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PRESIDENTIAL RULEMAKING

PETER L. STRAUSS*

One of the prominent issues during the 1992 presidential campaign was abortion, in particular the federal government's role in financing counseling activities that might promote it. In the Bush Administration, the Department of Health and Human Services had adopted a controversial regulation to withhold federal funds from any family planning or other medical service that included counseling about abortion in its activities;¹ the Clinton campaign promised to rescind that regulation if Clinton were elected President.² Shortly after his election, in a prominent White House ceremony, President Clinton announced that he had directed the rescission of the prior rule and the initiation of a fresh rulemaking to consider the issue.³

As the 1996 campaign approached, teen-age smoking, and the role of the tobacco companies in promoting it, emerged as a large public issue. During the summer of 1995 the President announced that he was directing the undertaking of a major rulemaking effort to control the advertising and distribution of tobacco products to minors;⁴ and in August of 1996 he announced the issuance of the

* Betts Professor of Law, Columbia University School of Law. As often since he joined my faculty, John Manning has been an invaluable reader and support. Thanks also to Lawrence Lessig and to the other participants in this symposium—particularly to Cynthia Farina. Her paper in this symposium, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987 (1997), paired with this one in the presentation, is complementary to this one. She persuades us to see government as a multi-voiced construct, so that asserting that we have a unitary presidency in the strong sense would be a serious—and threatening—category mistake. See *id.* at 987-89. The need for structural polyphony, as she argues, is if anything stronger today than when it was the underlying motif of the framing. See *id.* at 1037-38.

1. See 42 C.F.R. § 59.8 (1996).

2. See Ruth Marcus, *At Issue: Abortion; On Support for Choice and Limits, Bush-Clinton Contrasts Are Sharp*, WASH. POST, Aug. 16, 1992, at A21, available in LEXIS, News Library, Wpost File.

3. See Memorandum on the Title X "Gag Rule", 1 PUB. PAPERS 10 (Jan. 22, 1993); Remarks on Signing Memorandums on Medical Research and Reproductive Health and an Exchange With Reporters, 1 PUB. PAPERS 7 (Jan. 22, 1993). The Secretary of Health and Human Services promptly acted as she had been directed, adopting one rule restoring the prior rule to effect as an interim measure, see 58 Fed. Reg. 7468 (1993), and proposing a new rulemaking for a permanent resolution. See 58 Fed. Reg. 7464 (1993). At this writing, no new rule has been adopted, although the proposal appears regularly in the Unified Agenda of Federal Regulations. See, e.g., Unified Agenda of Federal Regulatory and Deregulatory Actions, 62 Fed. Reg. 21,662, 21,667 (1997).

4. See The President's News Conference, 1 PUB. PAPERS 1237 (Aug. 10, 1995) [hereinafter *Aug. 1995 News Conference*].

rule.⁵ While the voluminous rulemaking documents emerged from the Food and Drug Administration, in which any authority to adopt the rule had been statutorily placed,⁶ press releases called it the President's rule,⁷ and President Clinton led the public relations effort to announce its adoption, as he had its earlier proposal.⁸

Another prominent health-and-safety issue of recent times has concerned automobile air bags. While overall an important safety improvement, the current design of air bags has proved hazardous to some automobile passengers—particularly infants riding in the front seat of automobiles with passenger-side air bags, but also shorter drivers, and people particularly susceptible to percussive events. Responsibility for change in the current standard rests with the National Highway Traffic Safety Administration (“NHTSA”), a constituent part of the Department of Transportation, and it has undertaken a variety of rulemaking initiatives to deal with this problem.⁹ Again, however, the President has stepped in front of the rulemaking effort and, from a public relations/political perspective at least, taken it on as his own. In Saturday radio addresses, it became his effort, one which he had directed to assure safety, to protect our children, to end the current hazard.¹⁰

If one examines the documents of the rulemakings themselves, one gets little hint of this presidential overlay of political activity, assuming (and seeking) responsibility for an action that he presumably believed would produce a net gain in public political affection for his administration. The documents speak the usual mix of scientific and legal justification for “expert” action undertaken in a contested public policy space, to achieve statutory ends assigned to particular agencies for implementation, and they scarcely allude to the President's partici-

5. See Remarks Announcing the Final Rule to Protect Youth From Tobacco, 32 WEEKLY COMP. PRES. DOC. 1490 (Aug. 23, 1996).

6. See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents; Final Rule, 61 Fed. Reg. 44,396 (1996) (222 pages); Annex: Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44,619 (1996) (699 pages and requiring a separate book).

7. See, e.g., Aug. 1995 News Conference, *supra* note 4, at 1237.

8. See Remarks on the Initiative to Protect Youth From Tobacco, 33 WEEKLY COMP. PRES. DOC. 265 (Feb. 28, 1997).

9. See, e.g., Federal Motor Vehicle Safety Standards; Occupant Crash Protection, Child Restraint Systems, 62 Fed. Reg. 30,464 (1997) (interim final rule; request for comments) (modifying air bag warning label); Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 62 Fed. Reg. 26,425 (1997) (interim final rule; request for comments) (depowering air bags to protect children and small adults).

10. See, e.g., The President's Radio Address, 33 WEEKLY COMP. PRES. DOC. 196 (Feb. 24, 1997); The President's Radio Address, 33 WEEKLY COMP. PRES. DOC. 1 (Jan. 6, 1997).

pation.¹¹ A person who had not been reading newspapers or listening to presidential speeches would see only an ordinary (if high-visibility) agency rule, adopted and defended in the ordinary manner. What the courts will see on review, if they limit themselves to the rulemaking record, will be, correspondingly, a quite ordinary collection of documents and voluminous explanations of expert judgment by the departments ostensibly concerned.

What the public is seeing is quite a different matter, actions that are openly political and explicitly presidential. From their perspective it is the President whose judgment underlies decisions to fund family planning clinics even though they may counsel about abortion, and who reached conclusions about the marketing of tobacco to minors or the need to accommodate the general protections offered by airbags to the particular risks they present for sub-groups exposed to them. One can imagine, too, that the agencies, though observing the public formalities of responsibility for these rulemakings, understand them as the President's in a fairly strong sense.

While each of the last six Presidents has taken a strong interest in the rules generated by the agencies of his administration, the proprietary interest in particular outcomes that President Clinton has taken in public political actions appears to be a new phenomenon. He has made these "his" proceedings in the public eye, if not in formal documentary status, in ways I believe prior Presidents have not. We seem to have come a long way from Justice Black's observation for the Court in *Youngstown Sheet & Tube Co. v. Sawyer* that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."¹² The question to which this essay is addressed is whether we have, in this emerging practice, any cause for concern.

Doubtless, the President's willingness to take political responsibility, even for generally popular rulemaking initiatives, reflects our growing awareness and acceptance that rulemaking is not simply a technocratic process performed in neutrality by objective experts; rulemaking has a distinctly political cast, and that may make the President's actions seem even comforting. Yet, in my judgment, a simple dichotomy between law and politics is a false one. What characterizes government in these respects is a tension between the legal and the

11. See, e.g., Federal Motor Vehicle Safety Standards, 62 Fed. Reg. at 30,464; Federal Motor Vehicle Safety Standards, 62 Fed. Reg. at 26,425.

12. 343 U.S. 579, 587 (1952).

political. This tension is one on the maintenance of which our political society depends—and one which a strongly political, presidentially centered view of rulemaking threatens to erode. The President's practice, in my judgment, insufficiently respects the tension inherent in the Constitution between Congress's power to create the instruments of government and allocate authority among them and the fact of a single chief executive at the head of the agencies thus created, with intended and inevitable political relationships with all.

I. POLITICS AND ADMINISTRATION

Perhaps the initial point is to remark that the developments just described are not isolated. Rather they are part of what appears to be a larger political—and perhaps intellectual—development in relation to regulation, one that replaces a view of regulators as experts acting in isolation from politics with one that acknowledges the politicality of most if not all administrative policy choices. The emergence of rulemaking as a major instrument of policy formulation with the environmental, health, and safety regimes of the 1960s and 1970s doubtless helped fuel this change. As far back as John Quarles' *Cleaning Up America*¹³ and the very earliest developments of environmental impact statements, cost impact statements, and the like, the White House had come to be deeply involved in important rulemakings. Many administrative law scholars, perhaps most of us, saw in this increasing presidential engagement a good thing. We applauded sixteen years ago, when Judge Patricia Wald's influential and justly admired *Sierra Club v. Costle* saw the possibility that presidential influence may have shaped agency judgment in rulemaking, within the possibilities open on the agency record, as an acceptable, even desirable, element of the rulemaking process.¹⁴ References to presidential responsibility in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹⁵ seemed equally sensible and reassuring.¹⁶ The President could be accountable to the people, and the agencies, through

13. JOHN QUARLES, *CLEANING UP AMERICA: AN INSIDER'S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY* (1976).

14. See 657 F.2d 298, 404-08 (D.C. Cir. 1981).

15. See 467 U.S. 837, 864-66 (1984).

16. For suggestions that it may even be constitutionally compelled, see Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *STAN. L. REV.* 395 (1995), and Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 *GEO. L.J.* 2225 (1997); acknowledging the development, Cynthia R. Farina has sounded a more skeptical note in *The "Chief Executive" and the Quiet Constitutional Revolution*, 49 *ADMIN. L. REV.* 179, 185 (1997), and *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 *COLUM. L. REV.* 452 (1989).

him, could be held accountable for policy judgments in ways that the courts simply could not. The cost-benefit analysis requirements begun in the early 1970s made their way through Executive Orders 12,044¹⁷ and 12,291¹⁸ to 12,866¹⁹ with general approval—thought legally unobjectionable and politically tolerated even under the conditions of divided government that have generally prevailed during their implementation.

Nor has only the President turned in this direction. Beginning with the rapid growth and then failure in its use of the legislative veto, Congress has with some consistency sought more active engagement in agency policy formation. Congressional staff and oversight hours kept pace with the explosion of Federal Register pages that the new emphasis on rulemaking brought.²⁰ Now, with the enactment of Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”),²¹ every agency rule is to be laid before Congress for possible enactment of a joint resolution of disapproval—a requirement imposed on the clear understanding that it will arm political engagement by the Congress in rulemaking development, as agencies seek to avoid the possible entanglements and frustrations of the resolution-of-disapproval process.²²

The changing intellectual view has been interestingly sketched by Professor Lawrence Lessig, drawing for these purposes on dicta in an opinion Justice Antonin Scalia wrote while still sitting as a judge on the District of Columbia Circuit.²³ At the beginning of this century, Lessig recounts, “a growing adherence to scientism and professionalism in administrative law”²⁴ produced the belief that “much of the ‘political’ in administration could be removed and replaced by a nonpolitical, expert-based bureaucracy, thereby improving the activist

17. Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978).

18. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981).

19. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993), reprinted in 5 U.S.C. § 601 note (1994).

20. From 1961 to 1981, Federal Register pages rose from 15,000 to 65,000, congressional committee staff from under 1000 to 2500, and the number of oversight days quadrupled, to about 500. See PETER L. STRAUSS ET AL., GELLHORN & BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS 196-97 (9th ed. 1995) (reprinting tables from JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (1990)).

21. Pub. L. No. 104-121, tit. II, subtit. E, §§ 251-53, 110 Stat. 847, 868-74 (to be codified at 5 U.S.C. § 801-08).

22. A joint resolution, which must be signed by the President or enacted over his veto, does not present the immediate constitutional problems of the legislative veto, although the SBREFA’s mechanisms can be questioned in some of its details. See Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 104-06 (1997).

23. See Lessig, *supra* note 16, at 433-34.

24. *Id.* at 433.

regulatory state. If political scientists could replace politicians, the thought went, truth could guide administration."²⁵ This was the idea, he argues, that underlay the Supreme Court's holding in *Humphrey's Executor v. United States*²⁶ that Congress could constitutionally limit the President's right to remove an FTC Commissioner to "cause."

The Court viewed Humphrey as an 'expert' exercising a technical, rather than political, expertise. As an administrative officer, Humphrey's job was to obey the law, not the president. It followed that the president had no constitutional right to control Humphrey in his duties insofar as those duties related to the policies of the [Federal Trade Commission ("FTC")]. The statute, not the president, determined FTC policy.²⁷

But for contemporary observers, Lessig suggests beginning with a quote from then-Judge Scalia, faith in scientific administration has eroded:

It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely "independent" regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the committees of Congress to which they are then immediately accountable; or, indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process.

What Justice Scalia remarks here is a view about the very nature of executive lawmaking At its core, the argument is that administrative action . . . cannot be understood in the neutral, scientific, apolitical sense in which it was understood by the founders of the administrative state. It is instead now seen by all to be essentially 'political'—involving an essentially 'political choice.'²⁸

25. *Id.* (with a footnote after "regulatory state" as follows: "See, e.g., FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT* (1900); see also Robert E. Cushman, Book Review, 24 *AM. POL. SCI. REV.* 746 (1930); Ernest Freund, Book Review, 1 *AM. POL. SCI. REV.* 136 (1906) (reviewing *POLITICS AND ADMINISTRATION*)."). See also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1 (1994).

26. 295 U.S. 602 (1935).

27. Lessig, *supra* note 16, at 434 (with a footnote after "political expertise" that quotes *Humphrey's Executor*:

Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.

295 U.S. at 625-26).

28. *Id.* at 435 (quoting *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C.) (per curiam), *aff'd sub nom.* *Bowsher v. Synar*, 478 U.S. 714 (1986)). Another compelling contempo-

The premise of Justice Scalia's view, note, is that administrative action is either the one or the other—either the product of scientific policymaking, or the product of politics, and not the product of uneasy and shifting tensions between the two. If that is right, then the President's appropriation of these important rulemakings in the public's eye is, at least from this perspective, unproblematic; it is simply a further manifestation, like the SBREFA, of our growing appreciation of rulemaking's political character. Yet, still another Supreme Court justice, also speaking while a circuit court judge, has eloquently argued the claims of science and objectivity in recent years.²⁹ One can believe, moreover, that the appearance and eventual acceptance of the "scientism and professionalism" view towards the end of the last century was not wholly independent of the politics of its times; the Civil Service as well as the "independent regulatory commission" emerged alongside progressivism, during years when concerns with political corruption and machine politics gripped the nation, and such institutions seemed a useful palliative. In truth, the science/politics duality is only one of a number of "false pairs" one could identify, that appear to suggest the possibility, if not the preferability, of a middle course.

A. *POLITICS/politics*

Our daily newspapers confront us repeatedly with evidence that political controls still embody the potential for corruption—or its appearance, that provoked our search for alternatives—and that this potential still drives the relationship between politicians and regulators. Take, for example, President Clinton's press conference of January 28, 1997.³⁰ A principal subject of inquiry there was the presence of the Comptroller of the Currency, responsible for bank regulation, at a political fundraiser also attended by banking officials, the President, and the Comptroller's immediate superior, the Secretary of the Treasury.³¹ Questioning turned to the appropriateness of their having coffee at the White House with persons who were both generous political donors and the subjects of banking regulation.³² For the President, it was obvious that he could be at that coffee, and also that the Secretary of Treasury could. Fund-raising is a fact of political life, for executive

rary view of this development is to be found in JERRY L. MASHAW, *GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1997).

29. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993).

30. The President's News Conference, 33 WEEKLY COMP. PRES. DOC. 99 (Jan. 28, 1997).

31. See *id.*

32. See *id.*

branch as well as for legislative officials, and no one could think that the President's act of meeting with important political donors could be understood only as a form of corruption. (Well, one could think it, but we forbid only the fact of bribery and—however we may feel about it—not the business of raising political funds.) It was, however, the President admitted, a mistake for the Comptroller, the regulatory official, to be present.³³ That mistake at first seemed likely to cost the person who made it a promotion to cabinet status³⁴—perhaps for narrowly partisan reasons, but also with some grounding in established expectations about official conduct.

The distinction, and the loss of face that turned on it, is credible *only* if the duties and prerogatives of the two officials are different—that is, if there are duties unique to the Comptroller, in which the President does not share, and that must be kept apart from party political interests. This is different from the question of tenure in office and irrespective of the President's formal control over the length of an official's service. The Comptroller serves at the President's pleasure.³⁵ If that means that the Comptroller takes no decision save as

33. *See id.*

34. On February 20, 1997, the President stated:

The only other comment I want to make today is there has still not been a hearing scheduled for Alexis Herman. I think that is a big mistake. She enjoys wide support among labor—the labor unions endorsed her yesterday strongly—and she has wide support among business. I don't know that there's ever been a person nominated for Secretary of Labor that had as much broad support in the business and the labor communities. She's clearly well-qualified. If anybody wants to vote against her for whatever reason, they're plainly free to do that, but she deserves a hearing, and if she gets a hearing, she's going to be confirmed. And I think Senator Jeffords is a good man and a fair man, and I believe he will give her a hearing. But it's imperative that it be done. It's now midway through February and I think it's time to get on with this.

Remarks on Medicaid Patient Protection and an Exchange with Reporters, 33 WEEKLY COMP. PRES. DOC. 218, 220 (Feb. 20, 1997). Ironically, these remarks were made at the end of a press briefing called principally for a purpose like those discussed in the text, the President announcing that he had:

direct[ed] Secretary Shalala to inform all state Medicaid directors that it's illegal for health care plans to prohibit doctors from discussing any treatment options with their patients. Families facing illness simply should not have to worry that the doctor they trust does not have the freedom to tell them what they need to know. Patients have the fundamental right to know they are getting the best medical treatment, not simply the cheapest. And this must be only the beginning. We can act today to protect Medicare and Medicaid beneficiaries because they are Federal programs and because Government is the largest purchaser of managed care in our Nation. But to protect 130 million Americans enrolled in managed care throughout the private sector, the Congress must act.

Id. at 218-19. Once again, that is, the President had presented himself as the responsible rulemaker.

Ms. Herman was finally confirmed in May, 1997. *See* Jerry Gray, *After Impasse, Senate Conforms Clinton's Choice for Labor Post*, N.Y. TIMES, May 1, 1997, at A1, available in LEXIS, News Library, NYT File.

35. *See* 12 U.S.C. § 2 (1994).

the President's proxy, that the President's political responsibilities require the conclusion that he must be able to substitute his judgment for the Comptroller's as to any matter, the distinction being drawn is a senseless one. It has substance only if we imagine that the Comptroller has independent (regulatory) duties, conferred by Congress, that are inconsistent with political roles in ways the President's functions or the functions of a cabinet Secretary are not. That means that it is the Comptroller's right, and in some cases it may be his obligation, to refuse the President's direction, even if he realizes that his disappointed boss may immediately send him out of office. Should the President decide to do so, and it is hardly inevitable that he will, he will have to pay a political price for the confrontation. That is, in the view of the public that might exact that political price, he is not entitled simply to substitute his preference, or to pretend to the Comptroller that he has the right to do so. If they both understand that, it shapes the character of the transactions between them.³⁶

The distinction here may seem an ineffable one, but it is at the heart of our understandings about the borderline between law and politics, and it was at the heart of one of the great political crises of this century.³⁷ When Richard Nixon grew displeased with the direction Archibald Cox's Watergate investigation was taking, he did not act as if he could himself dismiss that important federal official. He did not so act even though the issue arose before enactment of the Independent Counsel statute³⁸ that the incident catalyzed. (Mr. Cox was simply an officer of the Department of Justice, whose tenure and responsibilities were fixed not by a statute but by a departmental regulation.³⁹) Rather, he asked his Attorney General to fire Cox. Were the Attorney General merely the mouthpiece of the President, with no independent duties of his own—had he seen himself in this way—it is hard to imagine that what we know to have happened would have happened. Not one but two persons acting as Attorney General refused to take the action the President sought. To be sure, they re-

36. Both the long-standing character of congressional arrangements seeking relative independence for officials concerned with the money supply and the legal and policy justifications for those arrangements are well developed in Lessig & Sunstein, *supra* note 25, at 27-31, 78, 107.

37. For an account of the events of the Watergate Saturday Night Massacre, see JAMES DOYLE, *NOT ABOVE THE LAW: THE BATTLE OF WATERGATE PROSECUTORS COX AND JAWORSKI* 186-202 (1977).

38. Pub. L. No. 95-521, 92 Stat. 1867 (1978) (codified as amended at 28 U.S.C. §§ 591-99 (1994)).

39. See *United States v. Nixon*, 418 U.S. 683, 694 (1974); Office of Watergate Special Prosecution Force, 38 Fed. Reg. 32,805 (1973); Establishing the Office of Watergate Special Prosecution Force, 38 Fed. Reg. 30,738 (1973).

signed; the President eventually found an acting Attorney General who would take the requested step.⁴⁰ The distinction was nonetheless made and enforced, and it had an inescapably tangible influence. Whether we consider events attending the dismissal of Archibald Cox to have reflected the President's right to fire a cabinet officer at will, or as the embodiment of a cabinet officer's moral obligation to resign when he cannot act as the President wishes, we can see what they do not reflect. They are sharply inconsistent with the proposition that the President's sole possession of constitutional "executive power" means that any responsibility assigned to an executive department is his, and that he may exercise it. Had Attorney General Richardson or Acting Attorney General Ruckleshaus believed that to have been the legal situation, their situation would have been much easier. It is far easier to act as a servant, than as an independent authority under instructions from one's principal.

Yet the issues in the Saturday Night Massacre or the independent counsel statute involve executive action simpliciter, the setting in which the argument from the President's political responsibility to his authority to act directly is the strongest. The same understanding has figured, as well, in discussions of presidential interventions in rulemaking. Thus, in applauding the possibility of presidential political oversight of rulemaking in her influential *Sierra Club* opinion, Judge Wald sounded one note of caution: that the facts before her made it unnecessary to decide the effect upon a rulemaking "of a failure to disclose so-called 'conduit' communications, in which administration or inter-agency contacts serve as mere conduits for private parties in order to get the latter's off-the-record views into the proceeding."⁴¹ Department of Justice lawyers, she noted, had "taken the position that it may be improper for White House advisers to act as conduits for outsiders."⁴²

In the years following, constant struggles between the White House and Congress over the economic impact analysis procedure, and much of the literature following it,⁴³ followed the same line: The

40. Only, it seems important to stress, after the fact of two resignations had already made evident the terrible political price the President would pay for his action and after the number of departmental officials who might ever have been prepared to act as Attorney General in normal course, under the provisions made for succession to acting status, see 28 U.S.C. § 508 (1994), had been cut to one.

41. *Sierra Club v. Costle*, 657 F.2d 298, 405 n.520 (D.C. Cir. 1981).

42. *Id.*

43. See, e.g., Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995).

role of the Office of Information and Regulatory Affairs (“OIRA”) in rulemaking review was to be exercised in significant political isolation, with its professional staff protected from contact with political operatives and communications between it and the agencies subject to a degree of publicity quite unusual for White House communications as a whole. At the same time as we acknowledge the political characteristics of rulemaking and the values of political responsibility for its outcomes, we treat as the stuff of scandal and impropriety news that political operatives, congressional or executive, have been seeking favors for their friends. Public outcry over Political Action Committees and campaign contributions, over phone calls, coincidences, and pressures, walks hand in glove with general approval of policy oversight by Congress and President both.⁴⁴

B. DISCRETION/discretion

The issues under discussion here, in my judgment, turn importantly on our understanding of the idea of discretion, an idea that figures also in later papers. The contrast I want to draw is like the one Professor Rubin suggests between two sorts of discretion under law, which he characterizes as “weak” and “strong,” and a “super-strong” discretion that is beyond legal controls.⁴⁵ He appears to argue that super-strong discretion is illegitimate in our system. In my judgment that is true only within the policy-making bureaucracy of rulemaking and other ordinary administrative behavior, and the contrast underscores the difficulties of the strong presidency idea. The problem is set by a misleading dichotomy drawn by the great Chief Justice in *Marbury v. Madison*,⁴⁶ the foundation stone of so much of our constitutional jurisprudence.

In justifying the Court’s authority to command an executive branch officer to act in some settings, Chief Justice Marshall drew the ancient distinction between discretion and ministerial duty in these terms:

44. That the issue does not concern only the President, consider, for example, a news report of February 21, 1997, that the Republican National Committee had been promising significant contact with Members of Congress in return for \$25,000 contributions from corporate donors. See Peter Overby, *Political Double Standard, Morning Edition* (National Public Radio broadcast, Feb. 21, 1997), transcript available in LEXIS, News Library, NPR File (reporting on Congressional Republicans who criticize the Clinton administration for selling access to the White House, while themselves appearing to sell access to their own campaign contributors).

45. Edward L. Rubin, *Discretion and its Discontents*, 72 CHI.-KENT L. REV. 1299 (1997).

46. 5 U.S. (1 Cranch) 137 (1803).

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.⁴⁷

The striking characteristic of this passage is that, in distinguishing so sharply between the worlds of politics (discretion) and law, Chief Justice Marshall wholly omits the world of regulation. In the world of politics—the example given is that of the Secretary of State acting in foreign relations—the Secretary “is the mere organ by whom [the President’s] will is communicated,” and “nothing can be more perfectly clear than that [her] acts are *only* politically examinable.” In the contrasting world he imagines, the world of law, “the legislature” directs an officer “peremptorily to perform certain acts”—in the case before him to deliver a signed commission of office. Thus, it is the absence of any expectation of external legal controls that arms Justice

47. *Id.* at 165-66.

Marshall's *Marbury* distinction. As Henry Monaghan, among others, has pointed out, the idea of "discretion" in *Marbury* is different from the one we associate with the administrative state.⁴⁸ All of Justice Marshall's *Marbury* examples involved discretion as a *political question*, discretion the abuse of which is beyond judicial office to examine, "only politically examinable." Marshall's distinction, moreover, has the same sharp-edged, either/or characteristic as the earlier-quoted passage from Justice Scalia, discussed by Professor Lessig.⁴⁹

The clarity of this contrast tends to obscure the vast middle ground that is the home of administrative law and of the question under discussion here. Once we acknowledge the possibility of congressional delegation of, say, rulemaking authority to be exercised within bounds defined (however imperfectly) by law, we have placed ourselves into what is for these purposes a conundrum. In rulemaking or other exercises of delegated authority, we say that Congress has permissibly delegated authority to act, because we say that courts and others are in a position to tell whether or not the delegate has acted in accordance with law. We do not ask that of the Secretary of State's exercise of DISCRETION, which was Marshall's "political question" point; there, Professor Rubin's "superstrong" discretion lives.

Yet the exercise of administrative discretion we take as a different matter entirely. On the one hand, we accept the delegation because, we say, a court is able to say whether or not the agency has acted within its authority under the law; if we thought a court could *not* make that judgment, that there was no law to apply, we might quickly conclude that an improper delegation had occurred. In that respect, we can characterize the act of administering the law as, in a relevant sense, ministerial—not because one believes that there is no discretion in executing such a law, but rather because it is authority that *can* be placed in an agency ("minister"), and because Congress has provided instructions we accept as adequate to say whether the agency is acting lawfully or not. On the other hand, we have to acknowledge that the scope of this discretion may be very large—that the Court has disclaimed standards for assessing whether Congress has made the most

48. See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983); Lessig & Sunstein, *supra* note 25, at 55-61 (suggesting that, in constitutional contemplation, only certain types of departments—State, for example—were imagined as "political," and that it was this understanding on which Marshall was drawing).

49. See *supra* notes 25-28 and accompanying text.

important political decisions or not⁵⁰ and even in some sense celebrated the possibility that it will fail to do so.⁵¹ That is what arms the argument for political controls; as we see that in fact agencies are not simply “finding” the policy of the law in the statute, but to a significant degree “making” the policy of the law from their own views, then the need for presidential engagement becomes stronger.

The problem on the regulatory middle ground, then, is far more complex than Chief Justice Marshall’s contrast between setting foreign policy and delivering a signed piece of paper. In the context of agency rulemaking, the question whether Congress will have done enough to make an agency’s judgments “ministerial” (i.e., in these terms, acceptable if made by ministers rather than the President) is indistinguishable from the question whether Congress decided enough when it required the Occupational Safety and Health Administration (“OSHA”) to assure “to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if [regularly exposed to a toxic substance] for the period of his working life,” without setting a value on human life.⁵² Why the President can be kept from controlling the exercise of this discretion directly, as why the Comptroller ought not to have been at that reception, inheres in Congress’s power to set law for administration.

To put the issue in terms of the notorious puzzle set by §§ 701(a)(2)⁵³ and 706(2)(A)⁵⁴ of the Administrative Procedure Act: for the Secretary of State, judicial review of discretion is explicitly forbidden; for the rulemaker, judges are told to determine whether agency discretion has been abused. To conclude that the legality of a rulemaking in a given case was a “political question,” beyond reach of

50. See *Mistretta v. United States*, 488 U.S. 361, 393, 416 (1989) (majority and dissent).

51. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 864-66 (1984).

52. See § 6(b)(5) of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. § 655(b)(5) (1994) (containing quoted language); *Industrial Union Dep’t, AFL-CIO v. American Petroleum Inst. (Benzene)*, 448 U.S. 607 (1980) (interpreting § 6(b)(5) of OSH Act). In Justice Rehnquist’s concurring view, § 6(b)(5) constituted an unlawful delegation precisely because it failed adequately to instruct the Secretary of Labor how to calculate the need for action. See *Benzene*, 448 U.S. at 671-88.

53. “This chapter applies, according to the provisions thereof, except to the extent that . . . agency action is committed to agency discretion by law.” Administrative Procedure Act (“APA”), 5 U.S.C. § 701(a), (a)(2) (1994) (emphasis added).

54. “The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” APA, 5 U.S.C. § 706 (1994) (emphasis supplied).

the courts, would be to conclude (if rulemaking were involved) that an unlawful delegation had taken place.⁵⁵

C. TYRANT/clerk

Another way to see this issue, in my judgment, is to understand the ambivalence of Article II about the President's authority, and the reasons for it so well captured by Edward Corwin:

Suppose . . . that the law casts a duty upon a subordinate executive agency *eo nomine*, does the President thereupon become entitled, by virtue of his "executive power" or of his duty to "take care that the laws be faithfully executed," to substitute his judgment for that of the agency regarding the discharge of such duty? An unqualified answer to this question would invite startling results. An affirmative answer would make all questions of law enforcement questions of discretion, the discretion moreover of an independent and legally uncontrollable branch of the government. By the same token, it would render it impossible for Congress, notwithstanding its broad powers under the "necessary and proper" clause, to leave anything to the specially trained judgment of a subordinate executive official with any assurance that his discretion would not be perverted to political ends for the advantage of the administration in power. At the same time, a flatly negative answer would hold out consequences equally unwelcome. It would, as Attorney General Cushing quaintly phrased it, leave it open to Congress so to divide and transfer "the executive power" by statute as to change the government "into a parliamentary despotism like that of Venezuela or Great Britain with a *nominal* executive chief or president, who, however, would remain without a shred of actual power."⁵⁶

The words of Article II of the Constitution reflect the same ambivalence and tension; we have opted for neither a tyrant nor a clerk, and the tension in our choice is captured in the idea of a single President, whose role in relation to domestic government, however, Congress may confine to oversight. On the one hand, as those supporting the idea of a strong, unitary presidency often remark, Article II begins by vesting "[t]he executive Power . . . in a President of the United States."⁵⁷ "[T]his does not mean *some of* the executive power, but *all of* the executive power."⁵⁸ On the other, it refers to "Duties" imposed

55. The statement in the text concerns grants of rulemaking authority; executive authority to choose priorities for action or to exercise management controls over the business of U.S. federal government raise different issues. See, e.g., *Lincoln v. Vigil*, 508 U.S. 182 (1993); *Webster v. Doe*, 486 U.S. 592 (1988); *Heckler v. Chaney*, 470 U.S. 821 (1985).

56. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 80-81 (4th rev. ed. 1957).

57. U.S. CONST. art. II, § 1, cl. 1.

58. *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

on “the principal Officer[s] in each of the executive Departments.”⁵⁹ It says of the President in relation to those officials only that he may appoint them and demand of them their “Opinion[s], in writing” on the matters for which they are made responsible.⁶⁰ Moreover, by making those appointments turn on the Senate’s Advice and Consent, it creates the likelihood that those Officers will feel some political responsibility to Congress, and will be nominated with a view to the Senate’s likely view of the qualities needed to carry out the particular duties of their offices.⁶¹ Finally, rather than directing the President (himself) faithfully to execute the laws, it says that “he shall take Care that the Laws *be* faithfully executed”⁶²—as if to say, executed by those in whom the Senate, as well as he, has expressed its confidence.⁶³ Just how our government should be organized below the level of Congress, President, and Court was explicitly left in Congress’s hands, under a Necessary and Proper Clause whose diction, perhaps carelessly but nonetheless tellingly, imagines “Powers vested by this Constitution . . . in any Department or Officer.”⁶⁴ In more than two hundred years, just about the only proposition we know to have been clearly established about the President’s power in domestic governance—and that by only a single vote in the Senate⁶⁵ and two in the Court⁶⁶—is that the Congress cannot reserve for itself participation in the discharge of an Officer of the United States.⁶⁷

59. U.S. CONST. art. II, § 2, cl. 1.

60. *Id.*

61. See *Morrison*, 487 U.S. at 705. This responsibility is revealed sometimes dramatically, as in the promise made by Elliot L. Richardson when confirmed as Attorney General that he would appoint a special prosecutor to investigate President Nixon, see *Nomination of Elliot L. Richardson to be Attorney General*, 93d Cong. 143-44 (1973), and sometimes contextually as in the undertakings about environmental law administration clearly understood when William Ruckelshaus, a person with established environmentalist credentials, succeeded Anne Gorsuch Burford as President Reagan’s second administrator of the EPA. See Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 40 n.205 (1994); see also, Seth Schiesel, *At F.C.C. Confirmation Hearings, Emphasis Will Be on Competition*, N.Y. TIMES, Sept. 29, 1997, at D1, available in LEXIS, News Library, NYT File (describing compromises made between the White House and the Senate prior to confirmation hearings for nominees to the Federal Communications Commission).

62. U.S. CONST. art. II, § 3, cl. 1 (emphasis added).

63. Cf. Lessig & Sunstein, *supra* note 25, at 61-70.

64. U.S. CONST. art. I, § 8, cl. 18.

65. See Lessig & Sunstein, *supra* note 25, at 84 n.334 (on the Senate’s attempted impeachment of Andrew Johnson for having removed the Secretary of War despite the Tenure of Office Act).

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

67. See *id.* at 174-76. This is not the place to revisit the extended debate about “for cause” removal, that seems to have been settled for the time being by the Court’s decision in *Morrison v. Olson*, 487 U.S. 654 (1988). If one supposes, however, as I do, that “for cause” must include discipline for insubordination, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 614-15 (1984), one quickly enough

II. DELEGATION AND THE PRESIDENT

It is at this point that we return to the question of regarding delegations of rulemaking authority to regulatory agencies as though they were delegations to the President. Rulemaking by the Executive Branch and by the independent regulatory agencies (imagining for the moment that they are somehow apart from the Executive Branch although responsible for the execution of a number of important statutory regimes)⁶⁸ is deeply embedded in our working Constitution. We have not doubted that executive officials can be lawmakers, in the strongest sense, at least since 1905, when the Court in *United States v. Grimaud* upheld the Secretary of Agriculture's enforcement of a rule making it an offense to graze sheep in national forests without a permit.⁶⁹ The Secretary had adopted the rule under broad authority to make rules providing for the management of public lands.⁷⁰ We have reached similar conclusions whether rulemakers have been independent agencies or (as for the Comptroller or the Secretary of Agriculture in *Grimaud*) executive officials simpliciter. They may act as rulemakers precisely because courts are able to say that their discretion—to make rules or to perform any other executive function—is exercised within a framework of law.

For the President, the rulemaking picture has been a good deal more clouded. Among the more prominent early vindications of congressional delegation were several involving delegations to the President *in propria persona*.⁷¹ These were, however, grants of authority to take expedient actions touching on foreign relations concerns—to deal with retaliatory tariffs, and the like. In approving them, the Court satisfied itself with the formal observations that the President was doing no more than declaring a contingency defined by Congress,⁷² or that he was acting within a relatively limited framework of defined authority.⁷³ While no realist could deny that the effect of the

sees how its invocation triggers both political and legal processes that will constrain presidential action. He must articulate a reason. That process may be subject to judicial review, in itself. And in any event it will arm a political process, both the public reaction to the dismissal and the need to obtain Senate approval of a replacement. Thus, again, one sees how the very fact of imagining duty and oversight as separate works to tame the politicality of administration. Cf. Lessig & Sunstein, *supra* note 25, at 110-113.

68. See Strauss, *supra* note 67.

69. 220 U.S. 506, 521 (1911).

70. See *id.*

71. See, e.g., *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928); *Field v. Clark*, 143 U.S. 649 (1892); *The Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813).

72. See *Field*, 143 U.S. 649 (retaliatory tariffs); *The Brig Aurora*, 11 U.S. 382 (neutrality).

73. See *Hampton & Co.*, 276 U.S. 394 (variation of tariffs).

Presidential actions thus authorized was indistinguishable from legislation in either the generality of its effect or the character of the judgments made, we can see today that the very involvement of delicate considerations of foreign relations, with trade wars or worse hanging in the balance, brought their subject matter near to the President's DISCRETION—and that could explain the Court's easy acceptance of them. The setting is one demanding prompt and nuanced response by one who can act *for the nation* in the international sphere. Today, certainly, we imagine an inherent arena for presidential action—more discretion and less structure provided by “law”—where such issues are concerned.

The two cases in which the Court most prominently invoked the delegation doctrine to defeat congressional legislation, however, each also involved presidential action.⁷⁴ On at least two subsequent occasions, where the President himself had undertaken to make “law” bearing on a dispute before the Court, the Court expressed in strong terms its doubt of his authority to do so—first, in *Youngstown Sheet & Tube Co. v. Sawyer* where the majority emphatically observed that, “[i]n the framework of our Constitution, the President's power to see that the laws are faithfully enforced refutes the idea that he is to be a lawmaker”;⁷⁵ and again several decades later, in *Chrysler Corp. v. Brown*, where in the face of a well-established regime established under Executive Order to regulate defense contracting, the Court observed that rules must be the “the product of a congressional grant of legislative authority.”⁷⁶ Even if these observations do not preclude Presidential rulemaking under a discrete and pointed conferral of authority upon him directly, they do insist that the source of his authority must be in the law.⁷⁷ The Court's decision last term in *Loving v. United States*,⁷⁸ announced after this Symposium was held, well fits this pattern. Rulemaking authority was directly conferred and supported by the President's constitutional responsibilities as Commander in Chief.⁷⁹

74. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

75. 343 U.S. 579, 587 (1952).

76. 441 U.S. 281, 302-04 (1979); see also *Chamber of Commerce v. Reich*, 74 F.3d 1322, *reh'g and reh'g en banc denied*, 83 F.3d 439 (D.C. Cir. 1996).

77. See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993).

78. 116 S. Ct. 1737 (1996).

79. See *id.* at 1751.

A particularly thoughtful approach to this issue appears in Todd Rakoff's persuasive analysis of *Schechter Poultry*,⁸⁰ the Supreme Court's least problematic invocation of the delegation doctrine.⁸¹ What distinguishes that delegation from most the Court approved, before and after, Rakoff argues, is the fact that it had been made, in effect, to the President, and that it swept across the whole range of regulation.⁸²

The central focus of this argument is on the element of assuring the legality of governmental behavior and the dispersal of power—the only aspects of the delegation idea that courts have shown any disposition to address. From the perspective simply of political responsibility, which is also a concern of the delegation idea, the President appears to be a superior rulemaker to an agency, because he can be held directly accountable at the polls. Placing sweeping [quasi-]legislative authority in the hands of an actor himself at the apex of governmental authority, however, raises considerations quite distinct from those we face when an agency is empowered to act in a limited frame of government, and in relation with not only the President but also Congress and the courts. The President as lawmaker is more hazardous than the Environmental Protection Agency (“EPA”) as lawmaker, precisely because he is omnicompetent, remote from effective check by courts or even Congress. The embeddedness of the EPA, its focus and its relations with multiple, organizationally superior overseers, gives us the practical assurance that it will not run out of control. Dispersion of power, on Rakoff's argument, is the trumping consideration. The agency's rulemaking is preferred (indeed, tolerated) despite its diminished political responsibility just because it is *not* omnicompetent, because it exists embedded in relationships with Congress and the courts as well as the White House. Legislative authority is assigned to the Congress. Indeed, when we think about the “agency” of agencies in rulemaking, we instinctively refer that relationship to Congress—they are *congressional* delegates—tending to obscure from ourselves that they actually exist in a subordinate relationship to *all three* branches of our government. That is the proposition that cannot easily be advanced about the President. That we cannot easily make it is what makes his participation as a rulemaker disturbing.

80. 295 U.S. 495 (1935).

81. See Todd D. Rakoff, *The Shape of Law in the American Administrative State*, 11 TEL AVIV U. STUD. IN L. 9 (1992).

82. See *id.* at 22-23.

CONCLUSION

Hence, my conclusion is that the President is simply in error and deserves the democracy he leads when he behaves as if rulemakings were *his* rulemakings. The delegations of authority that permit rulemaking are ordinarily made to others, not him—to agency heads whose limited field of action and embeddedness in a multi-voiced framework of legislature, President, and court are the very tokens of their acceptability in a culture of law. Where Congress has placed the statutory duty in the Administrator of the EPA, or the Secretary of Labor, one could say it has delegated rulemaking power to the President only if that were the necessary constitutional consequence of its choice. That proposition does not live in the cases or in the Constitution's ambiguous text. In the text both of the Constitution and of Congress's statutes, it is the heads of departments who have legal duties vis à vis regulatory law. The President can ask about those duties and see that they are faithfully performed, but he and his department heads are to understand that the duties themselves are theirs—if not “ministerial,” in Marshall's sense, they are emphatically not matters “only politically examinable.” Indeed, even the President's political controls will be shaped by that allocation of duty, and by his consequent knowledge that however free he may seem to be to remove an incumbent and appoint a substitute officer more willing to do his bidding, that result will turn on his ability to get his new nominee confirmed.

The President's public behavior suggesting that agency rules are his rules threatens to make us forget just this middle ground. It invites us to give up the constraints of law in favor of those of politics. While, from a political perspective, one can applaud a President who goes out of his way to take responsibility as well as credit for the policy judgments of his administration, this seems a high price to pay. To be sure, agency process, perhaps particularly rulemaking process, is increasingly seen as political rather than expert; that perception, in its way, has animated the recent apparent revival of interest in “delegation,” and other respects in which *political* elements of the Constitution's structural arrangements have become prominent.⁸³ And for those to whom the Constitution itself requires that any power granted by Congress to the Executive branch be directly exercisable by the President

83. See, e.g., *Freytag v. Commissioner*, 501 U.S. 868 (1991) (turning on an understanding of the political controls implicit in the Constitution's arrangements respecting the power of appointment to federal office).

himself,⁸⁴ direct presidential rulemaking may seem even a constitutional necessity. Yet, as seen, the text of the Constitution settles no more than that the President is to be the *overseer* of executive government, and—as Corwin’s account⁸⁵ and the struggles over even the milder presidential roles staked out to date must suggest—the contours and extent of present-day government make a stronger reading unacceptably hazardous to the public health. If we accept that rulemaking is irreducibly political in some respects, we imagine components of expertise as well; otherwise we would not be fighting as hard as we do over proper elements of risk analysis—the best means for identifying and managing uncertainties about complex technical facts, and so forth. The issue is mediating between politics and law—recognizing the strengths and weaknesses of each and finding ways of promoting their proper contribution—rather than pretending to locate the practice at either pole.

One kind of presidential response, perhaps implicit in paper trails that track the laws’ assignments of responsibility, is that, in acting as he has been, President Clinton has in fact not been displacing the apparatus of government but simply voicing its results—that of course an air bags rule will be the product of the informed analysis of the NHTSA’s staff or a tobacco rule of the FDA’s—but that in associating himself with these outcomes he simply acknowledges the responsibility the people would hold him to in any event. These are *his* bureaucrats, and it is politically useful to both government morale and citizen appreciation for the President to associate himself with regulatory outcomes in this way. Yet this argument, in my judgment, really does put us into the thick of the law/politics problem. It 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. It is Congress that gets to say how many people work in the White House, how many in the Department of Labor, how many in political offices, how many in the Senior Executive Service. In the current brouhaha about political fund-raising and

84. See, e.g., Gary Lawson, *Changing Images of the State: The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Steven G. Calabresi and Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

85. See *supra* note 56 and accompanying text.

use of the White House, we see both the importance of formal lines (i.e., the proposition that the White House may not be used as the site of political fund-raising) and the erosive effects of their repeated testing. The lines that are the focus of this commentary are of equal, and not unrelated, consequence.

This is, of course, a formal argument. It accepts the variety of political ways in which the President and those immediately around him chivvy in rulemaking, from the formal apparatus of Executive Order 12,866 to the informal checking and massaging that inevitably occur. The President in this respect is not too different from individual members of Congress and committees who may equally attempt to impress on administrative actors their views and the importance of respecting them in their discretionary activities. He is, to be sure, our chief executive, the one our Constitution has invested with executive power; but he wields that power, in these respects, within the constraints of law that Congress has established. No more than he could assign to the Secretary of the Interior responsibilities Congress had placed in the hands of the Secretary of Agriculture but he thought could be more capably met on F Street, can he depart from Congress's other assignments of responsibility. The bureaucrat or political appointee confronted by presidential chivvying can perhaps more easily see in this perspective the tension between duty and advice, grasp the limits on the President's capacity to understand and act on what may be quite complex technical matters with a sparse and largely political staff. 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.