

2016

## Things Left Unsaid, Questions Not Asked

Peter L. Strauss

Columbia Law School, [strauss@law.columbia.edu](mailto:strauss@law.columbia.edu)

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### Recommended Citation

Peter L. Strauss, *Things Left Unsaid, Questions Not Asked*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW ONLINE, VOL. 164, P. 293, 2016; COLUMBIA PUBLIC LAW RESEARCH PAPER NO. 14-536 (2016).

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## RESPONSE

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### THINGS LEFT UNSAID, QUESTIONS NOT ASKED

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PETER L. STRAUSS†

In response to Symposium, *The Bounds of Executive Discretion in the Regulatory State*, 164 U. Pa. L. Rev. 1587 (2016).

#### INTRODUCTION

The *University of Pennsylvania Law Review's* symposium on executive discretion is an important undertaking, but it is remarkable for several silences—for things left unsaid on this important subject—and for questions not asked. First, although the Constitution's "Take Care" Clause is extensively discussed, the one power Article II gives the President over domestic administration—to require the "Opinion, in writing" of the heads of the agencies Congress has invested with administrative duties—is not. Second, the discussion of the President's undoubted but possibly constrained authority to remove officials of whose actions he disapproves omits discussion of the difference between the strictly political discretion enjoyed by some officers in some functions, and the law-constrained discretion enjoyed by others. Third, discussion of the executive branch's clear advantages in dealing with complex, technological issues of fact, as compared to Congress and the courts, omits discussion of the possibility that the opaqueness of the executive's internal functioning may prevent understanding of the extent to which electorally driven politics, not technical expertise, controls its actions. And finally, the empirical exploration of the public's attitude toward possible differences between presidential oversight and presidential control frames its questions in a manner likely to have predetermined its outcome, and in

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† Betts Professor of Law, Columbia Law School. Many thanks to the editors of the *University of Pennsylvania Law Review* for their diligent work on this Response, which has included the provision of all the footnote parentheticals.

considering the impact on public perceptions does not address the possible impact on *administrators'* behavior of their understanding whether the President's views have only political or (rather) legal bearing on the issues statutes say they are to decide. This Response addresses each topic in turn.

### I. ARTICLE II'S "TAKE CARE"<sup>1</sup> AND "OPINIONS IN WRITING"<sup>2</sup> CLAUSES<sup>3</sup>

The Take Care Clause figures in several Articles in this symposium.<sup>4</sup> All are remarkable, however, for their inattention to the one clause in the Constitution affirmatively addressing the President's power in relation to the heads of the various executive departments that its drafters understood that Congress would create, but left entirely to its statutory judgment. Only Section 2 of Article II defines the President's affirmative powers. Immediately after making him, unmistakably, "Commander in Chief" of the country's military<sup>5</sup>—able, that is, to give legally binding orders, the violation of which would be punishable by court martial—and before conferring on him the power to pardon offenses,<sup>6</sup> Article II, Section 2 addresses his power in matters of domestic government; the only thing *it* says is that he 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."<sup>7</sup> In the course of rejecting the Solicitor General's strong unitary executive argument that the vesting clause "constitutes a grant [to the President] of all the executive powers of which the Government is capable," Justice Jackson's justly celebrated concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* understandably characterized this power as "trifling."<sup>8</sup>

The clear textual messages are that Congress will be assigning duties to others who will actually execute the laws and that the President's relationship to those persons is one of consultation and not, as with the military,

<sup>1</sup> U.S. CONST. art. II, § 3.

<sup>2</sup> U.S. CONST. art II, § 2, cl. 1.

<sup>3</sup> More extensive discussion of the analysis in this Section can be found in my earlier scholarship. See generally Peter L. Strauss, *The President and the Constitution*, 65 CASE W. RES. L. REV. 1151 (2015); Peter L. Strauss, Foreword, *Overseer or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965 (1997); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

<sup>4</sup> It is also the subject of *United States v. Texas*, a case that was pending before the U.S. Supreme Court when this Response was written and subsequently affirmed by an equally divided Court. 136 S. Ct. 2271 (2016) (mem.).

<sup>5</sup> U.S. CONST. art II, § 2, cl. 1.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> 343 U.S. 579, 640-41, 641 n.9 (1952) (Jackson, J., concurring).

command. From a rule-of-law perspective, these messages suggest an obvious possible understanding of the Take Care Clause that I did not find addressed in the Symposium. “[B]e faithfully executed” reinforces the impression the “Opinion in Writing” Clause conveys: Congress may validly place responsibility for the exercise of the duties it assigns to the executive branch in others than the President, and when it does so, the duties it assigns are, as it explicitly says, “*their[s]*.” The President’s wishes are politically important, but since he is charged only to see to “faithful” execution, his wishes cannot determine the legality of actions by members of the executive branch. To say otherwise would deprive “faithful,” the Clause’s passive voice, and Congress’s lawful placement of duties elsewhere of meaning. The responsibility for determining legality belongs first to the persons on whom Congress has conferred the duties and, second, to the courts.

Thus, in virtually any lawsuit challenging an action by an element of the executive branch, the issue is the legality of an action by someone other than the President. In *United States v. Texas*, the action at issue was taken by Jeh Johnson, the Secretary of Homeland Security.<sup>9</sup> Secretary Johnson could not demonstrate that his action was lawful by asserting that he was executing a presidential command, and the government’s argument of the case made no such claim. The President’s communicated wishes are persuasive only if he was seeing to it that Secretary Johnson was “faithfully” executing the law. If he was—that is, if Secretary Johnson’s acts meet the test of legality—the fact that the President requested, even demanded, the action adds little, if anything, to the matter.<sup>10</sup> We may expect/applaud/appreciate Secretary Johnson’s political loyalty, but that does not concern the legality of his behavior, which is a prior question and one that he is himself responsible for deciding. The analysis by the Office of Legal Counsel,<sup>11</sup> which Professor Bellia addresses at some length,<sup>12</sup> may have helped Secretary Johnson in reaching that assessment. What one should note, however, is that it was properly addressed to him and

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<sup>9</sup> *Texas v. United States*, 809 F.3d 134, 190 (5th Cir. 2015) (King, J., dissenting).

<sup>10</sup> This is not to foreclose the possibility that a court would think the President’s view is entitled to some weight in its own assessment of legality—reasoning, for example, from any responsibility the President may have had for the drafting of the legislation, any impetus he may have given to its initial implementation, and the possibility that his embracive responsibility for law-execution, provides a basis for understanding the law in question that a court—presented with a particular, narrow question in a possibly eccentric context—would lack. *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 549 (1940).

<sup>11</sup> The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. (2014), 2014 OLC Lexis 2.

<sup>12</sup> Patricia L. Bellia, *Faithful Execution and Enforcement Discrimination*, 164 U. PA. L. REV. 1753, 1765-69 (2016).

to his authority, not to the President and his. Any legal error would be his, not the President's.

That Secretary Johnson has this indefeasible responsibility for legality, backed up by the courts, could be thought an important source of resistance to presidential "arrogance," as Michael Gerhardt persuasively characterizes our prevailing drift toward one-person government.<sup>13</sup> If and to the extent he understands on whose shoulders the ultimate responsibility for decision sits, it creates an opportunity for counter-pressure within the executive branch<sup>14</sup> and in that way supports the rule-of-law side of administrative action.

## II. REMOVAL, *MYERS*,<sup>15</sup> AND THE MEANING OF "DISCRETION"<sup>16</sup>

Unlike "command," the President's power to remove members of the executive branch from office is readily associated with the President's care-taking responsibility. Here, however, the Symposium's discussions oddly omit a perspective on the removal cases that, in my judgment, serves to reconcile *Myers* with all that has come after on the subject, most recently *Free Enterprise Fund v. Public Company Accounting Oversight Board*.<sup>17</sup>

This reconciliation would be effected if we were to understand *Myers* as resting fundamentally on the understanding that, since it is the President's obligation to "take Care," Congress cannot require the Senate to agree to removal. Understanding *Myers* in this way, however, does not entail barring Congress from creating conditions that must be satisfied by the President as a condition of valid removal. We have the civil service, which has included individuals reaching high up into presidential administrations, at one time including, for example, the chief of the Forest Service.<sup>18</sup> Then there are the independent regulatory commissioners, the special prosecutors, administrative law judges (ALJs), and other inferior officers whose executive branch responsibilities require the possibility of *some* presidential "Take Care" oversight, but not necessarily full freedom to remove them from office without cause. Chief Justice Taft's opinion in *Myers* baldly asserted an equivalence between presidential authority over those who of necessity spoke *for him* in contexts in which, as Chief Justice Marshall famously remarked,

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13 Michael Gerhardt, *Constitutional Arrogance*, 164 U. PA. L. REV. 1649, 1650-51 (2016).

14 See generally Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

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

16 The arguments of this Section draw heavily on Peter L. Strauss, *On the Difficulties of Generalization—PCAOB in the Footsteps of Myers, Humphrey's Executor, Morrison, and Freytag*, 32 CARDOZO L. REV. 2255 (2011), and Strauss, *The Place of Agencies in Government*, *supra* note 3, at 614-16.

17 561 U.S. 477 (2010).

18 Roger A. Sedjo, *Does the Forest Service Have a Future? A Thought-Provoking View*, in A VISION FOR THE U.S. FOREST SERVICE: GOALS FOR ITS NEXT CENTURY 176, 184 (Roger A. Sedjo ed., 2000).

they were “the mere organ by whom [his] will is communicated” so that “nothing can be more perfectly clear that their acts are only politically examinable,”<sup>19</sup> and others exercising a discretion that is tolerable *only because* it is constrained by law and subject to judicial control for its legality.<sup>20</sup> A symposium addressed to “executive discretion” might surely have noted that “discretion” is a slippery concept, calling Chief Justice Taft’s assertion of equivalence between removing a Secretary of State and removing Portland’s postmaster into doubt. The only proposition that *Myers* necessarily decided, that the Senate could not demand the right of consent to a removal from executive office, suffices to sustain the opinion.

This perspective makes the holding of *Humphrey’s Executor v. United States* easy to accept, if not all of its reasoning; Congress had claimed no removal role.<sup>21</sup> It helps understand *Bowsher v. Synar*, where Congress did claim such a role,<sup>22</sup> and *Morrison v. Olson*, where, again, the issue was one of limits on presidential control.<sup>23</sup> *Free Enterprise Fund* is in this respect unique, finding that making the SEC, rather than the President, responsible for “for cause” removal offended Article II.<sup>24</sup> Again, it seems appropriate to understand the opinion’s holding in institutional rather than individual terms, despite its diction. The Court holds that the SEC is a “department” of the executive branch for purposes of Article II’s Appointments Clause, and reasons further from constitutional necessity that it must be subject to presidential oversight.<sup>25</sup> But that oversight would be impeded, and Congress would have

<sup>19</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803).

<sup>20</sup> “There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him.” 272 U.S. at 134.

Judge Harold Leventhal of the D.C. Circuit pithily stated the proposition that judicial review is the required coin of valid delegations of ordinary administrative discretion in *Ethyl Corp. v. EPA*: “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.” 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring) (footnote omitted).

<sup>21</sup> 295 U.S. 602, 631-32 (1935). The case describes Congress as conditioning the President’s removal power, not claiming it. *Id.* It also reasons that the FTC is no part of the executive branch, a position since properly rejected. See generally Strauss, *On the Difficulties of Generalization*, *supra* note 16.

<sup>22</sup> 478 U.S. 714, 736 (1986) (striking down a statute on the theory that the Constitution demands that “Congress play no direct role in the execution of the laws”).

<sup>23</sup> 487 U.S. 654, 692-93 (1988) (concluding that a “good cause” removal provision did not “interfere impermissibly with [the President’s] constitutional obligation to ensure the faithful execution of the laws”).

<sup>24</sup> 561 U.S. 477, 483-84 (2010).

<sup>25</sup> *Id.* at 511. The Court strangely reserves the question whether the SEC is subject to the “Opinions in Writing” Clause. *Id.* at 511 n.11. This reservation is intellectually incomprehensible; an

discovered a new means for insulating administrators from presidential oversight, if the President could be denied a direct oversight connection to this new institution. Since SEC Commissioners are themselves removable only “for cause,”<sup>26</sup> accepting that the SEC, and not the President, was in charge of the PCAOB members’ tenure would deny that necessary connection. Here would be more insulation of an administrative agency from presidential oversight than Congress had ever yet tried. When the protected tenure of ALJs, Inspectors-General, and other tenure-protected “inferior officers” comes before the Court, as perhaps it soon will, the Court should quickly discern that *Free Enterprise Fund* properly turns on the institutional characteristics of the PCAOB, and not, as such, on the characteristics of its individual members.

### III. OF KNOWLEDGE AND POLITICS

If the Symposium is properly understood as addressing executive discretion of the second, law-constrained variety—not Chief Justice Marshall’s conception of discretion exercised in the absence of law, by “the mere organ by whom [the President’s] will is communicated”<sup>27</sup>—then another surprising omission from it is direct discussion of the law’s constraints on the operation of politics. Of course, it is possible to deny those constraints, as Professor Vermeule has seemed to do on occasion,<sup>28</sup> and as my colleague

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agency can hardly be a “freestanding component of the Executive Branch, not subordinate to or contained within any other such component,” *id.* at 511, without being subject to the only positive presidential power over domestic administration, which Article II creates.

<sup>26</sup> This proposition cannot simply be assumed, as the Court appeared to do, *id.* at 487, despite Justice Breyer’s persuasive showing that the omission of “for cause” protection from the statute creating the SEC was almost certainly deliberate—the product of the still unchallenged reasoning of *Myers*, *id.* at 546-47 (Breyer, J., dissenting). Neither can the proposition be considered a matter of “convention,” as Professor Vermeule suggests, *see* Adrian Vermeule, *The Third Bound*, 164 U. PA. L. REV. 1949, 1950-52 (2016), since Chief Justice Roberts’ opinion *holds* that the PCAOB’s considerable powers are valid. *Free Enter. Fund*, 561 U.S. at 508 (majority opinion). That holding, in turn, depends on the constitutional propriety that, his opinion reasons, does exist as to “for cause” protected SEC commissioners’ oversight of their ordinary subordinates.

<sup>27</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

<sup>28</sup> *See generally* ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010) (arguing that executive power goes largely unchecked in the modern administrative state); Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015) (reviewing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) and arguing that administrative law is, indeed, lawful); Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673 (2015) (arguing that abuse of government power is something to be optimized rather than something to be eradicated); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009) (arguing there are various areas in the law where the President is given authority to act without regard for traditional legal constraints).

Philip Hamburger has emphatically lamented.<sup>29</sup> But if, as Judge Leventhal pithily remarked, ordinary administrative discretion is tolerated *only* because it is constrained by law, “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,”<sup>30</sup> then one might have thought discussions of that discretion would address the law versus politics boundary. And there is very little of that in the Symposium.

One of the more celebrated judicial discussions of the propriety of political guidance to law-constrained discretion’s exercise comes in the peroration to Justice Stevens’s opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.<sup>31</sup>

Notice two things here. First, in Justice Stevens’s formulation, we have the agency appropriately “*rely[ing]* upon the incumbent administration’s views of *wise policy* to inform *its* judgments.”<sup>32</sup> Second, the opinion is one that explores in considerable detail the reasonableness of the outcome the agency has reached—congruent, again, with Judge Leventhal’s pithy explanation<sup>33</sup> of the

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<sup>29</sup> See generally PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Philip Hamburger, *Vermeule Unbound*, 94 TEX. L. REV. SEE ALSO 205 (2016), <http://www.texaslrev.com/vermeule-unbound-2/> [<https://perma.cc/EW36-Q2H3>].

<sup>30</sup> *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (1976) (Leventhal, J., concurring).

<sup>31</sup> 467 U.S. 837, 865-66 (1984).

<sup>32</sup> *Id.* at 865 (emphasis added).

<sup>33</sup> See *supra* note 30 and accompanying text. One finds the same pattern in another case widely relied upon for its acceptance of presidential interventions in important rulemakings: *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981). That court proclaims its indifference to the possibility that “undisclosed Presidential prodding may direct an outcome that *is* factually based on the record, but different from the outcome that would [otherwise] have [been] obtained,” *id.* at 408, only after it dedicated almost a hundred pages of the opinion to an exquisitely detailed review of the agency’s reasoning and the factual basis for it.



coin with which this particular form of executive discretion has been purchased. The assumed legal framework is one in which the agency is responsible for the factfinding and the reasoning by which the rule's validity is judged.

Unanticipated in the 1980s, when these words were written—but the occasion for considerable commentary today—is the way in which regulatory impact analysis under Executive Order 12,866<sup>34</sup> and Executive Order 13,563<sup>35</sup> (hereinafter Executive Orders) has moved Administrative Procedure Act (APA) rulemaking—statutorily imagined as an agency-internal process—from the agency to the White House.<sup>36</sup> Lobbying happens there, before the ostensible “public comment period” of the APA, and between the close of the comment period and publication of a final rule.<sup>37</sup> “[T]he incumbent administration[]” forcefully transmits not only its “views of wise policy”<sup>38</sup> but also its views of the facts, and it acts to secure its assessments of political advantage.<sup>39</sup> In effect, the White House has taken over duties Congress conferred on the administrators and the procedures it established for their exercise.

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34 See Exec. Order No. 12,866, 3 C.F.R. § 638 (1994) (requiring significant regulatory actions to be submitted for review to the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB)).

35 See Exec. Order No. 13,563, 3 C.F.R. § 215 (2012) (reaffirming Executive Order No. 12,866 and the process of regulatory review).

36 See generally Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015) (arguing that the rise of “unorthodox lawmaking” and “unorthodox rulemaking”—through things like omnibus bills, emergency regulations, and presidential policymaking—shifts power to the White House); Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019 (2015) (arguing that the White House, through OIRA, is undermining expert agencies’ efforts to be more rigorous, expert, and transparent in their rulemaking).

37 Simon F. Haeder and Susan Webb Yackee analyzed the 1526 “significant” rules OMB considered at the final rulemaking stage between 2005 and 2011 (spanning the last Bush and first Obama administrations) finding lobbying in 126 of them; they found that “more interest group lobbying is associated with more regulatory change” and that “when only industry groups lobby, we are more likely to see rule change.” Simon F. Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President’s Office of Management and Budget*, 109 AM. POL. SCI. REV. 507, 512, 517-18 (2015). The study did not consider lobbying during the initial period of OIRA review, before a notice of proposed rulemaking is published, but OIRA’s website listing matters under review invites that practice as well.

38 *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

39 Cf. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-714, FEDERAL RULEMAKING: AGENCIES INCLUDED KEY ELEMENTS OF COST-BENEFIT ANALYSIS, BUT EXPLANATIONS OF REGULATIONS’ SIGNIFICANCE COULD BE MORE TRANSPARENT 16 (2014) (finding that OIRA sometimes changed whether rules were designated as significant—thus triggering additional review under the Executive Orders—without providing an explanation for the change); Stephanie P. Newbold & David H. Rosenbloom, *Critical Reflections on Hamiltonian Perspectives on Rule-Making and Legislative Proposal Initiatives by the Chief Executive*, 67 PUB. ADMIN. R. 1049, 1052 (2007) (noting that OMB review is a “major presidential institutional resource for controlling contemporary federal administration”).

In his contribution to the Symposium, Professor and former OIRA administrator Cass Sunstein makes an airtight case for the executive as “[t]he Most Knowledgeable Branch,” in contrast to the courts and to Congress.<sup>40</sup> Indeed, who would wish the tolerable level of sulfur dioxide in power plant emissions to be determined either by a judge (or jury), or by the 535 members of Congress—even if that institution had not become dysfunctional—rather than by extended expert inquiry? What Professor Sunstein does not do, however, is discuss the intrusion of politics into purportedly “knowledgeable” acts. He discusses OIRA’s fact-gathering as if it were wholly internal to government, as agencies with varying interests and expertise work to supplement one another’s knowledge. Outsiders lobby OIRA on important and contentious rules,<sup>41</sup> and while these meetings (or most of them) are eventually noticed in the public record,<sup>42</sup> their content is not. What transpires in the discussions, “predecisional” in Freedom of Information Act terms,<sup>43</sup> remains confidential. Moreover, the Executive Orders’ promises to document changes resulting from the OIRA process have rarely been kept.<sup>44</sup> The incumbent administration appears to have used the OIRA process to secure political advantage for itself, and not just in the service of broader knowledge and wiser analysis.

For example, a 2013 report prepared for the Administrative Conference of the United States<sup>45</sup> found unusual delays in the OIRA review processes

<sup>40</sup> Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1608-11 (2016).

<sup>41</sup> See *supra* note 37.

<sup>42</sup> In at least one case, this appears not to have occurred. In 2013, the Occupational Safety and Health Administration (OSHA) proposed a rule “to require employers to record and report work-related fatalities, injuries and illnesses.” 29 C.F.R. § 1904 (2013). Not yet adopted, the rule is listed among the Department of Labor’s fall 2015 rulemaking priorities. U.S. DEP’T OF LABOR, *Fall 2015 Statement of Regulatory Priorities*, [http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement\\_1200.html](http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_1200.html) [<https://perma.cc/7LAQ-BRHC>]. On December 10, 2015, OIRA officials met with employer-side insurance representatives, as is clearly shown by documents in the rulemaking docket. *Late Comment and Petition from Halprin, Lawrence P.; Keller and Heckman on Behalf of Strategic Comp/Great American Insurance Company*, REGULATIONS.GOV (Jan. 5, 2016), <http://www.regulations.gov/#documentDetail;D=OSHA-2013-0023-1836> [<https://perma.cc/LYU7-S9H2>]. This meeting is missing from OIRA’s logs, although they do record two later December meetings with labor-side interests. OFFICE OF INFO. & REGULATORY AFFAIRS, *EO 12866 Meetings*, <http://www.reginfo.gov/public/do/eom12866Search> (navigate to December 2015 on the calendar) (last visited Sept. 8, 2016).

<sup>43</sup> Certain internal agency materials are exempt from FOIA. 5 U.S.C. § 552(b)(5) (2012). The application of this exemption to “predecisional” discussions is explored, *inter alia*, in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975) and *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975).

<sup>44</sup> See Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1149 (2010) (“Despite the directives and the executive order disclosure requirements, however, public information about the content of executive supervision of an agency decision itself, such as through regulatory review, is surprisingly rare.”); Wagner, *supra* note 36, at 2050 (describing OIRA review as “largely nontransparent”); see also U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 39, at 16.

<sup>45</sup> CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 41 (Oct. 7, 2013), <https://www.acus.gov/sites/default/files/documents/>

during the run-up to the 2012 elections, when adopting regulations might have been disadvantageous to President Obama's reelection campaign, whatever their objective or informational merits. The mean time OIRA took to review rulemaking proposals under the Executive Orders rose from 51 days in the period through 2011

to 79 days, and in the first half of 2013, the average review time was 140 days—nearly three times the average for the period from 1994 through 2011. (*Note:* An increase in average review time for completed reviews in one year may reflect the closure of lengthy reviews that primarily occurred in previous years.)<sup>46</sup>

Ignoring the clearly stated time constraints of Executive Order 12,866<sup>47</sup> in the service of presidential ambitions does not seem to reflect either the superior knowledgeability of the executive branch or “the incumbent administration’s views of wise policy.”<sup>48</sup>

Strikingly, it seems entirely possible that the working out of the concrete example Professor Sunstein draws upon to illustrate his analysis was significantly the product of political, not policy or knowledgeability, judgments. That example is the development of the 2014 rule implementing the Cameron Gulbransen Kids Transportation Safety Act of 2007, which required the Department of Transportation to develop, almost immediately, a rule requiring improved rearview technology in cars, that might help avoid the tragedy of backing over one’s own child.<sup>49</sup> The statute was the product of a legislative process illustrative of Congress’s difficulty in objective cost–benefit assessment in the face of politically irresistible pro-legislative pressures.<sup>50</sup>

A proposed rule was published in 2010 after considerable internal examination, as Professor Sunstein relates.<sup>51</sup> He next picks up the story three years later, in 2013, when Transportation Secretary Ray LaHood wrote Congress explaining studies his Department had done.<sup>52</sup> Professor Sunstein presents the issues as if virtually everything happened within the Department of Transportation. Although his introductory discussion properly addresses

Copeland%20Report%20CIRCULATED%20to%20Committees%20on%2010-21-13.pdf [https://perma.cc/5UQC-A2EK]. A former staffer at the Government Accountability Office and the Congressional Research Service, Copeland’s access to government information and objectivity are extraordinary.

<sup>46</sup> *Id.* at 4; see also Jennifer Nou & Edward Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 735-39 (2016) (reporting apparently politically motivated failures to use the Regulatory Agenda and Regulatory Plan as they were designed, lest congressional critics get an early start on opposition).

<sup>47</sup> See Exec. Order No. 12866, 3 C.F.R. § 638, 644, § 6(b)(2) (1994) (setting time limits for OIRA review of up to ninety days with a thirty day extension).

<sup>48</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

<sup>49</sup> Pub. L. No. 110-189, § 2(b), 122 Stat. 639, 639-42 (2008).

<sup>50</sup> Jerry Louis Mashaw & David Harfst, *The Transformation of Auto Safety Regulation: Bureaucratic Adaptation to Legal Culture*, 34 YALE J. ON REG. (forthcoming 2017).

<sup>51</sup> Sunstein, *supra* note 40, at 1640 n.107.

<sup>52</sup> *Id.* at 1642.

the need to avoid tunnel vision, the virtues of interdepartmental consultation, and Executive Order 12,866,<sup>53</sup> he says little concretely about these in his discussion of the rearview camera issue; and explains delay just on the basis that OIRA had a lot of work to do.

Curtis Copeland's findings,<sup>54</sup> suggesting the influence of presidential election concerns, are strongly reflected in intervening events Professor Sunstein omits to mention. On February 27, 2012, the front page of the *New York Times* reported:

Federal regulators plan to announce this week that automakers will be required to put rearview cameras in all passenger vehicles by 2014 to help drivers see what is behind them. The National Highway Traffic Safety Administration, which proposed the mandate in late 2010, is expected to send a final version of the rule to Congress on Wednesday.<sup>55</sup>

On the very next day, a story hidden in the Business Section reported:

In January, [Secretary LaHood had] told Congress that he expected the department to issue the requirement by Feb. 29. "Further study and data analysis—including of a wider range of vehicles and drivers—is important to ensure the most protective and efficient rule possible," Mr. LaHood said in a statement issued late Tuesday. "The department remains committed to improving rearview visibility for the nation's fleet and we expect to complete our work and issue a final rule by Dec. 31, 2012."<sup>56</sup>

One may fairly doubt that in the space of 24 hours the Secretary came to the realization that the ready-for-release rule he had announced, already the product of so much internal discussion and processing, should be postponed to permit additional fact-gathering. Rather, it should be apparent that the occasion for postponement until after the pending presidential election was not departmental factfinding, as Professor Sunstein's account implicitly claims,<sup>57</sup> but a desire to avoid controversial rulemaking in an election year.

The rulemaking process imagined in the APA is a public process located in the agency to which Congress has assigned responsibility for issuing regulations, and for explaining its judgment in relation to the public comments

<sup>53</sup> *Id.* at 1621 & n.32.

<sup>54</sup> See *supra* notes 45–46 and accompanying text.

<sup>55</sup> Nick Bunkley, *U.S. Rule Set for Cameras at Cars' Rear*, *N.Y. TIMES* (Feb. 27, 2012), <http://www.nytimes.com/2012/02/28/business/us-rule-set-for-cameras-at-cars-rear.html> [https://perma.cc/F3AT-3736].

<sup>56</sup> Nick Bunkley, *U.S. Delays Rule on Rearview Car Cameras*, *N.Y. TIMES* (Feb. 28, 2012), <http://www.nytimes.com/2012/02/29/business/rule-on-rearview-cameras-for-cars-is-delayed-for-review.html> [https://perma.cc/ZH2D-PPN6].

<sup>57</sup> Sunstein, *supra* note 40, at 1636–45.

it has received. The Executive Orders not only have created a centralized mechanism for coordination within government, but also have moved the “public” process outside the agency. Lobbying of OIRA occurs,<sup>58</sup> both before proposals are published and, before final action is taken. And this is not a “public” process in the APA’s term, with an assured public record of interventions. It is evident that OIRA’s interventions are not simply those of a superior factfinder, but are highly political and opaque. Professor Sunstein’s account is, consequently, just as opaque as the realities he ostensibly describes.

One might ask: so what? Isn’t the President politically responsible for these outcomes, and won’t stressing the responsibility of those Congress has entrusted with decision simply confuse the public, as it appears Professor Coglianesi’s study<sup>59</sup> suggests? Do we really need to be concerned that newspapers and the public misunderstand *United States v. Texas* (the immigration case left undecided by an equally divided Supreme Court)<sup>60</sup> as a challenge to President Obama’s authority, rather than a challenge to the authority and actions of Jeh Johnson, the Secretary of Homeland Security,<sup>61</sup> as the Office of Legal Counsel well understood?<sup>62</sup> After all, the President publicly trumpeted this action, as he has others.

If presidential constitutional arrogance continuously threatens a movement to a “supreme authority” state, one counterforce can come from those to whom the President issues directives or commands about how they should execute the laws.<sup>63</sup> But that opposing force is likely to be present only if Jeh Johnson and his confreres clearly understand that what they are being asked to do is to exercise their own authority, for which they can be held responsible by Congress, in the courts, and in the public’s opinion of their

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58 See Haeder & Yackee, *supra* note 37, at 512 (noting that lobbying occurred during about 8.3% of OMB reviews).

59 Cary Coglianesi & Kristin Firth, *Separation of Power Legitimacy: An Empirical Inquiry of Norms on Executive Power*, 164 U. PA. L. REV. 1869, 1900-03 (2016).

60 See *supra* note 4 and accompanying text.

61 See, e.g., Linda Greenhouse, *The Supreme Court vs. the President*, N.Y. TIMES (Feb. 4, 2016), <http://www.nytimes.com/2016/02/04/opinion/the-supreme-court-vs-the-president.html>

[<https://perma.cc/2G29-QSGG>] (describing *United States v. Texas* as “an appeal from a ruling that the president lacked authority under the immigration laws to defer deporting undocumented immigrants whose children are American citizens or lawful permanent residents”). The press has similarly misunderstood a recent challenge to an EPA climate change regulation. See Coral Davenport, *Supreme Court’s Blow to Emissions Efforts May Imperil Paris Climate Accord*, N.Y. TIMES (Feb. 10, 2016), <http://www.nytimes.com/2016/02/11/us/politics/carbon-emissions-paris-climate-accord.html> [<https://perma.cc/DY7J-TRD9>] (“The Supreme Court’s surprise decision Tuesday to halt the carrying out of President Obama’s climate change regulation could weaken or even imperil the international global warming accord . . .”).

62 Bellia, *supra* note 12, at 1755.

63 See generally Katyal, *supra* note 14.

service.<sup>64</sup> And that is what the Constitution imagines when it refers to *their* duties, when it describes *their* obligation to provide the President with written opinions of how they will exercise those duties *of theirs*,<sup>65</sup> and when it tells the President to assure faithful execution by others (“*be faithfully executed*”).<sup>66</sup> This outcome is only possible if Presidents respect the laws that place those duties in individuals other than themselves.

Among the Nixon tapes are two conversations from 1971: one between President Nixon, Henry Ford, Lido “Lee” Iacocca, and John Ehrlichman; and the other between Ehrlichman and John Volpe, then Secretary of Transportation.<sup>67</sup> Ford was concerned that the Department of Transportation was about to announce a rule requiring air bags in American cars (which GM knew how to do a lot better than Ford at the time), fearing disaster for the American automobile industry. Ehrlichman called Volpe to tell him that the President wanted him to withdraw, or at least delay, the rule’s issuance. Volpe promised to consult his lawyer, and added that he was “trying to do a job over here.” The rule did issue, only to be derailed by the Sixth Circuit,<sup>68</sup> with the result that it took twenty more years of needless deaths to make air bags standard equipment.<sup>69</sup>

“I’m trying to do a job over here”—losing that understanding, abandoning the back-pressure that it might produce from within the administration and consequent constraint on our drift toward a “supreme authority” state, is what is at stake in the success of presidential arrogance.

#### IV. THE QUESTION THAT OUGHT TO HAVE BEEN ASKED

Professor Coglianese and Kristin Firth properly recognize<sup>70</sup> that concern for the “psychology of office” in persons appointed to office—namely, that Jeh Johnson understands that he has personal responsibility for the legality and

64 It is this attitude that I intended to invoke in earlier scholarship by calling attention to the impact of presidential claims of “command” authority on the psychology of office, which in my judgment is an important guarantor of our rule of law culture. Strauss, *Presidential Rulemaking*, *supra* note 3, at 985-86.

65 U.S. CONST. art. II, § 2, cl. 1.

66 U.S. CONST. art. II, § 3 (emphasis added).

67 For excerpts of these conversations, see Transcript: Conversation 488-15, National Archives (Apr. 27, 1971), *reprinted in* LISA SCHULTZ BRESSMAN ET AL., *THE REGULATORY STATE* 775 (1st ed. 2010) and Transcript of Public Recording, National Archives (Apr. 30, 1971), *reprinted in* BRESSMAN ET AL., *supra*, at 778.

68 See *Chrysler Corp. v. Dep’t of Transp.*, 472 F.2d 659 (6th Cir. 1972) (striking down the standards).

69 See Ronald White, *Airbags Have Saved Tens of Thousands of Americans . . . and Industry Obstruction Cost Three Times as Many*, CTR. FOR EFFECTIVE GOV’T (Aug. 5, 2015) <http://www.foreffectivegov.org/blog/airbags-have-saved-tens-thousands-americans%E2%80%A6-and-industry-obstruction-cost-three-times-many> [<https://perma.cc/W5N6-7344>] (“The auto industry’s fight against airbags resulted in a staggering loss of life: an estimated 90,000 lives over 20 years.”).

70 Coglianese & Firth, *supra* note 59, at 1905.

reasonableness of the actions he takes, and does not regard himself as simply obliged to do the President's bidding—is at the heart of my arguments over the years that the President's constitutional role is that of an overseer, not a decider.<sup>71</sup> In their empirical study, however, they explore only public understanding of responsibility, not office-holder understanding. Even those results, if one looks at the numbers thoughtfully,<sup>72</sup> show considerable understanding that it is indeed the person nominally acting—the Secretary and not the President—who bears responsibility. My concerns, however, are with the understanding held by the person in office, and with the corrosive impact on that understanding of “strong unitary executive” arguments and newspaper headlines attributing administrators' actions to presidential commands obeyed,<sup>73</sup> rather than to an independent decision that includes consideration of “the incumbent administration's views of *wise policy* to inform *its* judgments.”<sup>74</sup> That is a question Professor Coglianese's and Kristin Firth's study never addresses.

Even the questions they did ask, in my judgment, substantially risked skewing the results toward the conclusions they reached. Consider the scenario set for all but one of the question series they analyze:

The Federal Bureau of Engraving and Printing (“Bureau”) carries out the design and printing of U.S. paper currency. The Bureau recently redesigned the \$100 bill to incorporate new security features and these bills are currently in circulation. The question now is whether to update the security features in the \$50 bill.

Even though it made sense to redesign the \$100 bill, there are both pros and cons to the redesign of the \$50 bill. In a meeting at the White House, Bureau staff members brief the Treasury Secretary and the President of the United States on the pros and cons. At the conclusion of the meeting, the President thanks the staff for an informative presentation.

The Bureau is situated within the U.S. Department of the Treasury. Congress has given the Secretary of the Treasury the authority to make all decisions related to security features on currency. The Bureau will only begin work on a new design of the \$50 bill if it receives proper written authorization.<sup>75</sup>

Notice that the middle paragraph *assumes* that such decisions are made in the White House as a physical location, with the President and Treasury Secretary in attendance for a staff briefing, and with the President thanking

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71 For citations to those articles, see *supra* note 3.

72 Coglianese & Firth, *supra* note 59, at 1888-95.

73 See *supra* note 61 and accompanying text for examples.

74 *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (emphasis added).

75 Coglianese & Firth, *supra* note 59, at 1883-84.

that staff for their presentation. This framing effectively conveys to the reader that the decision to be made is presidential. To be sure, the next paragraph says that the Secretary has statutory authority to make the decision; nonetheless, the placement of the meeting, the President's presence, and the way the meeting concludes all reflect the very point of view the Article purports to find in survey responses.

Suppose instead that middle paragraph had read:

Even though it made sense to redesign the \$100 bill, there are both pros and cons to the redesign of the \$50 bill. At the President's request, the Secretary has sent him a memorandum fully explaining how she proposes to act, with a detailed account of the pros and cons as she and her staff see them. The President has responded with a request to take a different course, explaining the considerations animating his request.

This description physically separates President and Secretary, and places the decision where it legally is (in the Secretary's hands). Use of it, in my judgment, would have produced quite different responses. So the framing of the inquiry likely drove its results.

The second scenario is similarly impacted by framing considerations, albeit more subtly.

Congress has given the Secretary of Treasury the authority to make all decisions related to security features on credit cards. That includes the authority to create and amend credit card security regulations, as well as to respond to petitions about these regulations, whenever and however the Secretary decides.

Some years ago, the Treasury Department used the authority Congress gave the Secretary to create a regulation that required many businesses to install a new anti-fraud security technology. The regulation allowed businesses a limited time period within which to come into compliance.

As the regulation's deadline approached, it became clear that most businesses would not have completed the required installations in time. Several business groups jointly filed a petition asking the Treasury Secretary to amend the regulation to extend the deadline.

The Treasury Secretary wanted to keep the regulation unchanged. **However, hearing the concerns raised by business groups and concluding that the impending deadline would pose potentially serious economic repercussions, the President of the United States commanded the Treasury Secretary to grant the petition and amend the regulation to extend the deadline.**

The Treasury Department then used normal procedures to grant the petition and amend the regulation, issuing a deadline extension.



The amended regulation was then challenged in a lawsuit in federal court. The challengers' lawyers argued that the President illegally pressured the Treasury Secretary to relax the deadline. They pointed out that Congress had given regulatory authority to the Treasury Secretary and not to the President.

In response, government lawyers pointed out that a Treasury Secretary is appointed by the President, who can remove a Secretary from office at any time.

In similar lawsuits in the past involving other government departments, courts have applied a rule derived from the U.S. Constitution that says [NORM]. This is the law the judge must apply to the dispute over the Treasury Department's deadline extension.<sup>76</sup>

Respondents saw [NORM] in one of three forms:

- (1) Presidents are allowed to influence department heads like the Treasury Secretary, as long as departmental regulations (including amendments) are officially signed and approved by the department head and not the President.
- (2) Presidents are allowed to influence department heads like the Treasury Secretary, as long as they only do so in "reasonable" ways; or
- (3) Presidents are allowed to influence department heads like the Treasury Secretary, but not to make decisions for them.<sup>77</sup>

Here, the problem arises from the bolded sentence in the body of the hypothetical.

First, this sentence risks amalgamating as a single act, in the reader's mind, the granting of a petition to engage in rulemaking and the subsequent activity of proposing and then adopting a rule. Suppose the sentence following the bolded sentence had instead read:

The Treasury Department then granted the petition and, after conducting a notice and comment rulemaking, amended the regulation to extend the deadline, explaining its reasons for doing so.

Now the problem would have been framed as a two-stage event, as in fact it would have happened, explicitly informing respondents about public departmental procedures at the second stage that might have influenced the ultimate outcome.

More important, consider the contrast between "commanded" in the bolded sentence, and the formulation opening *each* of the three supplied norms: "Presidents are allowed to influence department heads like the Treasury Secretary . . ." Presidents *are* allowed to *influence* cabinet officers and, for that matter, independent regulatory commissioners; that, at least, is

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<sup>76</sup> *Id.* at 1895-96.

<sup>77</sup> *Id.* at 1896.

the necessary implication of the “Opinions in Writing” Clause. As long as only “influence” is under consideration, none of the three norms is problematic; the problem comes from the idea of “command”—a power constitutionally bestowed on the President only in relation to the military, not domestic government. The contrasting norms do not test the difference between “influence” and “command.”

Finally, it bears repeating that, in my judgment, the central issue concerns the psychology of an administrator in her dealings with the President, not the understanding of the public, and this paper’s analysis simply does not illuminate that issue. The attitude at risk is Volpe’s “I’m trying to do a job,” backed by an understanding of where Congress has properly placed the duties subject to administration, and the ultimate legal and political responsibility for their exercise. The possibilities of resistance to presidential *ukase* such an understanding entails, underscored both by the promises a nominee makes to the Senate on her confirmation and by the political costs she and the President understand he would face in sending her home and appointing her replacement, are important to the Constitution’s provisions for our governance and, ultimately, to the balance between politics and law in administration. Political influence is entirely appropriate—but only in the framework *Chevron*’s language assumes: “[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”<sup>78</sup>

#### CONCLUSION

There is so much of value in this Symposium. One wishes only that its organizers had flagged the difference between “executive discretion” in the largest affairs of government and the law-constrained “executive discretion” that characterizes the administrative state; had put more effort into considering the ways in which presidential arrogance has transformed the latter, thereby threatening our rule of law culture; and had framed the questions asked in ways that put these concerns more squarely in issue.

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Preferred Citation: Peter L. Strauss, Response, *Things Left Unsaid, Questions Not Asked*, 164 U. PA. L. REV. ONLINE 293 (2016), <http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-293.pdf>.

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<sup>78</sup> *Chevron*, 467 U.S. at 865.