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THE TRUMP ADMINISTRATION AND THE RULE OF LAW

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Abstract

American domestic government is created and defined by statute, not by the American Constitution. The Constitution's limited text defining the American President's authority in relation to that government suggests that his authority is that of oversight, not direct command. In the last half century, this article reflects, Presidents as diverse as Reagan, Clinton and Obama have attempted to extend their authority in the direction of command. Written one year after President Trump's inauguration, the article argues that the current President has dramatically continued this trend, acting as if a monarch. Presidential authority is unchecked and ventures away from any commonly shared interpretation of the constitutional rule of law.

Keywords

Trump's Presidency, Separation of powers, Agencies, Rulemaking, Executive Powers.

Résumé

— *La présidence Trump et l'État de droit – La création et l'organisation du gouvernement américain relève de la loi et non de la constitution. Les brèves dispositions de la constitution fixant l'autorité du président à l'égard du gouvernement suggèrent que cette dernière est de l'ordre de la supervision, pas du commandement direct. Or, le présent article soutient toutefois que des présidents aussi divers que Reagan, Clinton et Obama ont tenté d'étendre leur autorité en termes de commandement et non de supervision. L'auteur, qui écrit un an après l'investiture du Président Trump, affirme que celui-ci a poursuivi de façon spectaculaire cette tendance. Il n'hésite pas à comparer son action à celle d'un monarque. Toujours selon l'auteur, l'autorité du président actuel n'est pas contrôlée et ne relève d'aucune interprétation communément partagée de la règle de droit constitutionnel.*

Mots-clés

Présidence Trump, séparation des pouvoirs, agences, réglementation, pouvoirs exécutifs.

“I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress. But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that “The tools belong to the man who can use them”. We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers”. Jackson, J., concurring in *Youngstown Sheet & Tube v. Sawyer*, 342 U.S. 579 (1952).

In early November of 2016, the United States awoke to find it had, against the odds, elected as President a businessman and reality TV star without prior political experience, for whom “You’re fired!” was his most quoted expression, and “Crooked Hillary” the leitmotif of his campaign. Writing on the anniversary of his election, the Washington Bureau Chief of the electronic US Guardian – a daily publication of the UK’s respected *Manchester Guardian* – wrote its subscribers, in part,

“As the Guardian’s Washington bureau chief I’ve banned myself from using words such as “surreal” or “unprecedented” to describe Trump – he drained them of meaning long ago. The 45th president is exhausting, physically and morally. Covering his White House is like being tossed around inside a washing machine, from pre-dawn tweet storms to late night revelations of alleged collusion with Russia... It is incumbent on us not to normalize the abnormal, diminish the emergency or be distracted by his words while neglecting the consequences of his actions... If we didn’t know why we were journalists before, we do now. Speaking truth to power has taken on a whole new meaning.

Reporting on the strangest president in American history is to witness the awesome, awful spectacle of a 240-year-old democracy and its institutions creaking and bending under a freak storm”¹.

SOME BACKGROUND

The American Constitution is the contemporary of the French Revolution and, in its fundamental design of government has not significantly changed since its creation. Our Senate is now popularly elected, not appointed by state legislatures; those formerly enslaved became free and full citizens (albeit the reality of that fullness is still a work in progress); women and eighteen-year-olds have the vote. But legislative functions are still performed by a Congress of Senators and Representatives serving for fixed terms of office, legally if

1. From an e-letter by David Smith to the paid subscribers of *Guardian US* electronic edition, Nov. 8, 2017.

not always politically free of the President. Our President is by constitutional design one of only two elected officials in executive government, and the only one responsible for law-execution². And the federal judiciary is independent once appointed, and capable of enforcing the Constitution's provisions against unlawful legislative or executive action; but judicial appointments result from elected officials' choices, not professional training or advancement, and the importance of the judicial process (particularly in relation to social issues such as racial justice, religious freedom and abortion) has led to politics playing a major role in peopling the federal judiciary.

One consequence of this emphatic separation of "powers" at the apex of government, a significant debt to the French scholar Montesquieu, is particularly important to understand in relation to this essay: the American President can only recommend legislation to Congress³, and the shape enacted legislation ultimately takes is entirely the product of legislative politics. This is quite different from the situation typical of parliamentary democracies, including mixed regimes, where a prime minister and cabinet at the head of the legislative process significantly control legislative drafting and can be confident of shaping the legislature's output to their desires.

The project of government inevitably reflects the tension between politics and law; the "creaking and bending" the Guardian described is in many respects the product of a fundamental tension in the Constitution's provisions about executive (that is, presidential) authority, combined with the impact of two centuries of change. Where the drafters imagined a government of a few thousand, today the federal government numbers several million. And as to the shape and internal discipline of executive government, the Constitution is virtually silent. That there would be Departments is anticipated, but no department is named. The functioning government is, as some have observed, the hole in the American Constitution – or, perhaps more properly, the Constitution deliberately left its definition to the Congress, to legislation.

Section 2 of Article II of our Constitution is the only one to address, in terms, the president's powers. As to the military, it names the President "commander in chief", leaving little doubt about the legal obligations that attend a presidential command. As to domestic government, however, *all* it provides is that the President must get senatorial consent to his choices for the principal officers of the fundamental units of government Congress chooses to create; 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" (emphasis added); and that he has the responsibility to "take care that the laws be faithfully executed" – again, as if by others⁴.

Notice, then, that Congress may create duties to be exercised by a "principal officer", and that she is not simply the President's agent. The requirement of Senate consent to her appointment entails an in-depth public examination before a bipartisan committee, and is

2. The original text of the American Constitution defined no function for the Vice President besides serving as President should the office be vacated permanently or temporarily (other than in a regular election), presiding over the Senate, and casting a vote in the Senate should there be a tie vote amongst those elected to that body. Since the 12th Amendment to the Constitution, voters have elected him on the same ballot as the President, not independently; and the 25th Amendment gives him a constrained power, together with a majority of the principal officers of the executive departments, to declare the President incapacitated.

3. U.S. Const. Art. II, Sec. 3: "He shall from time to time ... recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient", but any recommendations become legislative business only when bills containing them are introduced into the House or Senate by a member thereof, and no law requires this to happen.

4. U.S. Const. Art. 2, Sec. 2.

a process instinct with the possibility of commitments how her “duties” will be exercised – commitments that can be enforced through appropriations measures and the other tools of “Congress’s Constitution”. (Chafetz, 2017). That this provision for divided loyalty and control is no accident, but an intended check against executive tyranny, is manifest in Section 2’s specific address to foreign relations, a context in which one might have expected the President himself to be empowered to create texts having the force of law: He shall have power, *by and with the advice and consent of the Senate*, to make treaties, *provided two thirds of the Senators present concur...*” (emphasis added).

It will not have escaped my readers that President Trump appears to believe that he has the right monarchically to command all domestic government. Understand, however, that this view is not a radical change (however much more emphatic than his predecessors he has been about it), but rather the continuation of a trend that has been in place at least since the presidency of Richard Nixon. It was during the Nixon administration that what you may know as secondary legislation and we denominate “regulations” or “rules” (the product of executive agencies, not Congress) came to prominence; it now considerably outstrips primary federal legislation as Americans’ source of legal obligation.

At the end of World War II, the federal Administrative Procedure Act had defined rulemaking, as we call it, as a simple public procedure⁵. This required an agency with statutory authorization to adopt rules, and wishing to do so, first to publish a rather general notice of its intentions in the daily federal gazette inviting public comment on the proposal. The statute then instructed it to preface any rule it decided to adopt, after considering such comments as might be submitted, with a “concise general statement of basis and purpose”. The process drew little attention; so far as is known, it was effected entirely within the responsible agency, without White House participation; as late as 1970, law school teaching materials for the course on administrative law essentially ignored it, and agencies that did adopt regulations behaved in the manner the notice, comment, and explanation requirements suggested – quite briefly stating their proposals, and ultimately setting out their explanations of adopted rules in a page or two of text.

In the late 60’s and early 70’s, federal legislation established a number of ambitious new programs addressing health, safety and environmental issues in reaction to public concerns that had arisen. Rather than themselves specifying particular measures to be taken, these statutes instructed new or newly empowered agencies to do so by regulations adopted within parameters the statutes set. Ralph Nader’s 1965 book, “Unsafe at Any Speed”, for example, ultimately catalyzed creation of the National Highway Traffic Safety Administration; and it has been NHTSA, not Congress, that has specified the detailed characteristics of automobile brakes required for safety. Similarly, the new Environmental Protection Agency (EPA), not Congress, would set standards for controlling pollution (a need put in the limelight by a fire on Cleveland, Ohio’s river⁶, and Rachel Carson’s “Silent Spring”), and the new Occupational Safety and Health Administration (OSHA), not Congress, would define unacceptably hazardous workplace activities.

These new responsibilities gave rulemaking major consequences for American industry and transformed it into a highly visible activity. Courts began to scrutinize the sufficiency of the notices issued to inform the public about the issues to be ultimately resolved⁷. The

5. 5 U.S.C. §553.

6. Jonathan Adler, “The Fable of the Burning River, 45 Years Later”, *The Washington Post*, June 22, 2014 (available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/22/the-fable-of-the-burning-river-45-years-later/?utm_term=.129837516dfc).

7. *Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013 (3d Cir. 1972).

comment process, they ruled, could hardly be effective unless agencies shared with the public the data and analyses on which they based their actions⁸. And despite the ordinary meaning of the words “concise general statement of basis and purpose”, the courts insisted on explanations that indicated how the agency had reasoned, and how it dealt with any significant comments⁹. Presidents, too, began to assert an interest in knowing about the regulations agencies were considering, and requiring analyses that, with increasing specificity, explored the potential benefits proposed regulations would bring to the public, and the costs their implementation would impose on industry¹⁰.

With the election of the conservative President Ronald Reagan in 1980 came an executive order founding the Office of Information and Regulatory Affairs (OIRA), a White House agency that was part of the principal bureaucracy of the President’s office, the Office of Management and Budget (OMB)¹¹. The order imposed a new analytic requirement on all executive agencies, to analyze the costs and benefits of important rulemaking actions, and to choose alternatives that maximized benefits in relation to the costs imposed on the regulated. Empowering OIRA to coordinate and supervise this process, it had both an objective component – helping agencies choose the most appropriate targets for their action – and a political impulse. In conservative hands it operated to diminish regulation as much as to foster the choosing of appropriate targets. One recalls that the first administrator of the EPA in the Reagan administration (Anne Gorsuch) and his Secretary of the Interior (James Watt) came into office with anti-regulatory impulses little different from those of the Trump administration’s first EPA Administrator Scott Pruitt and Secretary of the Interior Ryan Zinke. In the Reagan administration, however, the formal documents describing this analytic regime were careful to keep it within the dimensions of the Opinions Clause¹² – seeking a written analysis, but not purporting to wrest control over and responsibility for decision-making. It required consultation, to be sure, and anticipated that this might lead to delay, yet it stated time frames for White House action without qualification and contained no provisions denying an agency head authority to proceed to implement rulemaking, once that officer had reached her conclusion. The order thus appears to have scrupulously observed the implications of the opinion in writing clause, both as to the President’s right of consultation *and* Congress’s placement of the ultimate responsibility/duty to act in the agency head’s hands (Bruff, 1989).

This changed in a significant way in the administration of President Clinton, a President considerably more supportive of government regulation than his Republican predecessors although, perhaps for that very reason, anxious that any regulation undertaken would be the most effective use of government resources. His revisions to the Reagan executive order, now known as EO 12866¹³, essentially created the framework still in force today. It focused on strengthening bureaucratic structures – requiring each agency to create a position within its internal hierarchy that would be responsible for overseeing the analytic process, and assuring coordination with OIRA. And it took a further step, on which the burgeoning literature appears not to have focused:

8. *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

9. *Automotive Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968).

10. Following President Nixon and Ford’s less formal efforts, President Carter’s Executive Order 12044, 43 Fed. Reg. 12261 (March 23, 1978) “direct [ed] each Executive Agency to adopt procedures to improve existing and future regulations”.

11. Executive Order (EO) 12291, 46 Fed. Reg. 13193 (Feb 17, 1981).

12. See note 4 above.

13. 58 FR 51735 (October 4, 1993).

“Sec. 8. Publication. Except to the extent required by law, an agency shall not publish in the Federal Register or otherwise issue to the public any regulatory action that is subject to review under section 6 of this Executive order until (1) the Administrator of OIRA notifies the agency that OIRA has waived its review of the action or has completed its review without any requests for further consideration, or (2) the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration under section 6(b) (3), whichever occurs first. If the terms of the preceding sentence have not been satisfied and an agency wants to publish or otherwise issue a regulatory action, the head of that agency may request Presidential consideration through the Vice President, as provided under section 7 of this order...”

To be sure, EO 12866 continued

“Sec. 9. Agency Authority. Nothing in this order shall be construed as displacing the agencies’ authority or responsibilities, as authorized by law”.

Unmistakably, however, Section 8 conveys a presidential command – and this command is not only to the responsible agency whose authority Section 9 ostensibly preserves, but also to the presidential appointee responsible for publication of the Federal Register. By law, a rule *must* be published in the Federal Register for it to take effect¹⁴. And Section 8 of EO 12866 formally informs the officer responsible for publication, who serves at the President’s pleasure and is *not* the addressee of the Executive Order’s “opinion in writing” consultation requirements, that publication is not to occur without, in effect, the President’s approving signature. As a legal matter, it asserts, the agency head’s signature alone is insufficient to authorize publication of important rules.

The Federal Register Act¹⁵ does not mention the President. Performing its essentially ministerial responsibilities has not been assigned to the President and then delegated by him to the Government Printing Office. President Clinton’s executive order thus conferred on himself what no statute has created: the right in effect to *require* his countersignature on agency rulemaking. By statute, the authority to adopt rules is placed in the agency head, not the President; this assertion, in effect that White House approval was also required, crossed the line from consultation to control that the language of the Reagan orders had been careful to observe. An influential article by then professor, now Supreme Court Justice Elena Kagan celebrated the emergence of “Presidential Administration”, as she called it (2001). The increasing dysfunctionality of the American Congress – the erosion of any practice of bi-partisan consideration of legislative proposals – heightened the need for, and perhaps public acceptance of, executive actions one might have thought more appropriate for the legislature. In publicity, President Clinton took credit for actions that, by statute, could only be taken by authorized agencies, and newspaper reporting followed suit, announcing as the President’s actions what in fact were those of the Food and Drug Administration or National Highway Traffic Safety Administration.

14. 5 U.S.C. §§552(a)((1)(D) and 553(d).

15. 44 U.S.C. §§ 1501-11.

The Bush and Obama administrations each heightened, in their way, this trend to presidentialism. When faced with a Democrat Congress in the last two years of his administration, President Bush issued an executive order that converted the internal agency official responsible for coordinating rulemaking analyses with OIRA into a presidential official – no longer reporting to the agency head and necessarily someone the President had himself appointed; it ostensibly granted this official veto power over agency rulemaking decisions¹⁶. While President Obama reversed this particular change on taking it office¹⁷, he unmistakably continued both tight control and personal credit-taking in relation to important regulations – and, again, the newspapers tended to report rulemaking actions as his rather than as those of the agency officials statutorily responsible for them. In the last two years of his administration he could achieve nothing legislatively, including nomination of a Supreme Court Justice to a seat that then sat vacant for over a year. A consequence was that this time saw a considerable number of efforts by administration officials to achieve what could not be legislated; and the press attributed these actions to the President, perhaps in response to the way in which he announced them. This included an action to alleviate the situation of some illegal immigrants long in the US and guilty of nothing save their presence in the country. When that action was judicially challenged for procedural insufficiency, the Supreme Court, now only eight Justices, effectively upheld its disapproval when they were split evenly on the proper outcome¹⁸.

THE TRUMP ADMINISTRATION AND THE RULE OF LAW¹⁹

As a candidate, Donald Trump made clear at every turn that if elected he would be in command, and things would rapidly change. That has not quite happened. Although his election also brought his party control of both the Senate and the House of Representatives for the period this essay considers, legislative successes during those months were relatively few and, when they occurred, were more the product of discipline amongst Republican legislators than the President's wishes as such. When he has sought to command change within the executive branch, too, his actions have met considerable resistance – notoriously in federal courts (especially in the context of his efforts to close national borders to the citizens of certain countries and to punish states and cities offering “sanctuary” to illegal immigrants), and within the executive branch itself in the frustration of his efforts to end an inquiry into the possibility that Russian meddling in his election may have been one element of its success. The paragraphs following principally address his further building on the processes first begun in the Reagan administration, to establish formal presidential

16. E.O. 13422, 72 FR 2763 (January 23, 2007).

17. E.O. 13497, 74 FR 6113 (Feb. 4 2009).

18. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), affirmed by an equally divided court, 136 S. Ct. 2271 (2016).

19. This essay, like many that have appeared, focuses on a few discrete events; since its writing well over a year prior to its publication, more have occurred whose tendency has been to underscore President Trump's monarchical understanding of his office. It is current only to the beginning of 2018. For a comprehensive review of executive orders issued in the first days of his administration, characterizing as extraordinary his undermining of “the rule of law through a broad assault on constitutional norms, especially when considered in light of his public statements and complementary actions”, see Driesen, 2018.

controls over rulemakings undertaken by agencies Congress has authorized to engage in that procedure.

My past scholarship has long stressed the difference between presidential oversight of agency activities such as rulemaking (which the Constitution explicitly provides for) and presidential command of these outcomes, with attention to what has been for me the disturbing trend toward essentially unchecked presidential exercise of authority: Reagan presidency (Strauss, 1986) Clinton presidency (Strauss, 1997)²⁰, Bush II presidency (Strauss, 2007), Obama Presidency (Strauss, 2015). With President Trump, this trend has, if anything, accelerated. Consider these excerpts from the text of his Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs”²¹, issued not two weeks after his inauguration:

“By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Budget and Accounting Act of 1921, as amended (31 U.S.C. 1101 et seq.), section 1105 of title 31, United States Code, and section 301 of title 3, United States Code, it is hereby ordered as follows: ...

Sec. 2. Regulatory Cap for Fiscal Year 2017...

(b) For fiscal year 2017, which is in progress, the heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget (Director) ...

Sec. 3. Annual Regulatory Cost Submissions to the Office of Management and Budget.

(c) Unless otherwise required by law, no regulation shall be issued by an agency if it was not included on the most recent version or update of the published Unified Regulatory Agenda as required under Executive Order 12866, as amended, or any successor order, unless the issuance of such regulation was approved in advance in writing by the Director.

(d) During the Presidential budget process, the Director shall identify to agencies a total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year. No regulations exceeding the agency’s total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director. The total incremental cost allowance may allow an increase or require a reduction in total regulatory cost...”

20. “[The argument supporting presidential control of rulemaking] elides Congress’s constitutional prerogatives in structuring government, the duties it may confer on Heads of Departments who are not the President, although they operate within the framework of the President’s responsibility to see to it that the laws are faithfully executed. For him to make the bureaucrats believe that they are his is precisely to tear down the structures of law and regularity Congress has built up in relation to the presidency... The stakes for the psychology of government, for the extent to which civil servants and political appointees imagine themselves acting within a culture of law, are rather high” (Strauss, 1997).

21. 82 Fed. Reg. 9339 (Jan. 24, 2017).

While the order goes on to provide (like its predecessors) that:

“Sec. 5. General Provisions.

(a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations...”

no reader (and especially no governmental officer) could doubt that the prerogatives of command are being claimed²².

The Constitution, we have seen, uses the language of command only in relation to military affairs. And the statutory authorities claimed for the Trump EO’s commands do not signal that Congress has conferred the asserted powers on the President. The Budget and Accounting Act provisions, presumably cited in support of the imposition of a “regulatory budget” that ostensibly modifies the rulemaking authority of every federal agency, are exclusively concerned with presidential preparation of the annual fiscal budget proposal – a submission that lacks both legal force in itself, and is only a proposal for legislative consideration. Congress is free to legislate differently and, early in the Trump administration, it did so in respect of EPA budget proposals (Ribe, 2017). One cannot find in the language of the Budget and Accounting Act any hint that it creates presidential authority to modify agency rulemaking powers.

The reference to 3 U.S.C. §301 is still more mysterious. It provides:

“General authorization to delegate functions; publication of delegations

The President of the United States is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President: Provided, That nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions. Such designation and authorization shall be in writing, shall be published in the Federal Register, shall be subject to such terms, conditions, and limitations as the President may deem advisable, and shall be revocable at any time by the President in whole or in part”. (emphasis supplied).

22. Subsequent instructions from the Office of Management and Budget limited the order to exclude independent regulatory bodies, but its authority to do so is at best unclear. When the Attorney General sought to limit the extent President Trump had claimed for his directive to withhold all federal funds from cities and states offering sanctuary to illegal immigrants – a directive plainly beyond his power when so broadly put – a court sharply rebuffed the argument; the Attorney General, it reasoned, had no authority to amend a presidential order. *Cty. of Santa Clara v. Trump*, 2017 U.S. Dist. LEXIS 191840 (N.D. Cal. Nov. 20, 2017).

That is, it authorizes the President to authorize another official to exercise a responsibility that Congress has authorized the President to perform or required the President to ratify. One would search today's U.S. Code in vain for legislation conferring on the President a general authority to modify its statutes creating agency rulemaking powers.

And, indeed, should Congress attempt to confer such sweeping authority on the President, serious concerns could arise about the validity of that action. In finding unauthorized President Harry Truman's seizure of steel plants to maintain weapons production during the Korean conflict, a defining Supreme Court decision about presidential authority, *Youngstown Sheet & Tube Co. v. Sawyer*²³, remarked, "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker". To be sure, the statement was made in the absence of any provision empowering the President to adopt regulations; and, today, executive branch regulations are the dominant source of federal legal obligations. Perhaps Congress *could* confer broad rulemaking authority upon the President but, save in rare instances, it has authorized rulemakings by agencies, not the President. Its placement of rulemaking authority in executive agencies that are subordinate to it and to the courts as well as to the President, and that exercise that authority in accordance with defined, public procedures, offer assurances of legality and control that are absent when the President, or his essentially confidential White House establishment, purports to act.

Law-enforcement is the defining executive function, the one function neither Congress nor the judiciary can itself perform and, indeed, the one that is at furthest remove from judicial control²⁴. One might think, then, that this is the context in which the arguments for presidential responsibility/control would be the strongest. It may thus seem remarkable that while President Trump has grumbled loudly about it in tweets and verbal comments²⁵, he seems to have accepted the proposition that judgments about investigations and prosecutions – whether of "crooked Hillary" or of persons more closely connected to him – are by law committed to others and are *not* subject to his command²⁶. He could pardon Sheriff Joe Arpaio of Phoenix – clearly a constitutional prerogative – but he did not take what would have been the simpler step (if it had been available to him) of commanding a cessation of prosecutorial effort. Presidents have long been advised that their power is limited to removing and replacing appointees whose judgments displease them²⁷, and reaching into

23. 343 U.S. 579 (1952).

24. *Heckler v. Chaney*, 470 U.S. 821 (1985).

25. E.g., "*But you know, the saddest thing is, because I am the President of the United States, I am not supposed to be involved with the Justice Department. I'm not supposed to be involved with the FBI. I'm not supposed to be doing the kind of things I would love to be doing and I am very frustrated by it.* I look at what's happening with the Justice Department, why aren't they going after Hillary Clinton with her emails and with her dossier, and the kind of money... I don't know, is it possible that they paid \$12.4 million for the dossier... which is total phony, fake, fraud and how is it used? *It's very discouraging to me. I'll be honest, I'm very unhappy with it, that the Justice Department isn't going... maybe they are but you know as President, and I think you understand this, as a President you're not supposed to be involved in that process.* But hopefully they are doing something and at some point, maybe we are going to all have it out". (Radio interview with WMAL, as quoted in (Wittes, 2017), with his emphasis added).

26. "So what are the chains then? The chains are the workaday women and men of federal law enforcement, and their expectations that the political echelon at the Justice Department will shield them from becoming the President's janissaries and enforcers. Trump is menacing the norm of independent law enforcement. He is chomping at the bit to do violence to it. But at least for now, it is holding. ... [S]eeing Donald Trump chafe with frustration at what he cannot do – at least not yet – is a moment to warm the democratic heart. It is as vivid a portrait as I have ever seen of the American government structurally limiting the impulse to tyranny". (Wittes, 2017). For a well-developed argument that personalizing the administration of justice has long been taken as a defining element of tyranny, warranting revolution, see Chayes, 2016.

27. This history is explored in Strauss, 2007.

individual decision-making, whether by an “enemies list” or a directive to compromise a particular antitrust proceeding, was taken as behavior supporting the removal of President Nixon from office.

Congressional signals, too, deny presidential control of a variety of administrative decisions. *Portland Audubon Soc. v. Endangered Species Committee*²⁸ is but one example. There Congress had created a decision mechanism for permitting exceptions to endangered species protections, creating a committee almost wholly composed of “principal officers” who had been presidentially nominated and confirmed by the Senate²⁹. Granted that the committee was instructed to decide the exemption issue “on the record”, its makeup strongly suggested the anticipation of politically inflected judgment. In a case involving the virgin forest habitat of the threatened (and somewhat notorious) northern spotted owl, a habitat lusted after by Oregon lumbermen, the President appeared to have brought political pressure to bear on the committee’s decision. The reviewing court rejected every argument that either his responsibility for law execution or the striking membership of the committee permitted that interference. Consider, too, that Congress often provides for interagency consultation about matters of interest to more than one agency; and note that in doing so it does *not* name the President as referee or ultimate decision-maker (Shah, 2017). To be sure, and appropriately, Office of Management and Budget (OMB) and Office of Legal Counsel (OLC) are available as referees of interagency disputes, yet no statute requires their use. The strong implication of Congress’s legislated arrangements is that, just as agency heads must sign for agency actions, agency heads are to resolve these consultative issues.

Is rulemaking different because it is so strongly inflected with policy – that is, political – concerns? From a formal perspective, it is somewhat strange to argue that the President enjoys greater outcome control over rulemakings – quasi-legislative in character, occurring under ostensibly transparent procedures, and subject to significant judicial review – than he enjoys over enforcement actions that are wholly “executive” in character, occur behind closed doors, and are essentially beyond judicial reach. Then, too, preserving the proposition that the President is not to be a lawmaker, while permitting rulemaking by executive agencies, would seem to require holding his role to the one that Congress and the courts also enjoy – oversight, not decision. To be sure, that oversight may be varied, covert and quite forceful. Yet simple preservation of the formality that the agency head must sign rules his agency issues, while a necessary condition, is not sufficient to hold the line of legal authority. The President as well as the agency head is a creature of the law, and so must refrain from himself asserting a parallel or displacing authority; else he places himself outside the law. In her recent Foreword to the *Harvard Law Review*’s November, 2017 edition, my colleague Gillian Metzger brilliantly makes clear both the inevitability of rulemaking delegations to administrative agencies, and that those delegations constitute an element of the law that the President has undertaken to see faithfully executed (Metzger, 2017). Taking over that responsibility is as lawless as would be his assigning a duty/responsibility of the EPA to the Department of the Interior. He is bound by the statutory assignment. Absent congressional ratification of it, a presidential claim that for a rule to become effective, it must be one that the White House has permitted is, essentially, lawless. And this is the claim the Trump administration, building on President Clinton’s earlier efforts, has so emphatically asserted.

28. 984 F.2d 1534 (9th Cir. 1993).

29. The Secretaries of Agriculture, the Army and the Interior, the Administrators of EPA and the National Oceanic and Atmospheric Administration (NOAA), the Chair of the Council of Economic Advisors, and presidential appointees from the affected state(s) with one collective vote.

While my concern here has been with the President and rulemaking activities, EO 13771 hardly stands alone as a signal of President Trump's relationship to the rule of law. Again and again he has used executive orders (not to mention tweets³⁰) in ways that the courts have found deficient – subsequently offering revisions that, again, have been found lacking. His efforts to close our borders to persons attempting to come here from designated nations, largely Muslim, are currently in their third round of litigation, with each revision showing more attention to narrowing approaches that might achieve his ends while satisfying the constraints of law³¹. Perhaps deserving special mention here is EO 13768, “Enhancing Public Safety in the Interior of the United States”, whose language – its apparent meaning underscored by presidential comments – seemed to threaten all federal funding otherwise promised to “sanctuary jurisdictions” that were refusing cooperation with immigration enforcement efforts³². Following a preliminary injunction issued with an opinion stressing this breadth³³, the Attorney General issued a two-page memorandum to Department of Justice, giving the order's operative language an interpretation that appeared sharply to restrict its use. The government then unsuccessfully sought reconsideration and dismissal of the preliminary injunction; it was denied on the grounds that the Attorney General had no authority to amend the Executive Order, that his memorandum was issued only to his Department and did not purport to bind the Executive Branch as a whole, and that the interpretation offered was in any event “implausible”³⁴. And on November 20, granting

30. Donald Trump's tweets, before and after acceding to the presidency, informed the reasoning of the courts considering his executive orders respecting eligibility for entry into the United States. Ongoing litigation concerning the validity of a presidential memorandum of August 25, 2017, ostensibly restoring a policy of exclusion of transgender individuals from military service that President Obama's administration had ended after extensive investigation and consideration, has, similarly, been informed by its origin in abrupt and unsupported tweets he sent a month earlier. E.g., *Stone v. Trump*, 280 F. Supp. 3d 747 (2017). The August 25 presidential memorandum, <https://www.whitehouse.gov/the-press-office/2017/08/25/presidential-memorandum-secretary-defense-and-secretary-homeland>, purported to review the results of the earlier extensive study that had underlain the policy change, stating that in his judgment, the Department of Defense had “failed to identify a sufficient basis to conclude” that the Open Service Directive “would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources”. The assertion of a presidential right of redetermination, over a year after implementation of the policy based on it, is itself interesting for one concerned about the nature of presidential authority – and an indicator of the insufficiency of “the responsible administrator must sign” as protection for the role of law in executive action. For the deciding judge, the absence of new studies combined with the abruptness of the catalyzing tweet signaled the absence of justification. Although the memorandum expresses a willingness to consider new studies, he found that promise empty in light of these factors.

31. The Ninth Circuit has again upheld a district court's conclusion that most recent version of the executive order is unauthorized. *Hawaii v. Trump*, decided 12/22/2017, available at http://cdn.ca9.uscourts.gov/datastore/opinions/2017/12/22/17-17168_order_and_opinion.pdf Congress has authorized the President to act under certain circumstances, and a persuasive argument supporting his action relies on this statutory authorization, not an independent constitutional claim. See, e.g., <https://www.lawfareblog.com/ninth-circuit-previews-why-article-ii-will-save-travel-ban> (December 27, 2017).

32. Sec. 9. Sanctuary Jurisdictions. It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.

(a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law...

(c) The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction.

33. *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (2017).

34. *County of Santa Clara v. Trump*, 267 F. Supp. 3d 1201 (2017).

summary judgment to the plaintiffs, Judge Orrick made the injunction permanent³⁵. The “plain language” of the executive order, as presidential (and Attorney General) comments reinforced, he reasoned, reaches “all federal grants, not merely the three grants listed in the AG’s memorandum”. Again, he found the memorandum’s interpretation “implausible”, incapable of amending the executive order, and in any event operative only within the Department of Justice. Because the executive order purported to modify congressional uses of the federal spending power by placing new conditions on federal funds, it violated the separation of powers and the established Tenth Amendment interpretation requiring that conditions on exercise of the spending power must not only be congressionally set – but also clear at the time funds are accepted, reasonably related to the uses of the funds, and not “unduly coercive”.

More recently, a dispute erupted over the leadership of the Consumer Financial Protection Bureau (CFPB), an independent agency created in the wake of the 2008 financial crisis as a subordinate element of the Federal Reserve to exercise responsibilities, such as its name suggests, to protect consumers in financial markets. It is headed by a single “Director”, appointed with Senate confirmation to a fixed term of office, and removable only for cause. This removal restriction, one of only a few applicable to principal officers of government agencies outside of the multi-member regulatory commissions³⁶, was challenged in litigation³⁷ – an interesting question, but one that lies outside the present essay. Unmistakably, however, both this tenure restriction and the placement of the CFPB within the Federal Reserve – the most independent of the federal government’s “independent” agencies, signaled a congressional determination that the CFPB should be an independent body, operating at some remove from the President. When the incumbent director recently resigned, before the end of his statutory term, he designated a deputy within the agency to serve as Acting Director until his successor had been nominated and confirmed. President Trump, asserting statutory authority to do so under the federal Vacancies Reform Act, named the current head of the White House Office of Management and Budget to be Acting Director, while continuing to be the Director of Office of Management and Budget. Whether the specific provisions of the CFPB’s enabling act, used to appoint the deputy, should prevail over the more general terms of the Vacancies Reform Act empowering the President to name acting officials is also an interesting question made an issue in litigation³⁸, but outside the current essay. What warrants mention here is President Trump’s specific choice to be Acting Director, Mick Mulvaney. As the head of the White House’s most powerful internal bureaucracy, Mr. Mulvaney has both a strong confidential relationship with the President and particular reasons, given his place inside the Executive Office of the President, to treat him as his commander. It is hard to imagine actions more contemptuous of, or perhaps it is just oblivious to, Congress’ judgment that the CFPB was to be an independent body. The President has, in effect, brought the CFPB on to the White House grounds. His political will, and not the law, has controlled.

This essay closes with a paraphrase of Editor Smith’s remarks³⁹:

35. *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196 (2017).

36. The head of the Social Security Administration, a massive bureaucracy responsible for the administration of social security retirement benefits and several important welfare measures, is another.

37. The D.C. Circuit, en banc, sustained the constitutionality of this restriction. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018).

38. *English v. Trump*, 279 F. Supp. 3d 307 (D.D.C. 2018).

39. Note 1 above.

“It is incumbent on us not to normalise the abnormal, diminish the emergency or be distracted by efforts to cure language that do not change the consequences of his actions... If we didn’t know why we were lawyers before, we do now. Holding government to the rule of law has taken on a whole new meaning.

Living during the strangest president in American history is to witness the awesome, awful spectacle of a 240-year-old democracy and its institutions creaking and bending under a freak storm”.

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