

Volume 65 | Issue 4

2015

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Recommended Citation

Peter L. Strauss, *The President and the Constitution*, 65 Case W. Res. L. Rev. 1151 (2015)

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THE PRESIDENT AND THE CONSTITUTION

Peter L. Strauss[†]

That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety. . . . The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand. . . . With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.¹

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In the immediate wake of the November 2014 by-elections, the *New York Times* quoted an e-mail characterizing their results as “the final chapter in making the president small.”² As a political assessment, perhaps, but the results leave President Obama in precisely the position

† Betts Professor of Law, Columbia University Law School. Thanks to my Columbia colleagues at a faculty paper workshop and to the participants in this Case Western Reserve Law Review symposium for stimulating interventions and suggestions, and especially to Harold Bruff.

1. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634, 640, 655 (1952) (Jackson, J., concurring).

2. The whole of the quotation makes its focus on politics, not power, clear:
 Bi-election year 2014 was the final chapter in making the president small. The immediate aftermath of 2008 was that Americans had finally conquered their racial aversions. The election of Barack Obama was a victory both for renewed national hope and long-awaited democracy. Obama was big, a star, a voice to be reckoned with, a mind to be taken seriously.

By 2014 Obama was small, a punching bag, easily bullied, the one to whom small politicians could talk tough, abusively, the one whose ideas were ignored, the one whom his fellow partisans would come to avoid at all cost. How could this happen in six short years?

Thomas B. Edsall, Op-Ed., *Making the President Small*, N.Y. TIMES, Nov. 5, 2014, <http://www.nytimes.com/2014/11/05/opinion/making-the-president-small.html> (quoting David Leege, Professor of Political Science Emeritus at Notre Dame University).

George Bush occupied following the by-election of 2006, and President Bush's actions in the following two years hardly suggest presidential shrinkage. January 10 saw his initiation of a troop surge in Iran, 20,000 additional American military committed to that campaign, while the war in Afghanistan continued unabated. Eight days later, on the day before the new Congress convened, he published an executive order amending Executive Order 12,866.³ Executive Order 12,866 is the executive order under which, since the Clinton administration, the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA) had been supervising agency analyses of important proposed regulations' expected impacts, costs, and benefits.⁴ President Clinton's order had required each agency to appoint an internal Regulatory Policy Officer (RPO) to coordinate interactions with OIRA. But the agency head, not the RPO, was to take personal responsibility for agency rulemaking.⁵ The agency head appointed the RPO, and the order required that the RPO report to her.⁶ The new Bush amendments deleted both "report to the agency head" and the agency head's need personally to approve rulemaking activity; now, instead, RPOs must be presidential appointees—that is, formally answerable to him—and "[u]nless specifically authorized by the head of the agency, no rulemaking shall commence nor be included on the Plan" without the RPO's approval.⁷ The White House had effectively wrested control over agency rulemaking from the hands into which Congress had placed it.⁸ The following two years were marked by continuing perceptions that White House politics were distorting or suppressing regulators' scientific judgments; in one example Professor Heidi

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3. Exec. Order No. 13,422, 3 C.F.R. 191 (2008).
 4. Exec. Order No. 12,866, 3 C.F.R. 638 (1994). Subsequent amendments by the Bush administration, notably those of Exec. Order No. 13,422, were quickly repealed by the Obama Administration on taking office. Exec. Order No. 13,497, 3 C.F.R. 218 (2010), restoring Exec. Order No. 12,866 to its original form. A subsequent Obama Executive Order, Exec. Order No. 13,563, 3 C.F.R. 215 (2012), supplemented its terms in various ways, addressing new forms of analysis, requiring development of plans for retrospective review of existing regulations, and encouraging (but not mandating) compliance by independent regulatory commissions.
 5. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).
 6. *Id.*
 7. Exec. Order No. 13,422, 3 C.F.R. 191 (2008).
 8. A markup showing Exec. Order No. 12,866 as amended by the Bush administration can be found in PETER L. STRAUSS, TODD D. RAKOFF, CYNTHIA R. FARINA & GILLIAN E. METZGER, GELHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 164–78 (rev. 10th ed. Supp. 2007). For a discussion of these changes and reactions to them, see *id.* at 7–9.

Kitrosser notes in the new book that is one subject of this essay,⁹ President Bush's OIRA suppressed greenhouse gas rulemaking, simply by refusing to receive the extensive scientific analysis and regulatory proposals the Environmental Protection Agency (EPA) had developed in the wake of the Supreme Court's decision in *Massachusetts v. EPA*.¹⁰

Perceptions of President Bush's politicization of administrative processes helped fuel President Obama's successful first campaign. Restoring the integrity of government science was among his first promises to the American people on assuming office.¹¹ Yet similar uses of White House offices to suppress regulatory efforts in the service of political ends marked the run-up to his reelection in 2012¹² and perhaps the 2014 by-elections as well. President Obama's efforts to act on his own in the face of a dysfunctional Congress have been widely remarked upon,¹³ and he used his first press conference following the 2014 by-elections to make clear that he expected to continue efforts to govern with the authority he has.¹⁴ With loss of control over the Senate as well as the House, the coming two years seem likely to see for him, as they did for Presidents Clinton and Bush, further steps toward tight political control of government regulatory effort.

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9. HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION 184–85 (2015) (citing Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 608–09 (2008)). Chapter 8 of her book, as this article from which it was adapted, recounts numerous similar instances.
 10. 549 U.S. 497 (2007).
 11. Press Release, President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies: Scientific Integrity (Mar. 9, 2009), available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/; see also Peter L. Strauss, *Possible Controls over the Bending of Regulatory Science*, in VALUES IN GLOBAL ADMINISTRATIVE LAW 125 (Gordon Anthony et al. eds., 2011).
 12. See CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS, ADMIN. CONFERENCE OF THE U.S., 39–42 (Dec. 2, 2013), <https://www.acus.gov/sites/default/files/documents/Revised%20OIRA%20Report%20Re-posted%202-21-14.pdf>. Other reports of political intervention by the Obama Administration have not been lacking. See, e.g., Peter L. Strauss, *The Role of the Chief Executive in Administrative Action*, in GLOBAL LAW AND ADMINISTRATIVE LAW 45, 49–53 (Russell Weaver & Francois Lichère eds., 2011); Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 927, 956 (2014).
 13. A recent notable example is David B. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 4–11 (2014).
 14. President Barack Obama, Remarks by the President in a Press Conference (Nov. 5, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/11/05/remarks-president-press-conference>).

There are those who welcome tight presidential, political control over regulatory outputs, either as a necessary implication of the Constitution's vesting all executive power in a singular President,¹⁵ or as an appropriate reaction to the exigencies of modern regulatory government.¹⁶ As probably is well enough known, I am not among them.¹⁷ Justice Jackson's memorable concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, drawing on personal experience, remarked as well as anyone could on the difficulties of extracting meaning from Article II's limited text, while noting "the gap that exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office."¹⁸ But Article II does not stop with the Vesting clause, and it does not make the President personally responsible for law-execution. Its only words about his relation to the executive Departments that Article I contemplates that Congress will create stand in sharp contrast to his power of "command" over the military; they say that he may "require the Opinion, in writing" of the heads of those Departments about how *they* anticipate exercising the Duties Congress has imposed *on them*.¹⁹ He is to take care that *they* faithfully execute the laws.²⁰ In *Youngstown Sheet & Tube*, the Solicitor General's argument had emphasized, as some contemporary scholars and judges do, the Vesting clause of Article II. Jackson's response is worth recounting:

Lest I be thought to exaggerate, I quote the interpretation which his brief puts upon it: "In our view, this clause constitutes a grant of all the executive powers of which the Government is capable." If that be true, it is difficult to see why the forefathers bothered

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15. See, e.g., JOHN YOO, *CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO THE PRESENT* (2011); STEPHEN CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); Stephen G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).
 16. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).
 17. See Peter L. Strauss, *Overseer or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007). See also Robert Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001).
 18. 343 U.S. 579, 653 (1952).
 19. U.S. Const., art. II, §§ 1–2.
 20. *Id.* at § 3 ("[H]e shall take Care that the Laws *be* faithfully executed.") (emphasis added).

to add several specific items, including some trifling ones [citing the Opinions, in Writing clause].

The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and [their] description of its evils . . . leads me to doubt that they were creating their new Executive in his image. . . . In our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian. . . .²¹

Having anything original to say in a paper about the President and the Constitution is a daunting prospect. It is in one sense a relief to be able to use this occasion to comment on two striking books shortly to be published by the University of Chicago Press. Harold Bruff's *Untrodden Ground: How Presidents Interpret the Constitution* builds on his lifetime of scholarship about separation of powers, in general,²² and the presidency in particular²³—a career that got its start in 1979–1981 when, for both President Carter and President Reagan, Bruff served in the President's law office, the Department of Justice's Office of Legal Counsel. Focusing particularly on presidential actions in relation to national security—foreign relations, military affairs, “leaks,” and to a lesser extent domestic disturbances—Bruff moves one at a time from George Washington to Barrack Obama, exploring both the ways in which successive Presidents have built upon the understandings and precedents of their predecessors (trodden ground) and the ways in which personality and circumstance have influenced their taking new

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21. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640–41 (1952).
 22. See PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW* (3d ed. 2011); HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* (2006); Harold H. Bruff, *The Federalist Papers: The Framers Construct an Orrery*, 16 HARV. J.L. & PUB. POL'Y 7 (1993); Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491 (1987).
 23. See Harold H. Bruff, *Presidential Power Meets Bureaucratic Expertise*, 12 U. PA. J. CONST. LAW 461 (2010); HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* (2009); Harold H. Bruff, *The Story of Dames & Moore: Resolution of an International Crisis by Executive Agreement*, in *PRESIDENTIAL POWER STORIES* 369–400 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009); Harold H. Bruff, *Executive Power and the Public Lands*, 76 U. COLO. L. REV. 503 (2005); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989); Harold H. Bruff, *Independent Counsel and the Constitution*, 24 WILLAMETTE L. REV. 539 (1988); Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1 (1982); Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979).

directions.²⁴ By the twenty-first century, it is painful and perhaps unnecessary to recall, Presidents could draw on this history and its interstices to permit others acting under their authority to engage in highly questionable interrogation techniques, to support massive surveillance regimes, and repeatedly to thwart the exercise by government officials of the duties Congress had conferred not on him but on them—all under a blanket of secrecy whose corners were lifted only by “leaks” whose source their administrations often heatedly pursued.²⁵

Heidi Kitrosser’s *Reclaiming Accountability: Transparency, Executive Power, and the U.S. Constitution* culminates the work of a younger scholar whose scholarship has focused on White House secrecy and its implications for presidential accountability.²⁶ Her book examines both

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24. HAROLD BRUFF, *UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* (2015).
25. David Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512–635 (2013). At least for those who have not seen the President as Commander in Chief of domestic government from our nation’s founding (see *supra* notes 17, 18, 21) the inevitability of a rise in executive power under current circumstances is a dominant theme in current separation of power literature. See, e.g., William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505 (2008); Edward Cantu, *The Separation of Powers and the Least Dangerous Branch*, 13 GEO. J.L. & PUB. POL’Y 1 (2015). The emphasis in this Article will be on secret acts built on presidential understandings of the Constitution, and not open ones—as, for example, President Obama’s publicly announced delays in implementing the Affordable Care Act, his publicly implemented program of Deferred Action for Childhood Arrivals, or his conversion of an aging congressional authorization for military action against Al Qaeda into the basis for military actions against ISIS, the Islamic State—a body distinct from and opposed by Al Qaeda. All of these have been the subject of intense public criticism, from both the right (see, e.g., H.R. Res. 757, 113th Congress (Nov. 17, 2014)), and the left (see, e.g., Bruce Ackerman, *Obama’s Betrayal of the Constitution*, N.Y. TIMES, Sept. 12, 2014, at A31).
26. See Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT’L SEC. L. & POL’Y 409 (2013); Heidi Kitrosser, *Scientific Integrity: The Perils and Promise of White House Administration*, 79 FORDHAM L. REV. 2395 (2011); Heidi Kitrosser, *What If Daniel Ellsberg Hadn’t Bothered?*, 45 IND. L. REV. 89 (2011); Heidi Kitrosser, *It Came From Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401 (2010); Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 CONST. COMMENT. 483 (2010); Heidi Kitrosser, *Supremely Opaque: Accountability, Transparency, and Presidential Supremacy*, 5 U. ST. THOMAS J.L. & PUB. POL’Y 62 (2010); Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607 (2009); Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741 (2009); Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881

the presidential supremacy arguments grounded in those asserted needs for secrecy and today's arguments that the Constitution envisions a strong "unitary executive," one empowered to take all executive decisions from the White House.²⁷ But, she argues, power in a rule of law culture requires substantive accountability—ambition checking ambition, government actors ultimately answerable to the people. Originalist arguments for presidential supremacy and the strong unitary executive, she writes, overlook important elements of the framing underscoring this need. While acknowledging the changed circumstances of our national government and of its place in the world that have given these arguments such impetus, and the difficulties as well of effective response, she essays a careful exposition of counterarguments that could help to restore actual accountability of executive government to the people.

There is no doubt about the changes both these books build on, as many have noted before me. From a normative perspective, in my judgment, Professor Kitrosser puts the contemporary challenge just right. From a descriptive perspective, reflecting the exigencies of the day and President Clinton's own struggles with Congress, then Professor, now Justice, Elena Kagan put it well in her influential essay "Presidential Administration":

[A] line [between oversight and command] remains, and by so often asserting legal authority to direct regulatory decisions, President Clinton crossed from one side of it to the other. . . . [T]he explicit and repeated assertion of directive authority probably alters over time . . . the 'psychology of government'—the understanding of agency and White House officials alike of their respective roles and powers. This change, in turn, makes presidential intervention in regulatory matters ever more routine and agency acceptance of this intervention ever more ready . . . a significant enhancement of presidential power²⁸

The second President Bush and President Obama have taken the presidency still farther from this line. The concern for me, again from *Youngstown Sheet & Tube* but now in the words of Justice Frankfurter, is this:

(2008); Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049 (2008); Heidi Kitrosser, "Macro-Transparency" as Structural Directive: A Look at the NSA Surveillance Controversy, 91 MINN. L. REV. 1163 (2007); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489 (2007).

27. KITROSSER.

28. Kagan, *supra* note 16, at 2298–99.

The Founders of this Nation . . . rested the structure of our central government on the system of checks and balances. . . . These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power. . . . The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.²⁹

What Professor Bruff has written helps us to understand how we got here. Professor Kitrosser demonstrates both the difficulties and the importance of working our way free.

I. THE UNMEDIATED AND MEDIATED PRESIDENCIES

Professor Bruff's endeavor is a remarkable, ambitious undertaking—a valuable supplement to Stephen Skowronek's canonical *The Politics Presidents Make*,³⁰ to which he often refers. Skowronek also recounted presidential changes through history, but with different ends in view, considering four successive sets of three Presidents each, in the service of recurrent patterns he discerned as a repeating political cycle, the ebb and flow of our politics from the establishment of a new pattern by a strong figure³¹ through its articulation by intermediaries³² to its ultimate disjunction by a less successful figure.³³ Professor Bruff considers the constitutional vision of all our Presidents, one by one, and with less of a felt need to construct a theoretical framework. Inevitably, we see them through his eyes, and he does not hesitate to share his judgments with us. Some are presented as heroes (Lincoln, unsurprisingly, is in his view our greatest President); other judgments are harsher: “same mean spirit,” “dissimulation,” “failed his duty in this regard,” “unseemly vindictiveness.” “Harding revealed his own level of acuity by saying that ‘if Albert Fall isn't an honest man, I am not fit to be President.’ Both were true.”³⁴ The writing is informal; this makes for an enjoyable as well as an educational read; one comes away with the feeling of having met our Presidents as human beings—no small accomplishment.

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29. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593–94 (1952).
 30. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* (1993).
 31. Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin D. Roosevelt.
 32. James Monroe, James K. Polk, Theodore Roosevelt, Lyndon B. Johnson.
 33. John Quincy Adams, Franklin Pierce, Herbert Hoover, and Jimmy Carter.
 34. BRUFF at 224.

Professor Bruff's fundamental premise is that, at the end of the day, Presidents rely on their own constitutional views, influenced but not driven by what their office has become before they come to it, and by the advice they get from advisers, many of whom we also meet. Thus, the project is to see the Constitution through each President's eyes, as an individual (and profoundly influential) reader of our founding document. Unsurprisingly, some warrant more attention than others. Each of fourteen chapters has a focal President, and in all but the last two (George W. Bush and Barack Obama), they are preceded and/or followed by others of the forty-four. Each has a personality; each acts within the politics and circumstances of his time, facing particular challenges from which the character of his presidency emerges and by which the ground for his successors' actions may be laid. Bruff wants us to see not cyclical patterns but change and, over time, growth, as history and technology have brought us from tentative beginnings at the margin of the developed world to status as a military and economic superpower, without even the slightest alteration of the few words by which the Constitution describes the President's authority and place in government. And, as his abstract for the book remarks, his conclusion is an optimistic one: "Overall, the presidential office in the hands of its occupants has evolved in ways that seem sufficient to protect both the nation and the rule of law,"³⁵ albeit one conditioned as Professor Kitrosser's analysis persuasively urges, on the continued viability of presidential accountability to Congress and the public.³⁶

Bruff focuses the bulk of his attention on foreign relations, military affairs, and the protection of "state secrets." In these settings, we expect relatively little of law and have understood from the outset that other government actors are presidential alter egos, expressing or taking actions that reflect his views and decisions. The operative checks are political, with, as *Marbury v. Madison* early expressed, few if any possibilities of judicial review:

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

35. HAROLD BRUFF, UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION (Nov. 6, 2014) (unpublished abstract) (on file with Case Western Reserve Law Review).

36. "Even in ordinary times, our system has recently become similar enough to a permanent constitutional dictatorship to give deep pause. A massive and secret national security bureaucracy supports secret presidential decisions to use force or spy on the world, with only loose controls in congressional or judicial oversight and little public knowledge. The primary constitutional challenge for our time is to construct ways to respond to this development." BRUFF at 465–66.

when the legislature proceeds to [direct] . . . that officer . . . peremptorily to perform certain acts [on which individual rights turn] . . . he is so far the officer of the law . . . and cannot at his discretion sport away the rights of others.

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

. . . The province of the courts is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.³⁷

Presidential–congressional struggles over this unmediated,³⁸ first actor presidency—over foreign policy and the use of America’s military, with their associated considerations of national security—are at the heart of the President’s consideration of the Constitution’s meaning in authorizing, and constraining, his exercise of office. It can be no surprise that issues of transparency and honesty in those struggles, and the continuing accretion of presidential initiative respecting them, are at the center of Professor Bruff’s analysis. Elaine Scarry, less optimistic than he,³⁹ has recently inveighed against our *Thermonuclear Monarchy: Choosing Between Democracy and Doom*, concerned at the effect on our politics of one actor’s unilateral control over an arsenal that is in itself sufficient to produce global destruction.⁴⁰ Nonetheless, the very fact of this responsibility and other actors’ alter ego status warrants the personal focus Bruff’s account brings. For this very reason, as he remarks, Presidents concentrate on controlling the constitutional cabinet. And here Bruff’s account is detailed, richly describing events and introducing many of the actors involved, with both their virtues (e.g., Attorney General Robert Jackson, General Ulysses S. Grant) and their faults (e.g., Deputy Assistant Attorney General John Yoo, Colonel Oliver North). Successes and failures of congressional checking and/or ratification are similarly treated, whether Lincoln’s dealings with Congress anticipating and during the Civil War, the Gulf of Tonkin

37. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166, 169–70 (1803).

38. Thanks to Professor Bruff for suggesting this characterization as we corresponded during the development of this Article.

39. Professor Bruff’s book concludes “not in fear, but in hope. . . . A president’s highest attainment is, like Lincoln’s, to transcend ordinary politics and to set the United States on a better course. Toward that horizon there always lies untrodden ground.” BRUFF at 608–09.

40. ELAINE SCARRY, *THERMONUCLEAR MONARCHY, CHOOSING BETWEEN DEMOCRACY AND DOOM* (2014).

Resolution, or the War Powers Resolution that soon followed. Presidential maneuvering to maintain the appearance of compliance with the War Powers Resolution while testing its practical limits is a constant subject for the years following its adoption at the beginning of President Nixon's abbreviated second term in office.

Yet there is also a *mediated* presidency, the world of domestic regulation that is the principal focus of Professor Kitrosser's book. For many scholars of administrative law, including the author, the mediated presidency—domestic regulation and in particular the President's relation to agency rulemaking—has raised pressing questions not just of discretion's exercise, but also of law.⁴¹ In the mediated presidency, government officials are not simply the mouthpiece of the President, conveying or carrying out his policy preferences. They are themselves the possessors of legislatively created "duties" requiring their exercise of significant elements of judgment.⁴² It could be thought significant, in

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41. Over half a century ago, in his treatment of the American presidency, Edwin Corwin stated the dilemma of characterizing presidential power in a passage I find hard to improve on:

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.

EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 80–81 (4th ed. 1957).

42. As Attorney General William Wirt remarked in an opinion preserved in the first volume of *Opinions of the Attorney General*, "If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not

this respect, that the Opinion in Writing Clause, the Constitution's sole statement about their relationship to the President, specifies a writing, not a conversation. An opinion delivered *in writing* is one that may be seen by others, as (absent recording)⁴³ private conversations cannot be, potentially answering Professor Kitrosser's accountability concerns. And for the decisions of the mediated presidency, it is not so that "[q]uestions . . . which are, by the constitution and laws, submitted to the executive, can never be made in this court."⁴⁴ Rather, the ability of citizens to obtain judicial review to assess the legality of actions adversely affecting them appears to be the very coin by which the legislative creation of those duties must be purchased. As Judge Harold Leventhal once trenchantly remarked, "Congress has been willing to delegate its legislative powers broadly—and courts have upheld such delegations—because there is court review"⁴⁵

In this context, Professor Bruff's optimism about the survival of "the rule of law" faces sterner challenges. "From the outset," Bruff writes, "President Nixon intended to focus his efforts on foreign policy. Domestic policy, he thought, was about 'building outhouses in Peoria.'"⁴⁶ Yet Nixon's focus on the issues of the unmediated presidency was not exclusive. The emergence of rulemaking with high industrial stakes captured his attention, as it has captured his successors'. The National Highway Traffic Safety Administration had for the first time developed a rulemaking proposal that eventually would lead to having airbags in American automobiles; thousands of deaths annually were on the line. GM had the technology. Ford sought a presidential audience—fortuitously recorded—to urge the President to stop or at least delay a rulemaking advantageous to its commercial rival. President Nixon had John Ehrlichman call Secretary of Transportation John Volpe to pass on his wish that the rule, at least, be significantly delayed. Volpe's response? I'll ask my lawyer; "I am trying to do a job over here."⁴⁷ While the rule went forward, and Volpe kept his job, the conversation evokes the current day when, as already remarked, dozens of rulemaking proposals are stopped at the White House door, or delayed past promised action in the White House, in the service of simply political ends.

only be not taking care that the laws were faithfully executed, but he would be violating them himself." 1 Op. Att'y Gen. 624, 625 (1823).

43. See *infra* text accompanying note 72.

44. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169–70 (1803).

45. *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring).

46. BRUFF at 327.

47. See LISA SCHULTZ BRESSMAN, EDWARD L. RUBIN, & KEVIN M. STACK, *THE REGULATORY STATE* 779 (2010).

The problem in the domestic regulatory context is one for which an eighteenth-century document, looked at through the President's personal eyes, cannot possibly supply "original intent" answers; today's mediated presidency is not, and cannot possibly be, unitary in any personal sense. Here, it seems appropriate to consider several linked developments since Justice Jackson's formative experience—outside the unmediated presidency and thus largely unaddressed in Bruff's work—that have contributed to changed expectations about the presidency in the last half-century, from an office dependent for success on persuasion of the bureaucracy it oversees,⁴⁸ to an office responsible for and capable of control. The Executive Office of the Presidency has grown from a handful of officials tolerated by Congress on Franklin D. Roosevelt's promise that they would merely advise him, to hundreds of bureaucrats acting as intermediaries between President and agency, with "czars" responsible for major policy concerns acting outside public administrative procedures and shielded by White House prerogatives from public view. Many actors are able to claim to speak for the President without being the President,⁴⁹ and that is a bluff hard to call. In the agencies themselves, the increasing politicization of positions and the practical effects of creating the Senior Executive Service (during the Carter administration) have increased political control over high-level bureaucrats, undermining the civil service system and civil service expectations.⁵⁰ Beginning in President Nixon's administration, rulemaking under new national health, safety, and environmental statutes augured major economic impacts and brought in its train presidential regimes of increasing control. And, finally, the dawn of the Information Age has diminished, if not virtually eliminated, any agency advantage in its dealings with the White House that might come from superior access to information. A desktop computer tied to the government side of the new federal data management system can instantly bring to White House desks the full range of information known to an agency. If knowledge and information are power, the instant and independent availability of all this data on White House computer screens has effected a significant transfer of power to White

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48. When contemplating General Eisenhower winning the presidential election, Truman said, "He'll sit here, and he'll say, 'Do this! Do that!' And nothing will happen. Poor Ike—it won't be a bit like the Army. He'll find it very frustrating." RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 22 (1964).
49. Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006).
50. David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1126 (2008).

House overseers—power that is, again, outside public administrative procedures and shielded by White House prerogatives from public view.

Here lie the challenges to Bruff's optimistic view that "the presidential office in the hands of its occupants has evolved in ways that seem sufficient to protect . . . the rule of law."⁵¹ Bruff uses as the epigram for his Nixon-Ford chapter Nixon's remarkable statement in a 1977 interview with David Frost: "Well, when the president does it, that means it is not illegal . . . the president's decision . . . is one that enables those who carry it out, to carry it out without violating a law."⁵² As Joseph Kraft wrote then about Watergate in *The Washington Post*, "The president and his campaign manager have set a tone that positively encourages dirty work by low-level operators."⁵³ In 2014 a *New York Times* columnist used Nixon's infamous remark as a means of characterizing the 2012 Obama directive on Deferred Action for Childhood Arrivals, which (after the failure of The Dream Act, a legislative initiative of similar import) opened the door to work permits, social security numbers, and in many states drivers' licenses to millions of illegal childhood immigrants who could not otherwise have acquired them.⁵⁴ Professor Lisa Heinzerling has written corrosively about the manner in which politics carrying White House fingerprints derailed the Food and Drug Administration's scientific judgments about the safety of emergency contraceptives in both the Bush and Obama administrations.⁵⁵ And the meticulous work of a former Government Accountability Office (GAO) and Congressional Research Service (CRS) analyst has produced unmistakable evidence of political obstruction by the White House during 2011–2012 of numerous important health and safety regulatory initiatives.⁵⁶

51. BRUFF, *supra* note 35.

52. BRUFF at 325.

53. Robert Dallek, *Legacy Tarnished by His Own Words*, N.Y. TIMES (July 27, 2014), http://www.nytimes.com/2014/07/28/books/in-the-nixon-defense-john-w-dean-returns-to-watergate.html?_r=0.

54. *When the President Does It, That Means . . .*, N.Y. TIMES (Aug. 7, 2014), <http://douthat.blogs.nytimes.com/2014/08/07/when-the-president-does-it-that-means/>.

55. Heinzerling, *supra* note 12.

56. COPELAND, *supra* note 12, at 6–7; ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, STATEMENT #18: IMPROVING THE TIMELINESS OF OIRA REGULATORY REVIEW 2 (2013), available at <https://www.acus.gov/sites/default/files/documents/OIRA%20Statement%20FINAL%20POSTED%2012-9-13.pdf>.

II. OBSTACLES TO RECLAIMING ACCOUNTABILITY

Let us turn, then, to the problem that so concerns Professor Kitrosser—finding effective means of assuring presidential accountability, with a focus on the mediated presidency. Those of us concerned with the steady and apparently irresistible growth of presidential administration will find in *Reclaiming Accountability* a thoughtful response to the overstatements of the constitutional arguments claimed to support it that seem never to read Article II past its Vesting clause, and a careful exposition of counterarguments that could help to curb it. She understands the supremacists and unitarians well, and her analysis of the flaws in their argument is thoroughly grounded in original understandings. Rich with detail and examples, she shows how the arguments for presidential accountability, well grounded in our Constitution, support neither presidential supremacy nor the stronger forms of argument for a unitary executive, but rather a presidency in which executive secrecy and command are contained by law. The laws whose faithful execution the President is obliged to assure assign duties to others than himself, and unless he is the absolute monarch the authors of our Constitution clearly rejected, those assignments must be a part of the law for the faithful execution of which he is responsible.⁵⁷

Central to Kitrosser's concern is the secret curtain behind which the White House often acts, whose cloak over its influence is the obstacle to accountability. The controls OMB exercises over legislative requests, legislative testimony, reports, and speeches often figure in her analyses. Yet it is the emergence of agency rulemaking with high industrial stakes and in the hands of executive departments, relatively late in the growth of the regulatory state, that has brought so prominently into view questions of the President's relation to domestic regulation and his accountability for his influence over it.

As recently as the middle of the twentieth century, when federal regulation had blossomed and the Administrative Procedure Act was adopted, regulation was dominantly effected by adjudication. It may have been that dominance that permitted Chief Justice, formerly President, Taft to breeze past the possible distinction between the unmediated and mediated presidencies in *Myers v. United States*,⁵⁸ the foundation-stone of so many "unitary executive" arguments.⁵⁹ He was

57. Attorney General William Wirt, *supra* note 42.

58. 272 U.S. 52, 135 (1926).

59. The opinion's excessive breadth is clear. Chief Justice Taft had only to conclude that the Senate could not reserve *for itself* a right of participation in removals from office on analogy to its participation in appointments, a proposition having no necessary implication for the nature of the relationship between the President and government officers. The Constitution provides for appointments when Congress is not sitting—as until the 20th Amendment it very often would not be; it says nothing

careful to remark in his opinion that in adjudication, presidential control over decision-makers was constrained. The case presented no occasion to think about agency rulemaking. And it has been in the context of rulemaking, in debates over its oversight/control by the presidential Office of Information and Regulatory Affairs pursuant to the presidential initiatives that first emerged in the Nixon administration, that argumentation respecting the mediated presidency has gained significant prominence.

President Nixon's successors have fashioned rulemaking supervision (and possibly, although not overtly, control) regimes of steadily increasing breadth and rigor. They have involved themselves in particular rulemakings of political significance to them as well. One readily sees beneath the surface of these developments, as Professor Kagan quite persuasively detailed,⁶⁰ a presidential view of constitutional authority that has shifted strongly into "first actor, unmediated" mode. And one as readily sees the possibility, and in some cases the demonstrable fact, of the use of that authority for political ends outside the duties and responsibilities Congress has created for executive branch actors—uses, that is, outside "the law."

Consider as an early example EPA's effort to combat acid rain by controlling the sulfur emissions of coal-fired power plants, a rulemaking completed in the Carter administration. The rule was promulgated only after numerous conversations with the White House and with Senate Majority Leader Robert Byrd of West Virginia, a state whose economy was threatened by what would have been the least costly approach for the utilities, requiring their use of abundant, low-sulfur western coal. The *Washington Post* reported that a more costly requirement to use scrubbers that would permit the continued use of West Virginia coal was a price Senator Byrd insisted be paid for his support for other matters important to the President, a report that found credence in a noteworthy scholarly book written in its immediate aftermath.⁶¹ For the D.C. Circuit, reviewing the rule, the newspaper report was not enough to prompt a judicial inquiry into possible impropriety, and the White House meetings did not matter, so long as not used as a

about removals. The proposition that the Founders contemplated requiring the President to await Congress's December reconvening (and then debate and action) before effecting the removal of any principal officer defies belief. Given the text's reasonable care in providing for recess appointments, surely it would have said something about recess removals, had the Founders imagined a requirement of senatorial acquiescence in removals when Congress was in session. *See id.*

60. Kagan, *supra* note 16, at 2266.

61. BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1981).

“conduit” for industry-supplied views or information.⁶² The reviewing court repulsed any suggestion that meetings with the President were improper or could be conditioned on their transparency, noting that Congress had required only that *written* comments be made a part of the rulemaking record, that a presidential role was both desirable (to avoid agency tunnel vision) and constitutionally required, and that the possibility that “undisclosed Presidential prodding” produced a sustainable outcome, but one different from that which would have been reached without it, was irrelevant to its review function. It gave 90 percent of an opinion running 100 pages in F.2d⁶³ over to an examination in excruciating detail of the agency’s extensive opinion, in light of its voluminous record—but that examination established only that the agency’s conclusion *might* have been reached by the application of its judgment to the facts before it under the statute creating its authority, not that it had been.⁶⁴

Early on in her work,⁶⁵ Professor Kitrosser remarks how unlikely judicial indifference to “prodding” is to change. Supreme Court justices owe their place to presidential appointment, and Presidents may not be indifferent to their views about presidential authority. They are not immune to “presidential mystique,” and institutionally are committed to casting shadows on their coordinate branches. That courts would not be concerned whether determinative prodding has occurred doubtless encouraged the prodding. To be sure, the wording of the Reagan administration’s executive order on rulemaking review, E.O. 12,291, rather strongly respected agency autonomy and promised essential transparency about its exercise. More cautiously than its successors, this order was carefully framed in terms of the Constitution’s “Opinion, in writing” clause. Throughout, it acknowledged that substantive responsibility remained in the agency; it required agencies to submit draft and final analyses of major rules to the Director, to consult with him about them, and, unless under a statutory of judicial order to act earlier,⁶⁶ to “refrain from publishing [that analysis and the proposal or rule to which it related] until the agency has responded to the Director’s views, and incorporated those views and the agency’s response in the

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

63. *Id.* at 311–410.

64. Lisa Heinzerling, *Classical Administrative Law in the Era of Presidential Administration*, 92 TEX. L. REV. 171, 173 (2014) (responding to Daniel Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 Tex. L. Rev. 1137 (2014)). For Professor Heinzerling, *Sierra Club v. Costle* exemplifies the failure of “classical administrative law” to respond to the intrusion of raw politics into its processes. *Id.*

65. KITROSSER at 7.

66. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

*rulemaking file.*⁶⁷ Ostensibly, then, correspondence between agency and OMB would be open, and the agency would have the final word. Followed, these provisions honored agency duty and would have provided useful transparency to Congress and the public.

Professor Bruff, in his thoughtful analysis of “Presidential Management of Agency Rulemaking,”⁶⁸ described administration during the Reagan administration as a process of negotiation with tradeoffs only “at the margin” (given the agency’s “massive advantage in the size and expertise of its staff”);⁶⁹ he found controversy rising gradually through the bureaucratic hierarchy on both sides. “[T]he ultimate steps of appealing to the presidential level or issuing a rule over OMB’s objections are rare.”⁷⁰ Three things to note here: first, that the order explicitly acknowledged the superior force of statutory or judicial deadlines; second, that a rule *could* be issued over OMB’s objections, however rarely; and finally, and perhaps more importantly, that its tasks were framed in the era of paper records. Rulemaking documents came in limited numbers of copies and lived in agency files, from which the White House could only acquire them openly from the agency and with relative difficulty.

Subsequent administrations, however, have adopted regimes for influencing rulemaking that would “leave no fingerprints”⁷¹ or have simply failed to follow through on Executive Order promises that timetables for review would be respected and that changes review brought about would be placed in the public record.⁷² The strongest arguments for a unitary executive respecting the mediated presidency—a President able to decide controversial matters Congress has assigned to agencies—have taken hold with the emergence of the information age, during the quarter century since Professor Bruff wrote about presidential administration under E.O. 12,291. With its emergence, as

67. *Id.* (emphasis added).

68. Bruff, *Presidential Management*, *supra* note 23, at 560. This article, still an important element of the administrative law lexicon, is one of his few writings on the presidency Professor Bruff does not cite in his book.

69. *Id.*

70. *Id.* at 561–62.

71. *E.g.*, Michael Arndt, *Democrats Target Quayle’s Regulations Panel*, CHICAGO TRIBUNE (Sept. 6, 1992), http://articles.chicagotribune.com/1992-09-06/news/9203210202_1_democrats-council-president-bush.

72. Writing in 2010, Professor Nina Mendelson reported finding only forty-two explanations by the Bush administration of the several hundred economically significant rules modified after OIRA’s consideration, and no explanation of any kind during the first year of the Obama administration of the 90 percent of the rules modified or withdrawn following consultation. Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1150 (2010). Surveying subsequent years, Professor Kitrosser found no change. *See* COPELAND, *supra* note 12, at 7.

has not been much noted in the literature, the growing breadth and use of computer data sources has eliminated much of agencies' former informational advantage. A government-wide database, Regulations.gov, is now in place to house all rulemaking data in a readily searchable electronic format. For the public, this is transformative; anyone wishing to see the agency's public data including all comments previously files has it on her desktop, permitting a level of analysis and commentary never before possible. And there are additional elements of the database accessible only within government that further expand the visibility of the process. Few now believe, as Professor Bruff found in his early analysis, that White House rulemaking review remains a process dominated by agency responsibility and expertise, with tradeoffs only "at the margins."

Professor Kitrosser flags the transparency in mediated relationships that one could so readily find implicit in the "Opinion, *in writing*" clause of Article II, as essential to restoring the President's substantial accountability to the people. In this respect, she makes common cause with an important group of administrative law scholars, mostly women, who have been stressing both the present failures of transparency and the need for political influence to be openly exercised.⁷³ Looking at the dealings between Congress and the White House that produced, first, a presidentially managed budget⁷⁴ and then, about two decades later, the

73. Professor Heinzerling strongly criticizes the *Sierra Club* opinion for its tolerance of covert presidential intervention. Heinzerling, *supra* note 12, at 982–86. Compare Farber & O'Connell, *supra* note 64. Nina A. Mendelson, *supra* note 72. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009); Schultz Bressman & Vandenburg, *supra* note 49.

74. Professor Kitrosser understands the creation of the Bureau of the Budget under presidential supervision as an element of the growth of presidential authority, at 173 ff., but might have added that Congress simultaneously created the GAO as an arm of capable of supervising the expenditures thus centrally authorized. Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20. Those outside government tend not to know, as government bureaucrats do, that GAO houses staff inside every government agency, with a roving warrant to oversee its activities and report back on them to Congress—penetration into the bureaucracy in the service of its mandate to monitor budget implementation that has often produced "transparency" insights into executive branch actions otherwise unlikely to have been achieved. Professor Bruff points out (also without mentioning the GAO) that the BoB was created during the presidency of Warren Harding, "[a] weak man [who] did not favor a strong presidency and could not have conducted one." "[A]t long last," he writes, "Congress provided authority for the executive branch to form a federal budget, ending the longstanding practice of separate and uncoordinated submission of departmental requests and laying the basis for greater presidential control of the executive." BRUFF at 286. If one can see the President's acquiescence in the simultaneous creation of GAO as a bargain to balance greater presidential control with more effective congressional oversight, the irony of this happening during a "weak" presidency

EOP⁷⁵—indeed, at the manner in which President Reagan, to secure congressional acceptance, couched his Executive Order 12,291⁷⁶—one is struck by how the White House acknowledged this need. Might one now think that, with the 2014 by-election’s results, we will see legislation giving statutory form to the Executive Orders and, in doing so, requiring and making enforceable the transparency they have long promised? The executive order may be clear in stating that it creates no rights of judicial enforcement, but a statute need not take the same position. And the Republican Congress may be strongly motivated to expose the tight control presidential offices, rarely the President himself, now exercise over rulemaking outcomes.

Yet a complicating tension exists between our reliance on “transparency” to induce responsibility and arm oversight, and our understanding that transparency chills candor. President Truman once wrote that “[t]he President cannot function without Advisers or without advice, written or oral. But just as soon as he is required to show what kind of advice he has had, who said what to him, or what kind of records he has, the advice received will be worthless.”⁷⁷ Congress to date has recognized the White House’s high stakes in the confidentiality of internal discussions of policy issues, at least so far as citizen access is concerned.⁷⁸ Interpretations of the federal Freedom of Information Act reflect this proposition in two ways—the President and his personal advisors are not classified among the “agencies” subject to its

disappears. The Commission recommending creation of the BoB, as Professor Kitrosser recounts, stressed that “every plan to be executed be made an open book.” KITROSSER at 176.

75. The recommendations of the Brownlow Commission, leading to the initial creation of the EOP, remarked as well “the necessity of improving the machinery of holding the Executive Branch more effectively accountable to the Congress.” Heidi Kitrosser, *Scientific Integrity*, *supra* note 26, at 2402.
76. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).
77. HARRY S. TRUMAN, MEMOIRS: YEARS OF TRIAL AND HOPE 454 (1956).
78. There have been repeated battles between Congress and the White House over executive privilege claims respecting information demands from the Congress itself, most often (and best) resolved by negotiation. What is now the Government Accountability Office (formerly the General Accounting Office) was created at the same time as the Bureau of the Budget, as a congressional agency of investigation with continuous access to agency files, and its findings have sometimes created the possibility of accountability—underlying, for example, Professor Heinzerling’s acerbic critique of the Plan B Fiasco. Heinzerling, *supra* note 12.

commands;⁷⁹ and the Act's exemption for "pre-decisional" documents⁸⁰ has long and properly been understood to protect the confidentiality of policy advice. And if one needed confirmation of the wisdom of this exemption, one needs look only to the impact of a law from which such an exemption has been omitted—the federal Government in the Sunshine Act.⁸¹ This act, applicable only to multimember commissions like the FCC, requires the commissions to meet in public, on a week's advice notice, on all matters save those subject to its limited exemptions, and there is no exemption for discussions leading up to decision. A commission's discussion of the budget request it will make to OMB and/or the Congress for the coming year, if oral and collective, must be held in public. So too must discussions of rulemaking proposals and other often sensitive policy matters. The consequence of the Act has been to lead agencies away from collegial discussion. Decisions are developed and taken by circulating memoranda, by notational voting, and other means that will avoid the necessity of an open meeting.⁸² Staff acquire effective political power that commissioners lose.

Might one somehow distinguish, respecting the implementation of the executive order, between the requirement of annually developing a regulatory plan for the coming year, Section 4 of the order, and the regulatory impact analyses required of individual significant proposed rulemakings, Section 6? The regulatory plan of Section 4 is at the heart of the President's claims on the mediated presidency, providing an annual chance (like the fiscal budget) to allocate priorities for the year and address actions that involve coordination of several agencies. The

79. Although 5 U.S.C. § 551 (2012) defines "agency" as "each *authority* of the Government" with exclusions that do not mention the President or the EOP, and 5 U.S.C. § 552(f) provides that for FOIA purposes "agency" includes "any . . . *establishment* in the executive branch of the Government (including the Executive Office of the Presidency)," emphases added, courts solicitous of presidential confidentiality claims have interpreted "authority" and "establishment" to embrace only statutorily defined bodies such as OMB, and not the President himself or individuals acting for him. *Judicial Watch v. United States Secret Service*, 726 F.3d 208 (D.C. Cir. 2013).

80. 5 U.S.C. § 552(b)(5) (2012).

81. 5 U.S.C. § 552b (2012).

82. See, for example, the letter sent by the FCC to the Senate Committee on Commerce, Science and Transportation, Feb. 2, 2005, reproduced in PETER L. STRAUSS, TODD D. RAKOFF, CYNTHIA R. FARINA & GILLIAN E. METZGER, GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 518 (11th ed. 2011), and the practices revealed in REEVE T. BULL, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, THE GOVERNMENT IN THE SUNSHINE ACT IN THE 21ST CENTURY (2014), available at <http://www.acus.gov/sites/default/files/documents/Government%20in%20the%20Sunshine%20Act%20Draft%20Report%20REVISED%205-7-14.pdf>.

recent emergence of well-publicized presidential directives—the events that then-Professor Kagan once celebrated⁸³—are individual instances of such guidance and, like the plan itself, their transparency fits well the desire for accountability. But as administered, if not promised, Section 6 actions frustrate it. The failures to honor its promises of transparency deflects accountability; the possibility of redirecting particular outcomes that agencies would prefer, as appears to occur, offends what President Reagan’s executive order was careful to recognize:⁸⁴ Congress’s placement of the duty of rulemaking not in the President but in the agency. And that OIRA is subject to FOIA opens at least some possibilities for required disclosure. While predecisional documents may be withheld, agencies are under a statutory obligation to disclose “any reasonably segregable portion of a record”; assertions of fact, corrections of technique, and similar elements possible—and believed to be elements of—OIRA’s communications to agencies are not policy advice (though they may form the foundation for it), and so would not fall within the “predecisional” exemption. The particularistic argumentation about the adequacy of analysis in an agency draft that marks dialog between agency staff and OIRA desk officers is a far cry from the policy advice President Truman insisted must be confidentially supplied to him personally;⁸⁵ its public availability seems more likely to enhance than to lessen its worth.

Which, of course, would leave the telephone and other evanescent means of conversation. So much depends, as I have earlier written,⁸⁶ on the psychology of office—on the way in which government actors regard and hold their responsibilities and their relationships with others. “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law”⁸⁷ But then the President and those who share high executive office with him must so regard themselves.

CONCLUSION

The presidency exemplifies a tension that animates all of administrative law, between the worlds of law and politics. The aspiration to a “government of laws and not of men” is impossible of realization at even the most basic of levels, individual bureaucrats, since “men” will always be a part of government, and discretion can never be entirely

83. *See generally*, Kagan, *supra* note 16.

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

85. *Judicial Watch v. United States Secret Service*, 726 F.3d 208, 224 (D.C. Cir. 2013).

86. *The President and Accounting Offices*, 1 Op. Att’y Gen. 624, 624 (1823).

87. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (Jackson, J., concurring).

subdued. The issue, rather, is assuring that we have a government of laws *as well as* “men”—that politics occurs within a framework respectful of legal constraint, that we are able to preserve what Peter Shane has wisely described as a “rule of law culture.”⁸⁸ And that, in turn, demands that—again in Shane’s words—“the written documents of law must be buttressed by a set of norms, conventional expectations, and routine behaviors that lead officials to behave as if they are accountable to the public interest and to legitimate sources of legal and political authority.”⁸⁹ There must be, that is, a psychology of office promoting the personal responsibility of those in whom Congress has created duties of administration—a psychology that might be reinforced both by the discipline of judicial oversight and by the possibilities of political oversight not just from the White House, but also from Congress and ultimately from the people, yet a psychology that ultimately will depend on personal understanding of the nature of one’s position. The servant acts in a different mindset than the independent contractor, the soldier than an attorney.

88. Peter M. Shane, *The Rule of Law and the Inevitability of Discretion*, 36 HARV. J. L. & PUB. POL’Y 21, 24 (2013).

89. PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 116 (2009).