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## Preface

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## THE TRUMP ADMINISTRATION AND ADMINISTRATIVE LAW

PETER L. STRAUSS\*

Shortly after the 2018 mid-term elections ended a two-year period of “unified government,” under the Republican party,<sup>1</sup> twenty one law professors from around the country met at Chicago-Kent College of Law to discuss the seven papers contained in this edition of its Law Review. Commentaries written in response to each of these papers will appear in the next edition of the Law Review. For those reading any of these essays in the interval between publication of this and the commentary issue, this necessary inconvenience is regrettable; the commentaries (and ensuing open discussion) were enriching and, indeed, have contributed to the final form of the essays you have before you. If you have reached this symposium after publication of the commentary issue, please do read the comments prepared for the essay(s) you read.

Although, on the whole, these essays and their discussion address aspects of the way executive authority was used during the first two years of the Trump administration, the dysfunctionality of Congress that has characterized most of the past several decades lurks behind them.<sup>2</sup> A time of increasing claims of executive authority, and of spreading autocracy in the world, brings to mind Justice Jackson’s warning in *Youngstown Sheet & Tube Co. v. Sawyer*:

\* Betts Professor of Law Emeritus. Words cannot express the intellectual debt I owe to the participants in this symposium, both at the symposium and in their subsequent thoughts on this summary of their contributions to it. Deep thanks also to the editors of the Law Review for their helpful editing and support.

1. Perhaps the most distinctive characteristic of presidential as compared to parliamentary governments is the possibility that one or both houses of their legislature, if bicameral, will not be in the control of the party or coalition responsible for government administration (law-execution). The prescribed cycle of American elections makes two years the longest period a party winning unified control of Congress and the presidency can be assured of maintaining it. For an extended discussion of the significance of this feature, see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

2. See, e.g., Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430 (2018); JOSH CHAFETZ, *CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* (2017); THOMAS MANN & NORMAN ORENSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006); THOMAS MANN & NORMAN ORENSTEIN, *IT’S EVEN WORSE THAN IT LOOKS WAS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2d ed. 2016).

[I] have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that “The tools belong to the man who can use them.” . . . [O]nly Congress itself can prevent power from slipping through its fingers.<sup>3</sup>

Susan Rose-Ackerman’s comparison of American developments with the UK’s Brexit underscored for many the differences between parliamentary and presidential government—and in particular, the ways in which a President’s incapacity to achieve legislatively what he might wish can contribute—as it so often has in other presidential regimes<sup>4</sup>—to efforts to go it alone that contribute to what can be troubling developments in the exercise of executive power.<sup>5</sup> Here the reader may be thinking of events during the Clinton, Bush, or Obama administration. Divided government has been common in the United States, and with it has come an increase in partisanship that has given these divisions remarkable force. Yet one might look more broadly at experience elsewhere in the world, where the consequence has often enough been a lapse into autocracy.<sup>6</sup> Those alarms are being sounded here, in an administration whose leadership, playing to its base, has often enough seemed indifferent to the constraints of fact and law.

Peter Shane’s essay, “Prosecutors at the Periphery,” opened the conference with an analysis speaking directly to contemporary arguments for a “unitary” presidency by exploring through both textual and historical analyses the claim the President has inherent constitutional authority to control prosecutions. The constitutional text clearly reflects the Founders’ deliberate choice for a single political leader atop the executive branch, not a council; but, as he shows, it also reflects that—in the manner of “checks and balances”—it does not make him the exclusive possessor of executive authority, and particularly so in

3. 343 U.S. 579, 654 (1952).

4. Latin America’s checkered experience with presidential constitutions was thoughtfully explored in Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make A Difference?*, in 1 *THE FAILURE OF PRESIDENTIAL DEMOCRACY: COMPARATIVE PERSPECTIVES* 3 (Juan J. Linz & Arturo Valenzuela eds., 1994).

5. Professor Rakoff’s thoughtful response to Professor Buzbee’s essay in this series raises challenging questions of a similar kind, in its comparison between President Clinton’s treatment of the regulation involved in *Rust v. Sullivan*, 500 U.S. 173 (1991), and President Trump’s recent attempts at “regulatory splintering.”

6. Among the several current books exploring this dark recent history are TOM GINSBURG & AZIZ HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018), and STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).

the realm of prosecution. The Senate's participation in appointments, Congress's responsibility (and power) to shape executive government, Article II's explicit acknowledgment that it could assign duties to the heads of executive departments (from whom the President was given, explicitly, only the power to inquire how they meant to act), are all derogations from the "pure" executive authority a prime minister might expect in parliamentary government. And, with respect to prosecutors, numerous factors suggest the absence of any expectation that the document they were creating would give the President control of federal prosecutions: private prosecution, state prosecutor enforcement of federal law, and judicial appointment of public prosecutors were all common at the time of the framing; the initial judiciary act in which Congress provided for district attorneys (today called US attorneys) created no relation between them and the Attorney General; even today, statutes provide for judicial appointment of acting US Attorneys when such a position falls vacant. Professor Shane argues that the constitutional ambiguity surrounding the executive character of the prosecutorial role legitimates proposals for statutory protection against the at-will removability of federal prosecutors and requires a President intent on affecting prosecution to act through the Attorney General, rather than issuing orders to prosecutors directly. Readers will find Dean Krent's commentary to be supportive—no surprise from one who long ago, as Professor Shane remarked, wrote dubiously about claims for what he styled a "unilateral presidency"—though he would not suggest, as perhaps Professor Shane does, that Congress's historical power to limit executive control over prosecutions suggests *plenary* control. Rather, Congress's capacity to structure prosecutorial functions (especially those involving executive branch actors themselves) should be seen in a "checks and balances" perspective, accepting both the President's affirmative authority to oversee law-execution and the defensive participation available to Congress and the courts against his self-aggrandizement. Professor Shane's colleague Christopher Walker, accepting the difficulties the historical record suggests, allied himself with Justice Scalia's strong dissent in *Morrison v. Olson*.<sup>7</sup> The President, too, must enjoy fortifications of his role permitting effective defense against encroachments by the other two branches and, as Justice Scalia reasoned in *Morrison*, separating the executive function of prosecution from the President's control, especially when it

7. 487 U.S. 654, 697–734 (1988).

concerns the performance of him and/or his close advisors, renders him defenseless. That said, Professor Walker was intrigued by Professor Shane's historical argument that prosecutorial power was not considered an exclusively executive power but also in some sense a judicial power. If true, the Constitution would seem to allocate a role for all three branches in the federal government's exercise of prosecutorial power.

"Executive Rulemaking and Democratic Legitimacy: 'Reform' in the United States and the United Kingdom's Route to Brexit," Susan Rose-Ackerman's contribution, celebrates the importance of informed public participation in anticipation of the adoption of secondary legislation (statutory instruments [SIs] in the United Kingdom, regulations here) as a means of providing democratic legitimacy to acts of lawmaking that, given their technical complexity, are beyond the capacity of the elected generalists of a legislature or the small cadre of elected politicians at the head of a ministerial government. Brexit suggests that the United Kingdom will soon have to adopt a great many SIs to replace EU standards if they are lost. Exploring recent English case-law, Professor Rose-Ackerman finds hints in recent decisions of a disposition to value, perhaps require, the kinds of consultations characteristic of American rulemaking and takes that as a hopeful sign. On the American side of that comparison, she considers the increasing obstacles to rulemaking imposed by the Trump administration (and others before his) and congressional proposals for "reform" that seem likely further to impede it. The resulting impression, in her judgment, is of an American move away from the relatively transparent and responsive public processes that have, until now, provided an element of democratic legitimacy to rulemaking processes. Nicholas Almendares admired this "description with a normative punch," as he characterized it, of two countries headed in opposite directions. He wondered, however, whether American rulemaking processes are not the product of congressional understanding that participatory procedures (that can inform judicial review) may be the only choice it has in a presidential system in which the President can veto any effort to undo his administration's secondary legislation. For Professor Almendares, then, American rulemaking processes are perhaps better seen as a means of controlling the essentially technocratic choices of bureaucrats, than as a means of supplying those judgments with democratic legitimacy. Parliament suffers no similar constraint on the possibility of disapproving SIs, formally enjoying unimpeded control of their effectiveness

(albeit, to be sure, not often engaged with them). Nor is it obvious how reliance on the courts supports *democratic* legitimacy—perhaps any such effect is just a happy coincidence. The second commentator on Professor Rose-Ackerman’s paper was the author of these prefatory remarks; his comments observed the differences between parliamentary and presidential government, and the potential for a drift toward autocracy in the event of legislative dysfunction, as already mentioned.

“Information Mischief Under the Trump Administration,” Nathan Cortez’s paper, concerns the problematic character of governmental policies concerning the sharing of information already in its possession. (Governmental policies respecting the acquisition of information, as under the Paperwork Reduction Act, might have been the subject of another paper in this Symposium!). The proper focus of information policy reflecting what is revealed, he argues, must be on fact and not opinion. And he finds a strong contrast between the Obama administration’s emphasis on openness, disclosure and factual integrity, suggested by such initiatives as *open.gov*,<sup>8</sup> and Trump administration actions. He explores in some detail its activities removing websites and data, altering facts, censoring climate science, weaponizing transparency,<sup>9</sup> etc. The paper discusses laws (e.g., the Information Quality Act) that might constrain government handling of information, but leave significant room for discretion; non-legal constraints (norms) are subject to disregard or erosion. Concluding his effort, a first, to log and evaluate the Trump administration’s performance, Professor Cortez finds it “unclear the extent to which legal and non-legal tools can provide meaningful constraints on an executive interested in exploiting its power over information.” David Thaw, commenting, drew on his expertise in computer science as well as law in remarking that distinguishing fact from opinion is made difficult by the extent to which scientific analyses rest on judgment derived from imperfect data. Renee Landers, drawing on her direct experience with health law, stresses the distinction important to draw between misinformation, and disinformation—not error, but lies.

“Civil Servant Disobedience,” Jennifer Nou’s paper, thoughtfully explores the parallels between “civil disobedience,” the variety of ways in which private citizens engage in principled law-violation, and civil servants’ public resistance to what they believe to be illegal instruc-

8. The discussion suggested that the Obama administration had its own difficulties in this regard.

9. See David E. Pozen, *Transparency’s Ideological Drift*, 128 *YALE L.J.* 100 (2018).

tions from their superiors. The idea of the civil service as an internal “fourth branch” of government, capable of opposing orders from politicians whose instructions they find inconsistent with the law they are responsible to administer, has attracted a fair degree of attention in the literature, and the Trump administration’s sharp reversal of course from its predecessor’s policies and commitments to “drain the swamp” have produced numerous incidents of civil servant disobedience. Drawing on the extensive literature on civil disobedience, and the sacrifices/commitments it requires of those disobeying, Professor Nou suggests the ethically required steps for normatively worthy civil servant disobedience—conditions the known incidents meet only occasionally. She explores, as well, the imperfect alternative of exit, harsher for civil servants who had committed to a lifetime of public service than for politicians expecting at some point to use the revolving door, and also potentially highly disruptive, and she worries about the longer term consequences in producing presidential backlash harmful to the civil service generally. “The potential for mutually respectful, reciprocal progress is . . . being squandered for mutually assured destruction to the long-cultivated norms of professionalism that have defined the civil service.”<sup>10</sup> The two commenters, Bijal Shah and Joel Mintz, explore the phenomenon in contexts with which they are particularly familiar. For Professor Shah, the resistance of civil servants in the immigration context—to policies furthered under Presidents W. Bush and Obama—has in some cases led to relenting by their superiors. Under President Trump, however, retaliation against resistance has become the norm, which may lend itself to the inaccurate framing of resistance as “disobedience.” Ultimately, she suggests that increasing incidents of resistance from otherwise divergent factions of the immigration bureaucracy, particular if met with severe backlash from executive leadership, implore a public or even congressional response. For Professor Mintz, who served in the EPA during the Reagan administration, under Administrator Anne Gorsuch, the current situation painfully echoes the experience then, as civil servants dedicated to the environmental protection for which their agency was responsible worked under political leadership committed to impairing their agency’s efforts. In normal circumstances, he observes, career staff members carry out the directives of EPA’s political leadership, even if disagreeing with its policies. They might quietly share factual infor-

10. Jennifer Nou, *Civil Service Disobedience*, 94 CHI.-KENT L. REV. 349, 380 (2019).

mation with extra-Agency actors (including congressional committee staffers, journalists, NGO professionals, and others) but they have rarely engaged in “civil servant disobedience” as Professor Nou defines it. In the early Reagan and Trump administrations, the Administrators’ anti-environmental EPA policies and the approaches to relating with EPA’s career staff were such as to generate staff behaviors fitting her account more closely. If not different in ideology, the differences in leadership between President Trump’s two EPA Administrators, Scott Pruitt and Andrew Wheeler, may be prompting a return to normal circumstances.

Daniel Farber’s paper, “Regulatory Review in Anti-Regulatory Times,” opens with a review of the long-running disputes over the impacts and worth of cost-benefit analysis, in which both economists and sympathetic legal scholars are under pressure from critics, both those who favor environmental regulation, and those who think it overdone. Studying how it is being done in an emphatically deregulatory administration, he characterizes its transformation by the Office of Information and Regulatory Analysis as “only one part of a larger attack on the regulatory state,” emphasizing costs to the virtual exclusion of benefits (and not treating as a “cost” of deregulation any amenity losses suffered by those on whose behalf regulation had been occurring). His “short primer” on CBA focusses attention on the difficulties of calculation, with particular attention to the discount rate. Turning to Congress’s use of the Congressional Review Act, he finds, remarkably, that there was no apparent connection to CBA—most high-cost regulations survived it, while a number for which CBAs had not been done did not. Then exploring OIRA’s role and President Trump’s Executive Order 13771, imposing deregulatory requirements and a regulatory budget, he notes how inconsistent the order is with CBA, in its indifference to regulatory benefits and inattention to benefits through deregulation as costs—only costs to the regulated are considered, naught else. That significant new regulation is not occurring is simply a reflection of administration policy, not CBA. And the opaqueness of the OIRA process, in several respects, impairs analysis of its work. Finally, he turns to how EPA, in particular, has worked with the social cost of carbon, the treatment of pollution reduction benefits, and three important deregulatory initiatives. Such steps as the exclusion of benefits occurring outside the United States and consideration of a rule’s co-benefits are, perhaps, readily understood from a political perspective, but not from that of rational analysis. “What we have seen so far raises serious ques-



tions, both as to practices under this Administration and as to the future trajectory of cost-benefit analysis.” Richard Pierce’s characteristically forceful commentary, generally supporting Professor Farber’s analysis, finds reasons for both optimism and pessimism about the future. President Trump’s deregulatory efforts, obtuse to the law’s requirements, have been failing and will continue to find disapproval in the courts; an EPA effort to improve the transparency of scientific evidence, if problematic in its motivation and difficult to achieve in a practicable way, is warranted in the face of recent cases of academic fraud at important institutions and the importance of replicability to scientific inquiry. But any EPA effort to require utilities to substitute less polluting facilities for the coal-fired generating plants they currently use, the heart of the Obama administration’s Clean Power Plan, faces the obstacle of establishing EPA’s authority to require action outside a plant’s fence; climate change mitigation measures face insuperable obstacles internationally; and the discredit the Trump administration’s manipulations are bringing to cost-benefit analysis may simply preclude its future use by *any* administration, despite its potential—well done—for rationalizing regulatory decisionmaking. Jonathan Masur, also a supporter of honest CBA, illustrates in detail how the EPA has manipulated that analysis in its effort to substitute an Affordable Clean Energy Plan for the Obama administration plan. He suggests that the solution is to make CBA judicially enforceable, thereby preventing presidents such as Trump from circumventing CBA in order to promulgate harmful regulations.

“Deregulatory Splintering,” William Buzbee’s contribution, is the third in a series of papers he has written about the Trump administration’s litigation of its deregulatory initiatives and judicial engagement with them.<sup>11</sup> Here, exploring the litigation that has been occurring, he addresses the variety of ways in which the Trump administration has been attempting to achieve the practical result of repealing rules without actually performing the hard work of notice-and-comment rule-making that would be formally necessary to do so. Aware it lacked authority to postpone the effectiveness date of a rule, EPA has attempted to create, as a new concept, an “applicability” date; agencies have announced policies of non-enforcement, or argued that they could suspend current rules while considering their replacements—without

11. William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357 (2018); William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, DUKE L.J. (forthcoming 2019).

even, necessarily, having initiated any further process; or, joining opponents of a rule previously adopted, they have discovered doubts about their authority to act, and joined a request to stay its effectiveness or confessed error on the merits—without creating the record that might support this change of view. Recent Supreme Court opinions, Professor Buzbee argues, clearly establish an agency’s obligation to provide a reasoned basis for a change of position; and these splintering strategies all involve evasion of that responsibility, short-circuiting the usual regulatory procedure for effecting regulatory change. Most courts confronted by use of these strategies, correctly in Professor Buzbee’s judgment, have rejected them. Todd Rakoff, playing Devil’s advocate, builds on Lon Fuller’s characterization of law as inevitably the product of both reason and fiat to suggest that these strategies, in their transparency, might be seen to embrace the rule of law. His effort is to build a “Hypothetical Trump Administration Jurisprudence” (or HTAJ) which, although in some respects in conflict with decided cases, is not per se a crazy way of looking at publicly-enforced law. Here, he invokes the example of the Clinton administration’s treatment of the anti-abortion rule the Supreme Court upheld in *Rust v. Sullivan*;<sup>12</sup> precisely as Professor Buzbee remarks, it announced a policy of non-enforcement while it pursued repeal of the rule by fresh rulemaking—a rulemaking that disappeared from view for essentially the whole period of the Clinton administration. One might note that if it is not actually replaced by a new rule (which in the *Rust* context did occur in 2000, a few months before the Clinton administration came to an end), the initial regulation remains on the books as law that might tomorrow be enforced. Rebecca Bratspies, drawing on examples from the administrations of Presidents Jackson and Roosevelt, remarks that the United States has faced earlier threats that the rule of law would be displaced by raw politics. “To the victor belongs the spoils,” a politicization of administration dramatized by President Jackson, would not be answered until the adoption of the Pendleton Civil Service Reform Act in 1883. The sweeping and virtually standardless delegations of regulatory authority created in the Roosevelt administration found response, first, in the only cases actually rejecting legislation on “delegation” grounds, and ultimately in the regularization of the administrative process effected by the 1946 passage of the Administrative Procedure Act. Again we face a President for whom power, not law, is the watch-

12. 500 U.S. 173 (1991).

word of his administration; and what now could be an effective, restorative response?

In “The Regulatory Accountability Act and the Future of APA Revision,” Ronald Levin addresses congressional efforts to “reform” rulemaking. The simple rulemaking procedures of APA Section 553 have been complicated by judicial and executive decisionmaking, and some reforms to recognize the variability and importance of this procedure are surely warranted, and have been strongly urged by the ABA and the Administrative Conference of the United States. Yet the Regulations from the Executive In Need of Scrutiny Act (REINS), the Separation of Powers Restoration Act (SOPRA), and the Regulatory Accountability Act (RAA), bills speedily and in some cases repeatedly passed by the House of Representatives, reflect disenchantment with the regulatory state and, in particular, a purpose further to complicate a rulemaking process already regarded by many as excessively sluggish—as, for example, by revivifying the practice of formal rulemaking for the highest consequence rules. Drawing on his earlier writings and congressional testimony, Professor Levin—a central actor in the consideration of these issues by the Administrative Law and Regulatory Practice Section of the ABA—focuses his attention on the RAA, carefully disentangling the reforms he regards as important from those that to many appear largely obstructive. The 2018 mid-term elections, returning control of the House to the Democrat party, make the enactment of the RAA, of any of these bills in their present form, unlikely; thus, his effort is to suggest reforms that would be appropriate to seek, on which there is substantial agreement from the bar—however doubtful it is that any Congress will have the will to do so. The comments of Jeffrey Lubbers and William Funk, each also active in the ABA’s Section, support his analysis and add thoughts on other issues of administrative law reform. Professor Lubbers addresses issues respecting administrative law judges—the uncertainties respecting their appointment and removal that have arisen in the wake of the Supreme Court’s decisions in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*<sup>13</sup> and *Lucia v. Securities & Exchange Commission*.<sup>14</sup> President Trump’s executive order removing the Office of Personnel Management from the selection process and dramatically reducing necessary qualifications for ALJs,<sup>15</sup> ostensibly based on *Lucia*, appears to invite political hiring.

13. 561 U.S. 477 (2010).

14. 138 S. Ct. 2044 (2018).

15. Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018).

Moreover, since ALJ tenure is under the supervision of officers who may be removed only “for cause”—the Merit Systems Protection Board—are they subject to “at will” removal? Remarkably, despite a clear signal from the Court that it did not think this question before it in *Lucia*, the Solicitor General devoted ten pages of his merits brief to the question and he has since written to agency general counsels suggesting that he may not defend the constitutionality of ALJ removal protection unless MSPB is more deferential to agency moves to discipline and remove them. Professor Lubbers raises significant concerns about the impact of these developments on the objectivity and professionalism of administrative adjudication. Professor Funk, also agreeing with Professor Levin’s analysis, addresses two pro-regulation regulatory reform proposals—a bill introduced by Senator Elizabeth Warren and an American Constitution Society Issue brief authored by Professors Farber, Heinzerling, and Shane. Both proposals attempt to counter perceived institutional favoritism in rulemaking toward corporate and industry interests. And, just as Professor Levin finds the RAA’s anti-regulation bias results in some very questionable provisions, Professor Funk finds very questionable provisions in both pro-regulation proposals.

Seven remarkable papers, then, about the first two years of President Trump’s administration, with thoughtful commentary responsive to each. Developments since they were written—our longest ever government shut-down, the invocation of a national emergency in a situation acknowledged not to be an emergency in any usual sense of that term and involving the military ever more deeply in our domestic affairs, indictment after indictment of men among the President’s closest associates, the UK’s difficulties with Brexit, offenses given our closest allies—underscore the importance of careful attention to what it means to say that “the executive power” is vested in our President.