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Rulemaking and the American Constitution

Peter L. Strauss¹

Abstract: A Constitution that strongly separates legislative from executive activity makes it difficult to reconcile executive adoption of regulations (that is, departmentally adopted texts resembling statutes and having the force of law, if valid) with the proposition that the President is not 'to be a lawmaker'. Such activity is, of course, an essential of government in the era of the regulatory state. United States courts readily accept the delegation to responsible agencies of authority to engage in it, what we call 'rulemaking', so long as it occurs in a framework that permits them to assess the legality of any particular exercise. As is well known, rulemaking employs distinct public procedures, and judicial review of the validity of the resulting regulations is considerably more intense than would occur of the validity of legislation. The working assumption, however, is that rulemaking decisions are made by particular agencies responsible for the precise matters at issue, on the basis of what they expertly know and of the

¹ Betts Professor of Law, Columbia University. Warm thanks to Andrew Amend, CLS '08, for sound research and editorial assistance. This paper was initially delivered in the fall of 2008 but with the editors' encouragement has been somewhat changed to reflect the first months of the Obama administration.

information and views they have received in the course of the public process. In recent decades, presidential oversight of this process has steadily intensified. Former President Bush strongly claimed a right not just of oversight, but of decision as the single politically elected official of our executive branch. The result has been both to concentrate considerable power in one place, in tension with American 'checks and balances' ideas, and to render rulemaking an increasingly political rather than 'expert' activity. The paper explores these trends and conflicts.

When Professor Oliver was kind enough to invite me to join a conference on constitutional impacts of the regulatory state, what I offered was to discuss the role of our President and politics in regulatory rulemaking. One of the characteristics of the regulatory state – I am confident in London, as well as in the United States – is its considerable reliance on administrative officials, purportedly exercising expert judgment, to supplement statutory provisions by the adoption of subsidiary legislation – regulations or rules, as we call them. One kind of constitutional question, theoretically powerful at least since the days of John Locke, is whether or at least under what conditions a legislature can even authorize this kind of activity by executive actors. This is what is commonly called the question of the delegation of legislative authority. Locke wrote that

The power of the Legislative being derived from the People by a positive voluntary Grant

and Institution, can be no other, than what the 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.²

Our Supreme Court has often enough seemed to say the same thing, and just over half a century ago it emphatically rebuked President Truman's effort to avoid national calamity by emergency action during the Korean War with the comment that 'the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker'.³ Yet with only two exceptions, both of which occurred in the early days of the New Deal, the Court has resolutely refused to find unconstitutional Congress's placement in administrative agencies of the authority to adopt regulations that, if valid, have the full force of statutes. Although frequently finding relatively constrained interpretations of the scope of such grants, as one means of containing them, it has in effect denied that judicially administrable standards exist by which to measure the validity of such delegations. Most recently, it has acknowledged that the rulemaking they authorize involves the exercise of executive, not legislative, power.⁴ It has in effect celebrated the delegations, making clear that so long as the appearance of legality can be

² *Second Treatise of Civil Government* (1690).

³ *Youngstown Sheet & Tube Co v Sawyer* 343 US 579, 72 S Ct 863 (1952).

⁴ *Whitman v American Trucking Associations* 531 US 457, 121 S Ct 903 (2001).

maintained it will accept them. Effectively, the only question for courts is whether an administrative act is *infra vires*, not whether it can be permitted at all. If our President is not to be a lawmaker, an agency can be.

This outcome can hardly be surprising. In the American legal system, as virtually all others, one can observe a hierarchy of textual instruments created for and/or by the government, and having the force of law or, if not quite that force, significant influence over how citizens and corporations conduct their affairs. This hierarchy might be depicted in the following way:

One Constitution ratified by ‘the people’

Hundreds of statutes enacted by an elected Congress

Thousands of regulations adopted by politically responsible executive officials

Tens of thousands of interpretations and guidance documents issued by responsible bureaus

Countless advice letters, press releases, and other statements of understanding generated by individual bureaucrats

Yet familiar as this pattern may be, it must be evident that there is considerable tension between our acceptance of it and the proposition that the President, responsible for execution of the laws, is not to be a lawmaker. And that tension became virtually unbearable in the framework of the strong ‘unitary President’ idea advanced by President Bush and Vice President Cheney during the administration that has now thankfully drawn to a close. That idea, as you probably know, is that the President is entitled to be ‘the decider’, not merely an overseer, of matters that the

Congress may have committed to the responsibility of any administrative agency. While there are considerable differences to a Prime Minister's role in parliamentary systems, my sense is that the frequent intransitivity of regulatory statutes in such systems as well as in ours – so that parliaments, too, create lawmakers as much as they do laws – must have real consequences for those legal systems, as well as for ours, concerning one's ideas about constitutionalism and the 'rule of law' in the regulatory state. So this is what I mean to talk about here.

Distinguishing Between Politics and Law in the American Administrative State

The American Constitution radically separates executive and legislative authorities in a manner quite strange to parliamentary systems of government. Under the Constitution, the American Congress has no responsibility for rulemaking beyond its creation by statute of legal authority for executive actions (such as rulemaking), its provision of budgetary support for government actions, its power to countermand regulations by statute,⁵ and its informal oversight of agency actions through investigative hearings and the like. Members of Congress, like any member of the public, may attempt to influence rulemaking outcomes by commentary; but once they have authorized rulemaking to occur, its fruition as a legal matter is strictly an issue for the

⁵ That is, if an agency adopts a regulation, Congress's only power of disapproval is by statutory enactment. 'Laying before' procedures of a less formal sort are constitutionally unavailable.

executive. And the Constitution is explicit that members of Congress are forbidden to hold executive office. Thus, the difference between the second and third levels of the hierarchy sketched above is quite dramatic. Congress legislates; but rulemaking is an executive activity.⁶

Analysts from parliamentary systems draw a distinction between ‘political’ and ‘administrative’ (or bureaucratic) controls of regulatory bodies. They tend to ascribe ‘political’ control to the parliament, and ‘administrative’ control to executive actors, who are understood in a more technical than political sense. This is natural in a system in which ministerial and legislative terms of office are interdependent, and only legislators are elected (even if it may be known in advance which person or persons, if elected with majority legislative support, will assume executive office). In parliamentary systems, moreover, executive governance may usually be imagined as somewhat collegial in character; a ‘prime’ minister’s government depends on continuing consensus among *all* ministers and the support of the legislators who have elected her.

This interdependency with the legislature and this collegial character of the executive are not to be found in the United States. Our President and the members of Congress are separately elected, in each case to fixed terms of office. These terms do not coincide – two years for the

⁶ Federal Courts also adopt regulations, but these concern judicial procedures, evidence, etc, and are not directly addressed to private conduct.

House of Representatives, six years for the Senate, four years for the President. These terms are also rigorous; the government does not fall on a vote of no confidence. The President is the solitary elected executive official.⁷ While his appointments to the highest positions of leadership in the various government departments and agencies require senatorial approval, these persons, once appointed, are answerable *only* to him; unless Congress uses the stringent process of impeachment, it cannot participate in the removal of any executive official from office, from the President on down. It cannot require senatorial approval of Presidential removals. Political realities do offer some protection, since a President will know that he must secure Senate confirmation of the successor to any person he removes from office. Nonetheless, a cabinet secretary or agency head understands that her continuation in office depends on a President who, in general, can remove her at any time, for any reason, without recourse.⁸ The result is to make

⁷ The Vice President is also elected, of course, but not independently; he or she is a fixture of the ballot for President, and election follows automatically from the President's. The Vice President may preside in the Senate and has a casting vote in the event of a tie, but has no constitutionally defined *executive* responsibilities beyond availability to assume the presidency if required.

⁸ In limited circumstances, notably for our independent regulatory commissions such as the Securities and Exchange Commission (SEC), Congress has validly provided that agency heads can be removed only 'for cause'. The effective meaning of this constraint has never been tested.

executive control of administrative actions such as rulemaking ‘political’ as well as ‘administrative’.

One consequence is to dramatize the placement of administrative law, from an American perspective, on the difficult and evanescent boundary between politics and law. One can find this already expressed in the earliest of our great constitutional cases, *Marbury v Madison*, which established the principle that American courts can review legislation to determine its constitutionality.⁹ In doing so, Chief Justice Marshall’s opinion famously established the place of the courts in the constitutional order. In the course of his opinion, he sought to distinguish between governmental acts that a court might control by law, and others that were not subject to judicial constraint. He denied any possibility of judicial review over acts that the President was entitled to *command* from his subordinates. When an official

is to conform precisely to the will of the President [h]e is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable

In any event the President would be the one to determine that ‘cause’ existed. His determination could be challenged only in the courts, which would be very likely to defer to any credible explanation. The finding that cause exists does not, and constitutionally could not, require congressional approval.

⁹ *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

by the courts. . . . The province of the court 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.*¹⁰

In the particular case, the official in question was the Secretary of State, and Chief Justice Marshall was drawing a contrast between the administration of foreign affairs (a question in its nature political) and another responsibility of the Secretary of State at the time, to deliver commissions for certain public offices (not a political question, but a matter in which the officer had a legal right).

Are American courts then precluded from reviewing any governmental acts in which the executive has some ‘discretion’? No. Few if any American analysts would describe decisions about air quality made by the Administrator of the Environmental Protection Agency (EPA)¹¹ in

¹⁰ Ibid 166, 170 (emphasis added).

¹¹ The EPA is an executive agency that is not an element of any cabinet department. Headed by a single Administrator whose appointment requires Senate confirmation and who serves on presidential sufferance, EPA’s responsibilities are almost entirely regulatory, and not political in the sense Chief Justice Marshall was expressing. Cabinet departments, headed by Secretaries, often mix regulatory and political responsibilities; the regulatory activities are often assigned to

the way Chief Justice Marshall describes decisions of the Secretary of State about foreign affairs.

The Secretary of State is exercising discretion in its largest sense, one might say ***DISCRETION!***, in contexts for which there is no law to apply and which ‘can never be examinable by the courts’. The great Chief Justice did not have in mind ‘discretion’ such as the EPA Administrator is given by statute to decide mixed questions of law and politics. Issues like his determinations about necessary air quality are the everyday focus of administrative law; courts review these determinations for ‘abuse of discretion’ under our federal Administrative

internal subdivisions, also headed by presidentially-appointed administrators, whose responsibilities, like EPA’s, are almost entirely regulatory. Examples would include the Food and Drug Administration (FDA) in the Department of Health and Human Services, the Occupational Safety and Health Administration (OSHA) in the Department of Labor, and the Federal Aviation Administration (FAA) in the Department of Transportation. Independent regulatory commissions like the SEC, too, have responsibilities that are almost entirely regulatory. The statements in this text, unless otherwise noted, apply to every actor of this kind – EPA, FDA, OSHA, FAA, or SEC. Those interested in a primer on these different agency structures may wish to consult PL Strauss, *Administrative Justice in the United States* (2nd edn, 2002) 127-35; see also n 45 and accompanying text below.

Procedure Act.¹²

Indeed, we would say that for these acts, the possibility of effective judicial review to justify their legality is *essential*. It is generally expressed as a *sine qua non* of their constitutionality. That is, the ability of the courts to say whether the Administrator's acts are *infra vires* is the necessary condition of a valid delegation to her of the authority to act. Generally we assume that such agency determinations reflect *objective judgment* about general propositions of fact (as, for example, what is the degree of hazard posed to human life by given quantities of ozone in the atmosphere) rather than simple *political will*. If standards did not exist permitting a court to assess the legality of the Administrator's decisions and acts concerning these matters, we would say an unconstitutional delegation had been made.¹³ These are *not* matters to be decided by

¹² 5 United States Code (USC) s 706(2)(A).

¹³ See, eg, *Ethyl Corp v EPA* 542 F 2d 1, 68 (US Ct of Apps (DC Cir), 1976) (Leventhal, J, concurring) ('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'.); *Skinner v Mid-Atlantic Pipeline Co* 490 US 212, 218; 109 S Ct 1726, 1731 (1989) ('[S]o long as Congress provides an administrative agency with standards guiding its actions such that a court could ascertain whether the will of Congress has been obeyed, no delegation of legislative authority trenching on the principle of separation of

politics, and they *are* questions examinable by the courts.

There are, indeed, many respects in which the techniques of American rulemaking facilitate these propositions. As a general matter, agencies engaged in rulemaking must make available to the public, in advance, the data available to them on the basis of which they expect to act, and a suggestion what it is they propose to do. They must then receive public comment on their proposal. In subsequently acting, they must provide a reasoned explanation of the conclusions they have reached, which in practice must include an explanation of any departure from important commentary they may have received.¹⁴ Not one of these propositions would be true in the legislative context. Should review of the legality of an agency's action then be sought, it will be assessed not just in terms of the Constitution, but also of compliance with required procedure, of fit with statutory authority, and of reasonable exercise of judgment within that authority, given the relevant facts and views. No such 'hard look',¹⁵ as it is often described, is called for when

powers has occurred'. (internal quotations omitted).

¹⁴ 5 USC s 553. Increasingly, this process and the documents associated with it may be followed, and submissions to it may be made, on the Internet, <www.regulations.gov>.

¹⁵ This term originated in decisions of the United States Court of Appeals for the District of Columbia, which – sitting in the nation's capital – has a high concentration of administrative law business (it is, however, a generalist court like the other circuit courts of appeal, and *not* an

the constitutionality of legislation is challenged.

Thus, to take an example well known to American students of administrative law, the Clean Air Act tasks the EPA with identifying and regulating sources of air pollution ‘which may reasonably be anticipated to endanger public health or welfare’.¹⁶ Exercising this authority with respect to coal-burning power plants in the late 1970’s, EPA imposed ceilings on allowable emissions of sulphur dioxide and particulate matter. After conducting some preliminary analysis, the agency published a proposed rule, a call for public comment, and a summary of background information and studies – material totaling 30 pages – in the Federal Register, a daily official publication of administrative and Presidential documents.¹⁷ Over the next three

American *Conseil d’Etat*). The case described in the next paragraph of text is a good example of its work. The Supreme Court effectively ratified the ‘hard look’ approach in a case faulting an agency for failure to consider all the alternatives and collect additional data, see *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co* 463 US 29, 103 S Ct 2856 (1983). In the words of an EPA attorney, courts will ‘inquire into the minute details of methodology, data sufficiency and test procedure and will send the regulations back if these are lacking’. WF Pedersen, ‘Formal Records and Informal Rulemaking’ (1976) 85 Yale LJ 38, 60.

¹⁶ 42 USC s 7411(b)(1)(A).

¹⁷ Environmental Protection Agency, ‘Standards of Performance for New Stationary Sources,

months, the agency received more than 625 comments and held a hearing; six months later, it issued a final rule, incorporating certain modifications.¹⁸ EPA announced the new regulation and set forth in detail the reasoning behind it, including responses to public comments, in a 45-page entry in the Federal Register. When challenges to the new rule were filed (by both environmental *and* industry groups), the reviewing court devoted 103 pages of opinion text to the adequacy of EPA's procedures and the reasonability of its conclusions in light of the relevant data and statutory concerns.¹⁹ By contrast, had the same standard been set by legislation, judicial review for constitutionality would have entailed nothing more than a query, virtually always answered in the affirmative, whether Congress's action could in *any* rational way be thought to serve a legitimate governmental end.²⁰

Electric Utility Steam Generating Units' 43 Federal Register (Fed Reg) 42,154 (19 September 1978).

¹⁸ Environmental Protection Agency, 'New Stationary Sources Performance Standards; Electric Utility Steam Generating Units' 44 Fed Reg 33,580, 33,598 (11 June 1979).

¹⁹ *Sierra Club v Costle* 657 F 2d 298 (US Ct of Apps (DC Cir), 1981).

²⁰ Eg, *Williamson v Lee Optical* 348 US 483, 75 S Ct 461 (1955). The situation would be different if issues of individual right were involved – if the legislation, say, discriminated on the basis of race, gender, or religion – but that point need not concern us here.

What Role for the American President?

To what extent, then, is our President entitled to command, as a political matter, outcomes whose determination Congress has entrusted to an administrative agency like the EPA? How far down into the structure of government do political operatives penetrate? At what point is the work of government done by a permanent civil service that may act under political supervision, yet has 'administration' rather than 'politics' as its guiding light? Over the past few decades, two trends have emerged in American administrative law: a growing reliance on rulemaking to elaborate the detailed (but often quite significant) elements of regulation, as well as a steadily increasing insistence by American Presidents on political penetration of the agency apparatus and political control of its products.

The increased use of rulemaking is, from one perspective, a natural consequence of our increased awareness of social interdependence and environmental hazard. At the same time as human existence has come to involve more artificial elements of uncertain long-term effect, we have developed greater technological capacities to discern and evaluate risk. The great increase in rulemaking occurred, precisely, at the time of the great outpouring of health, safety and environmental legislation in the United States that marked the 1960's and 1970's. Whatever the Nineteenth Century's contributions to global warming, industrial disease, and other ills, the

people of that time had fewer tools with which to detect them (and, perhaps, more immediate and evident hazards to which to respond). The judgments we want to reach in consequence of our growing knowledge about and sensitivity to risk – to continue one example already mentioned, how much ozone is safe to permit in the atmosphere we breathe – involve too much detail to be entrusted to the vote of an elected, generalist legislature’s politicians. Inevitably, as the pyramidal figure opening this essay may suggest, we expect political legislatures to set general standards for determinations of this sort, and to leave it to experts – i.e., administration – to find the precise levels for particular substances, like ozone, that those standards make appropriate.

The severance of executive from legislative function in the United States (or, to put it another way, the political irresponsibility of American legislators for rulemaking’s particular outcomes) introduces a reinforcing temptation to rely on rulemaking – one that is much celebrated in the American scholarship on ‘public choice’. The only political necessity for Congress to earn public credit for ‘action’ is to *appear* to have dealt with a problem. It need not actually have done as much as it might have by way of political resolution of issues. It can then point the finger of blame elsewhere should things not work out so well. In consequence, some of the work that ideally ought to be politically resolved, at the second level of the hierarchy above, is passed on to the third.

We have discovered no effective corrective for this institutional failure. The logical

candidate would be a constitutional limitation on Congress's power to confer authority on executive government.²¹ As already indicated, however, the rubric of the 'delegation' doctrine suffices only to prevent the conferring of *DISCRETION!* in contexts where courts will conclude that they must be in a position to determine the legality of government behaviour – that is, where they will conclude that for executive power to be tolerated, there must be law to apply. Government lawyers thus rarely argue in any administrative context that judicial review is unavailable, but instead work to persuade the courts that agency behaviour meets the constraints of legality.

While there thus must be 'intelligible standards' to which government actors may be held,²²

²¹ Implicit in this account is a fact about our Constitution: it does not define the government of the United States, but rather only the three principal heads of authority: Congress, President, and Supreme Court. Definition of all the rest – cabinet departments, lower courts, independent agencies, even the precise size of the Supreme Court – is left to statutory determination by Congress under its general authority to enact any statutes 'necessary and proper' to accomplish the Constitution's ends. US Const art I, s 8. See PL Strauss, 'The Place of Agencies in Government: Separation of Powers and the Fourth Branch' (1984) 84 Columbia L Rev 573.

²² *JW Hampton, Jr, & Co v United States* 276 US 394, 409; 48 S Ct 348, 352 (1928) ('If Congress shall lay down by legislative act an intelligible principle to which the person or body

the test for their existence is extremely permissive. One may almost say that it suffices for the government to acknowledge the need to demonstrate legality under the governing statutes.²³

Our courts have lamented that they lack a judicially manageable standard for identifying

authorized to [set standards] is directed to conform, such legislative action is not a forbidden delegation of legislative power' .).

²³ In *State of South Dakota v United States Dept of Interior* 69 F 3d 878 (US Court of Apps (8th Cir), 1995), the government argued before the Eighth Circuit court of appeals that the court lacked power to review a decision of the Secretary of the Interior in a matter involving permission to an Indian tribe to conduct gambling operations on its reservation, because the statute authorizing that decision conferred **DISCRETION!** on the Secretary. Thus, the government argued, there was no law to apply. Ibid 881. Astounded, the court then held that the statute was an unlawful delegation of authority. Ibid 885. The case was taken to our Supreme Court and, while it was pending, government lawyers informed that Court that the Secretary had now concluded that there *was* law to apply, and that the lower court *could* effectively review the challenged decision for its legality. Without hearing argument, the Supreme Court vacated the Eighth Circuit's opinion and remanded the matter to it for the review that had now been conceded to be proper. *Dept of Interior v South Dakota* 519 US 919, 117 S Ct 286 (1996).

legislative insufficiencies.²⁴ Rather than tell Congress that it had not legislated sufficiently, they work hard to find the ‘intelligible standard’ that is the coin of a valid delegation of lawmaking authority, which then permits them to assess the legality of agency action. Yet this review necessarily accepts broad scope for agency discretion on issues that courts are ill-equipped themselves to decide (eg, the health or environmental consequences of various concentrations of ozone).

So the resulting regulation embodies a judgment that at the same moment:

- has high social consequence (the choice of one rather than another ozone level may have tremendous economic and other effects on various elements of society);
- has an objective character suggesting the appropriateness of expert determination, but in actuality is incapable of a single ‘correct’ resolution and thus requires significant elements of scientific ‘judgment’;

²⁴ See, eg, *Whitman v American Trucking* 531 US 457, 474-75; 121 S Ct 903, 913 (quoting *Mistretta v United States* 488 US 361, 416; 109 S Ct 647, 678 (1989) (Scalia, J, dissenting)) (‘[W]e have “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law”’.); *Mistretta* 488 US at 415, 109 S Ct at 677 (Scalia, J, dissenting) (noting that ‘the doctrine of unconstitutional delegation . . . is not an element readily enforceable by the courts’).

- is subject to effective judicial review to only a limited degree;
- cannot be laid politically at the feet of Congress or the political party that at the moment may hold the balance of power there; and
- although ostensibly reached by an expert agency (the EPA), *might* be laid politically at the feet of the President, who appointed the head of the EPA, and who will have his own general concerns about regulatory affairs.

One then readily understands how, as the uses and impacts of rulemaking have increased, Presidents have increasingly sought to bring it under their unitary and political control. They have sought to bring politics and will to bear where the governing assumptions are that the exercise of such authority is rationalized by its being an act of judgment.

Oversight or Decision?

In its most extreme form, growing in popularity over recent years and characterizing the administration of the most recent President Bush, the claim is that in creating a single, ‘unitary’ executive, our Constitution entitles the President ultimately to decide any matter Congress has made the responsibility of an executive agency.²⁵ This is a proposition I have addressed at

²⁵ Representative positions taken in the contemporary literature: **Constitution confers decisional authority**: see, eg, SG Calabresi and SB Prakash, ‘The President’s Power to Execute the Laws’ (1994) 104 Yale LJ 541, 549-50; CS Yoo, SG Calabresi, and AJ Colangelo, ‘The

length in another place,²⁶ and it may be helpful here to summarize the arguments made there.

Our Constitution itself is at best ambivalent on the question. On the one hand, the opening words of Article II, which addresses the executive power, place it simply in the President, and the Philadelphia convention famously and emphatically rejected any idea of a collegial executive.²⁷ Those who argue most strongly for presidential authority find in these words a

Unitary Executive in the Modern Era, 1945-2004' (2005) 90 Iowa L Rev 601, 730; **Constitution does not confer decisional authority, but it should be presumed Congress intends it, given the realities of modern administration:** see, eg, E Kagan, 'Presidential Administration' (2001) 114 Harvard L Rev 2245, 2251; L Lessig and CR Sunstein, 'The President and the Administration' (1994) 94 Columbia L Rev 1, 2-3; **the President, unless directly authorized, is only an overseer:** see, eg, CR Farina, 'The Consent of the Governed: Against Simple Rules for a Complex World' (1997) 72 Chicago-Kent L Rev 987, 987-89; KM Stack, 'The President's Statutory Powers to Administer the Laws' (2006) 106 Columbia L Rev 263, 267; PL Strauss, 'Presidential Rulemaking' (1997) 72 Chicago-Kent L Rev 965, 984-86.

²⁶ PL Strauss, 'Overseer or "The Decider"? The President in Administrative Law' (2007) 75 George Washington L Rev 696.

²⁷ See Strauss (n 21 above) 599-602.

placement in the President's hands of the power to decide any matter assigned to the executive branch. On this view, when Congress assigns a matter for decision to a constituent element of the executive branch, it does so only for convenience; as a matter of constitutional power, the President has the right to decide it.²⁸ On the other hand, the Constitution twice refers to 'duties' or 'powers' assigned to other officers.²⁹ While Article II unambiguously makes the President 'Commander in Chief' of the armed forces, the *only* authority it gives the President in relation to domestic officers is the right to seek from them a written opinion about *their* exercise of those duties. It does not say he may *command* their exercise of the duties assigned to them.³⁰ The

²⁸ See, eg, Calabresi and Prakash (n 25 above); Yoo, Calabresi, and Colangelo (n 25 above).

²⁹ US Const art I, s 8, cl 18 confers on Congress the authority to 'make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof'; US Const art II, s 2, cl 1 provides that the President 'may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices'.

³⁰ Ibid (The President 'may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to *the Duties of their respective Offices*'.) (emphasis added).

final passages of Article II state that the President is responsible to see to it that the laws ‘*be faithfully executed*’³¹ – i.e., as if by others. From this perspective, as some (but not all) Attorneys General have concluded,³² when Congress creates duties in others, that act creates in

³¹ Ibid s 3, cl 3 (emphasis added).

³² The contrast often given in the literature is between the advice of Attorney General Wirt to President Monroe that

[the President’s role is to give] general superintendence [to those to whom Congress had assigned executive duties, as] it could never have been the intention of the constitution . . . that he should in person execute the laws himself. . . . [W]ere the President to perform [a statutory duty assigned to another], he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.

‘The President and Accounting Officers’ 1 Official Opinions of the Attorneys General of the United States (Op Att’y Gen) (1823) 624, 624-25, and the advice of Attorney General Cushing to President Pierce that

no Head of Department can lawfully perform an *official* act against the will of the President, [because a contrary view would permit Congress so to] divide and transfer the executive power as utterly to subvert the Government, [albeit that] all the ordinary

the President constitutional obligations not only to oversee, but also to respect, their independent exercise of those duties. Just as he must respect a statutory framework that assigns care for the national parks to the Department of the Interior, and care for the national forests to the Department of Agriculture, on this view, he must respect a statutory framework that assigns actual decision-making about particular issues affecting air quality to the EPA; he is entitled only to his (inevitably political) oversight.

Of course the difference between oversight and decision can be subtle, particularly when the important transactions occur behind closed doors and among political compatriots who value loyalty and understand that the President who selected them is their democratically chosen leader. Nonetheless, a subordinate's understanding whether what she owes the President is simply respect and political deference, on the one hand, or law-compelled obedience, on the

business of administration [is, in statutory terms, placed under the authority of the Departments, not the President, and] may be performed by its Head, without the special direction or appearance of the President.

'Relation of the President to the Executive Departments' 7 Op Att'y Gen (1855) 453, 469-71 (emphasis in original). These opinions, with helpful commentary, may be found in HJ Powell, *The Constitution and the Attorneys General* (1999) 29-34, 131-48; see also HH Bruff, *Balance of Forces: Separation of Powers Law in the Administrative State* (2006) 456-59.

other, has in my judgment important implications for what it means to have a government under laws. I cannot improve on the characterization of the problem given half a century ago by

Professor Corwin:

Suppose . . . that the law casts a duty upon a subordinate executive agency *eo nomine*, does the President thereupon become entitled, by virtue of his 'executive power' or of his duty to 'take care that the laws be faithfully executed,' to substitute his own judgment for that of the agency regarding the discharge of such duty? An unqualified answer to this question would invite startling results. An affirmative answer would make all questions of law enforcement questions of discretion, the discretion moreover of an independent and legally uncontrollable branch of the government. By the same token, it would render it impossible for Congress, notwithstanding its broad powers under the 'necessary and proper' clause, to leave anything to the specially trained judgment of a subordinate executive official with any assurance that his discretion would not be perverted to political ends for the advantage of the administration in power. At the same time, a flatly negative answer would hold out consequences equally unwelcome. It would, as Attorney General Cushing quaintly phrased it, leave it open to Congress so to divide and transfer 'the executive power' by statute as to change the government 'into a parliamentary despotism like that of [Venice] or Great Britain with a *nominal* executive chief . . .

[utterly powerless].'³³

My own conclusion then, is that in ordinary administrative law contexts, where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President's role – like that of the Congress and the courts – is that of overseer and not decider.³⁴ Our Constitution explicitly gives us a unitary head of state, but it leaves the framework of government almost completely to congressional design. Given a choice between President as overseer of the resulting assemblage, and President as necessarily entitled 'decider', the implicit message is that of oversight, not decision. Congress's arrangements of government are a part of the law that the President is to assure will 'be faithfully executed', and the Constitution's text anticipates that those arrangements

³³ ES Corwin, *The President: Office and Powers 1787-1957* (4th revised edn, 1957) 80-81 (quoting the opinion of Attorney General Cushing cited in n 32 above) (emphasis in Corwin). If 'parliamentary despotism' seems a counterintuitive descriptor of Great Britain with its Queen or Venice with its Doge, it is important to bear in mind the context in which the term appears: Attorney General Cushing's point is that in these examples the chief of state had come to be a figure-head with no genuine authority, such that the legislature effectively wielded undivided power.

³⁴ See, for example, Strauss (nn 25 and 26 above).

will place ‘duties’ elsewhere in the executive branch, which Congress is given wide scope to define. The size and ambition of contemporary government, in a country dedicated to the rule of law and resolute to defend itself against unchecked individual power, point in the same direction. Congress can, to be sure, give the President decisional authority, and it has sometimes done so. In limited contexts – foreign relations, military affairs, coordination of arguably conflicting mandates – the argument for inherent presidential decisional authority is stronger. But in the ordinary world of domestic administration, where Congress has delegated responsibilities to a particular governmental actor it has created, that delegation is a part of the law whose faithful execution the President is to assure.³⁵ Oversight

³⁵ Illustrative of the stronger view of President Bush’s administration is a statement he issued on signing the Postal Accountability and Enhancement Act of 2006, which contained a statutory provision explicitly requiring a search warrant to open domestic first class mail:

The executive branch shall construe subsection 404(c) of title 39, as enacted by subsection 1010(e) of the Act, which provides for opening of an item of a class of mail otherwise sealed against inspection, in a manner consistent, to the maximum extent permissible, with the need to conduct searches in exigent circumstances, such as to protect human life and safety against hazardous materials, and the need for physical searches specifically authorized by law for foreign intelligence collection.

responsibilities, in my judgment, satisfy the undoubted constitutional specification of a unitary chief executive, while avoiding the executive tyranny horn of Corwin's dilemma.

An Increasingly Unitary Executive (?)

Of course it would rarely be the President himself who commands, but a political apparatus operating under his immediate control. Recent years have seen both a significant expansion of that apparatus in the White House itself, and much enlarged penetration of 'political clearances' into agency bureaucracies.³⁶ From the administration of President Ford (1974-77) forward,

That is, as he had inherent authority to act to protect the nation, the statutory provision could be ignored. 'Statement by President George W. Bush Upon Signing H.R. 6407' 2006 United States Code Congressional and Administrative News (USCCAN) S76, S77 (20 December 2006).

('H.R.' as used here and throughout is an abbreviation for House of Representatives designating bills originating in that chamber of Congress.)

³⁶ '[T]he number of full-time political appointees serving in the federal government [in policy positions] jumped from 2150 in 1964 to 3687 in 1992. . . . These [positions, with 2300 others effectively open to political clearance] . . . dwarf, by orders of magnitude, the number of political appointees available to the executive leaders of most European nations'. DJ Barron, 'From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization' (2008)

Presidents have created increasingly stringent mechanisms for oversight of agency rulemakings likely to have a significant economic impact. These particular mechanisms, centered in the Office of Information and Regulatory Analysis (OIRA) of the President's Office of Management and Budget, will be discussed further below. Here, one should remark that OIRA's controls are professional and bureaucratic, at least in comparison with those of other White House offices. Lisa Bressman and Michael Vandenberg's groundbreaking account of the EPA-White House interface from the perspective of EPA political appointees dramatically illustrates the number of White House voices (in both Republican and Democratic administrations) purporting to exercise 'presidential control';³⁷ Elena Kagan, now Solicitor General of the United States, recounted at length her experience of presidential direction of agency rulemaking during the Clinton administration, without ever focusing on OIRA's work.³⁸

The increasing scope of political clearance for persons having policy responsibilities has attracted rather less attention, but certainly renders American 'administration' more political than would be expected in the strong civil service regimes of many parliamentary democracies.

76 *George Washington L Rev* 1095, 1123.

³⁷ LS Bressman and MP Vandenberg, 'Inside the Administrative State: A Critical Look at the Practice of Presidential Control' (2006) 105 *Michigan L Rev* 47, 47-52.

³⁸ Kagan (n 25 above).

Probably the move in this direction began during the presidency of Jimmy Carter, when a reform of the civil service laws created in the upper echelons of the civil service a Senior Executive Service, those persons responsible for policy direction and other matters involving substantial discretion. In the United States as in European democracies, important federal bureaus, elements perhaps of a cabinet department, might be under the direction of senior civil servants, permanent government employees rather than political appointees.³⁹ The new law made them more subject to reward and punishment, reassignment and direction, than they had previously been. While these persons were still nominally in the civil service (that is, they were still permanent employees), it is perhaps not surprising to learn that with the enlarged possibilities of reward and discipline from above, practices of political clearance developed:

- The White House office responsible for vetting appointments within government for, inter alia, political acceptability grew from thirteen to twenty-one during the quarter century between 1982, the second year of the Reagan administration, and 2008, during the second term of the second Bush administration. The office peaked in 2001, the first year of the second President Bush's administration, with thirty-five employees.⁴⁰

³⁹ The classic study of their work, written at about the time of this change, is H Kaufman, *The Administrative Behavior of Federal Bureau Chiefs* (1981).

⁴⁰ Compare *Federal/State Executive Directory 1985* (Carroll Publishing Co 1985) with *Carroll's*

- A Department of Justice investigation found that Monica Goodling, the DOJ's White House Liaison and Senior Counsel to the Attorney General, 'improperly subjected candidates for career positions [in the Justice Department] to the same politically based evaluation she used on candidates for political positions, in violation of federal law and department policy'.⁴¹

Federal Directory 2008 (Carroll Publishing Co 2008).

⁴¹ US Department of Justice, 'Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General' (2008) 1, 135

<<http://www.usdoj.gov/opr/goodling072408.pdf>> accessed 1 October 2009.

Similar implications arise from presidential reactions to congressional requirements of relevant expertise for important policy positions. In the wake of the Katrina disaster and the deficiencies in Federal Emergency Management Administration management it revealed, Congress passed statutes requiring that the person appointed to head FEMA be a person experienced in the management of complex institutions and disaster management. Department of Homeland Security Appropriations Act, 2007 s 611(11), 6 USC s 313. In a later statute, it directed that appointees to high office in the United States Postal Commission have similar experience-related backgrounds. Postal Accountability and Enhancement Act of 2006 s 501, 39 USC s 202. In signing the lengthy statutes including these provisions into law, the President

- Newspapers have reported that Vice President Cheney both attempted to control decisions as slight as the amount of water having to be released from a federal dam to protect threatened fish populations (in competition with the needs of farmers in a drought-stricken region) and suggested the placement of White House political operatives deep within agency bureaucracies.⁴²
- A presidential executive order following quickly upon the Democratic Party's winning back control of Congress in 2006 essentially required every agency to place control over

identified these two provisions in particular, as against many he accepted, as unconstitutional infringements of his authority to nominate or appoint anyone he chose. 'Statement by President George W. Bush Upon Signing H.R. 5441' 2006 USCCAN S49, S52 (4 October 2006) ('[the statute] purports to limit the qualifications of the pool of persons from whom the President may select the appointee in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the office. The executive branch shall construe [section 611] in a manner consistent with the Appointments Clause of the Constitution'.); 'Statement by President George W. Bush Upon Signing H.R. 6407' (n 35 above), S76 (making an almost identical statement).

⁴² Jo Becker and Barton Gellman, 'Leaving No Tracks' *Washington Post* (27 June 2007) A1, 2007 WLNR 12054552.

its rulemaking operations, not in the hands of the agency head, but a White House appointee.⁴³

- The administration of the second President Bush has been dogged throughout its length with accusations of the political bending of science,⁴⁴ from refusals to permit government analysts to testify concerning their results, to thumb-on-the-scales influence over determinations ranging from the protection of an endangered whale species to the precise level of ozone most appropriate for national air quality standards.

All of this, one might understand, is intimately connected with presidential claims to dominate, as of right, the work of executive government – then turned not to administrative, but to political ends.

This intense politicization of what had been imagined as expert, administrative processes is from a certain perspective not surprising. It can be thought a consequence of legislative

⁴³ Executive (Exec) Order No 13,422, 72 Fed Reg 2763 (23 January 2007). President Obama repealed this measure as one of his first steps in office. Exec Order No 13,497, 74 Fed Reg 6113 (4 February 2009). For further discussion of Obama administration reforms, see text accompanying nn 50-55 below.

⁴⁴ TO McGarity and WE Wagner, *Bending Science: How Special Interests Corrupt Public Health Research* (2008).

irresponsibility in Congress, of the increasing practical importance of regulation to the American economy (and hence to politicians), and of the American habit, common in recent decades, of putting one political party in power in the White House and the other in power in Congress. For Presidents facing a politically hostile Congress, the incentive – the need – to take active control of the permanent government bureaucracy is clear. This imperative may seem all the more compelling with respect to independent regulatory commissions, those agencies whose members the President cannot discharge at will.⁴⁵

⁴⁵ Even these commissions, however, are subject to considerable Presidential influence: in most cases the Chair, who in turn has authority to appoint and remove inferior officers within the agency, holds the post of *Chair* (though not the post of commissioner) at the pleasure of the President. Additional leverage comes from the need of independent regulatory commissions, like all agencies, for Presidential support on matters ranging from budget and legislation to office space. ‘In sum, any assumption that executive agencies and independent regulatory commissions differ significantly or systematically in function, internal or external procedures, or relationships with the rest of government is misplaced’. Strauss (n 21 above) 596. Then again, one can readily imagine the frustration of President Franklin Roosevelt, who once wrote to a member of the Federal Trade Commission, ‘I do not feel that your mind and my mind go along together on either the policies or the administering’ of the commission; when the commissioner

The difficulties, of course, are those suggested by Corwin, and by history's experience with over-powerful chief executives. Congress's creation of power in discrete executive branch bodies might not seem so threatening to civil liberties. Even though there is a democracy deficit – such agencies are politically responsible only through their tie to presidential appointment – these are dispersed authorities. Each agency acts in a delimited area of not only responsibility but also technical expertise, and each exercises its limited authority using procedures that are both transparent and subject to judicial oversight.⁴⁶ It is harder to accept the argument that the power to decide *all* the manifold policy decisions Congress has committed to government agencies lies in the hands of a single politician acting behind closed doors and, one may fear, under the influence more of power politics than of expert judgment. Congress, after all, has placed the responsibilities in the agencies, not the President, and made them subject (as he ordinarily is not) to judicial as well as political controls.

What we are doing, then, is reframing the tension between the acceptance of rulemaking as a constitutionally valid activity, and Justice Hugo Black's famous remark (made in a context that

refused to resign, Roosevelt's attempt to remove him was rebuffed by the Supreme Court.

Humphrey's Exor v United States 295 US 602, 619; 55 S Ct 869, 870 (1935).

⁴⁶ This argument is elegantly made in TD Rakoff, 'The Shape of the Law in the American Administrative State' (1992) 11 Tel-Aviv U Studies in L 9.

had nothing to do with presidential direction of rulemaking, in his majority opinion for the Court rejecting President Truman's effort to claim an enlarged executive authority to deal with an emergency of the Korean War) that 'the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker'.⁴⁷ Our courts do accept *agency* rulemaking, which is unmistakably lawmaking. They see agency decisions as agency, not presidential, lawmaking. It is perhaps not difficult to see the challenges that the arguments for such a strong 'unitary executive' pose to this accommodation.

Posing our problem as one of choosing between the rule of law *or* the rule of men imagines the impossible. Even with the rule of law, we will at best have both. The question is how we can keep the politics in check – and this is perhaps above all else an issue of integrity. Three years ago, Neal Katyal published in the Yale Law Journal an essay entitled 'Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within'.⁴⁸ Faced with a broken Congress, he argued – and it is hard to doubt that Congress *is* broken – the restraints of law on a President's political ambition must come from within the Civil Service.

⁴⁷ *Youngstown Sheet & Tube Co v Sawyer* 343 US 579, 587; 72 S Ct 863, 867 (1952).

⁴⁸ NK Katyal, 'Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within' (2006) 115 Yale LJ 2314.

Much maligned by both the political left and right, bureaucracy serves crucial functions. It creates a civil service not beholden to any particular administration and a cadre of experts with a long-term institutional world view.

Fans of ‘Yes, Minister’ will recognize this as not simply a possible American view.

Americans now have as President Barack Obama, who comes to that high office from a career in the Senate – the first American President since Lyndon Johnson to have been elected from a legislative, not executive office career.⁴⁹ Possibly the result will be an interruption of what has seemed a steady flow of political authority in the United States into the President’s hands. Some signs are encouraging in this regard: promptly upon taking office, President Obama revoked⁵⁰ changes President George W. Bush had made to the process by which the White House, acting through OIRA, oversees agency rulemaking; the Bush-era changes had obscured the role of the Vice President, expanded the reach and intensity of OIRA’s review, and required the designation in each agency of political officers directly responsible to the President. Further, President Obama has proposed revamping the OIRA review process and solicited public as well as agency views on the matter.⁵¹ Also

⁴⁹ Gerald Ford, too, came from the legislature, but was never elected.

⁵⁰ Exec Order No 13,497 (n 43 above).

⁵¹ ‘Regulatory Review: Memorandum for the Heads of Executive Departments and Agencies’ 74

worth noting is an effort by the new administration to prevent Presidential politicking from usurping the role of science in agency decision-making: a March 2009 memorandum charges the Director of the Office of Science and Technology Policy, the White House office responsible for coordinating science matters in government, with developing suggestions to produce merit-based (i.e., not political) appointments, use of scientific methods (including peer review as appropriate) in developing information, heightened transparency, and improved protection for dissidents ('whistleblowers').⁵²

On the other hand, it remains unclear exactly how much power President Obama actually will relinquish. While he has restored OIRA to the role it played under President Clinton, even that regime did not lack critics of its politicizing and delay-promoting possibilities. Moreover, of the 183 submissions responding to President Obama's invitation for suggestions on further OIRA reform, not one is from a public agency;⁵³ this silence is

Fed Reg 5977 (3 February 2009); Office of Management and Budget, 'Federal Regulatory Review' 74 Fed Reg 8819 (26 February 2009).

⁵² 'Scientific Integrity: Memorandum for the Heads of Executive Departments and Agencies' 74 Fed Reg 10,671 (11 March 2009) (Scientific Integrity Memorandum).

⁵³ Two meetings are mentioned, but in each case only the names of agency attendees are given. See <<http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp>> accessed 10

striking, and may well indicate an instinct on the part of the Obama White House to control executive branch communications at the expense of transparency.⁵⁴ Outside the OIRA context, President Obama's appointments to White House positions – for example, a former EPA administrator, Carol Browner, to a new position as White House Coordinator of Energy and Climate Policy – suggest that the scheme of multiple avenues of presidential control described by Bressman and Vandendergh⁵⁵ persists. And while the new President's calls for reform with respect to OIRA and scientific integrity are laudable, it is yet to be seen what reforms will follow.

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⁵⁴ In what may well be signs of the same tendency, President Obama has issued statements capable of being read as consistent with previous regimes of strong White House control over statements made by agencies, even to Congress. See Scientific Integrity Memorandum (n 52 above), s 3(b)(ii); Press Statement of 11 March 2009 <http://www.whitehouse.gov/the_press_office/Statement-from-the-President-on-the-signing-of-HR-1105/> accessed 13 March 2009. The latter statement exemplifies that President Obama has continued use of Presidential signing statements, albeit at a slower pace than President Bush; see nn 35 and 41 above.

⁵⁵ See n 37 and accompanying text above.

The genius of our constitutional arrangements over the centuries has been their success in preventing too much power to be placed in one pair of hands. The developments of recent years have put that success at risk. Will the coming years see a restoration of reasonable balance between bureaucratic/technical and political influences over governmental policymaking? Ongoing crises of security and the economy will doubtless tempt our new President to continue down his predecessors' path. One may certainly hope he resists.