened Record Review*, 95 YALE L.J. 1789, 1800–01 (1986) and Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 21–23 (1994).

79. See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

80. *Id.* at 552–53 (Scalia, J., dissenting).

81. *Id.*

the White House. Yet Presidents have preferred to develop Section 6: cost-benefit analysis of particular rulemaking efforts—retrospective nit-picking that is extremely vulnerable to the kinds of political uses more readily identified as illegitimate. In talking with high level bureaucrats from parliamentary systems, I find them quite credibly accepting of political direction on general policy issues, but dismissive, to the point of regarding as illegitimate, political efforts to tell them how to decide particulars.

As we speak, these issues appear to be significantly in play. In early directives concerned with Executive Order 12,866 and restoring integrity to science, President Obama has promised respect for agency responsibility, significant advances in transparency, and a thorough revision of Executive Order 12,866, the formal mechanism<sup>82</sup> by which the White House interacts with rulemaking.<sup>83</sup> Yet his critics have already noticed the President's significant reservations in these documents (and other behaviors) looking the other way.<sup>84</sup> In my judgment, a great deal hangs in the balance.

#### CONCLUSION

As I remarked at the outset, my effort has been not to solve a problem, but to suggest tensions that are likely to endure, and that it is in our best interests to *have* endure. Our continuing challenge is to maintain circumstances recognizing the importance of politics—the imperatives, if you like, of the democracy deficit in rulemaking—while at the same time keeping excessive power for covert action, for the concretization of simple “will,” out of any single pair of hands. In today's world, our risk of failure in that balancing effort lies principally with the presidency.<sup>85</sup> We must so construct the President's

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82. But hardly the only such mechanism; see, e.g., Kagan, *supra* note 67; Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006).

83. See Regulatory Review: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 5977 (Feb. 3, 2009); Scientific Integrity: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 10,671 (Mar. 11, 2009).

84. For instance, President Obama asked for public input on how to reform Executive Order 12,866, see Office of Management and Budget, Federal Regulatory Review, 74 Fed. Reg. 8819 (Feb. 26, 2009), but of the 183 submissions received, not one came from a public agency. See Public Comments on OMB Recommendations for a New Executive Order on Regulatory Review, <http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp> (last visited Mar. 20, 2010). This silence, striking in any event, might be taken to suggest a policy of clamping down on executive branch communications at the expense of transparency. Similarly, while President Obama has trimmed OIRA's role back to what it was in the Clinton years, see Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009), even in the Clinton years, White House review of rulemaking did not lack critics of its politicizing and delay-promoting possibilities. As editing of this essay drew to a close, a watchdog organization reported that President Obama's OIRA appeared to have required specific changes in a recent EPA decision to place air pollution monitors near major roadways. See Posting of Matthew Madia on OMB Watch, White House Meddling in EPA Rule on Air Pollution Monitors, <http://ombwatch.org/node/10733> (Jan. 28, 2010).

85. See PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS

relation to government as to permit the enduring belief that we live in a rule-of-law culture of constrained reasonable judgment, even as we recognize the contributions that political will can make. It is not easy. It is not hard to find oneself peering into the abyss. "In the end this may seem merely a fiat, but that is always true, whatever the disguise."<sup>86</sup> In another recent article, Adrian Vermeule has reminded us of the bleak assessment of the German philosopher Carl Schmitt: that the rule of law must inevitably fail.<sup>87</sup> Schmitt wrote about, and Vermeule is principally concerned with, the problems of emergency powers, so much with us in the wake of 9/11 and the Iraq War. But the black holes and grey holes he describes, as indeed he remarks, pervade administrative law's efforts to constrain the irrational exercise of power. We cannot ignore them, but neither must we succumb to their gravitational force.

Let me end as I began, by invoking Phil Frickey's lifelong commitment to *practical* legal studies. In this most real of all possible worlds, as my friend Roy Schotland put it to me long ago, accommodating reality is the best we can hope for. And Phil gave us a treasure-house of such efforts.

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AMERICAN DEMOCRACY (2009).

86. *Sinram v. Pa. R.R. Co.*, 61 F.2d 767, 771 (2d Cir. 1932).

87. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).