Testimony of

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concerning

Rulemaking Process and the Unitary Executive Theory

Thank you very much for inviting me to testify before you today. I am a scholar of administrative law, who has had the privilege of teaching that subject at Columbia Law School for the past 37 years and who for two years in the 1970's had the honor of serving as the first General Counsel of the Nuclear Regulatory Commission. I was later Chair of the ABA's Section of Administrative Law and Regulatory Practice, a consultant to the ABA's Coordinating Committee on Regulatory Reform, and long-time chair of the Section's Rulemaking Committee. My 1984 analysis of agency relations with the President won its annual prize for scholarship. I have continued since then to write about separation of powers and, in particular, the President's constitutional relationship to the agencies on which Congress has conferred regulatory authority. My most recent writing on this subject, an essay that recently appeared in the George Washington Law Review entitled "Overseer or 'The Decider' – The President in Administrative Law,"[1] is squarely on point of today's subject.

We all understand that the Constitution creates a single chief executive officer, the President, at the head of the government Congress defines to do the work its statutes detail. We do have a unitary executive. Disagreement arises over what the President's function entails. Once Congress has created a government agency and specified its responsibilities, we know both Congress and the courts are just to oversee the agency in its assigned work, not actually to perform that work. But is it the same for the President? When Congress authorizes the Environmental Protection Agency to regulate pollution, the Occupational Safety and Health Administration to regulate workplace safety, or the Food and Drug Administration to regulate the safety of food, drugs, and medical devices, what is the President's role? May he *decide* these matters, or is he, too, only to oversee the agencies' decision processes?

[1] 75 G.W.L.Rev. (2007).

Our Constitution is very clear, in my judgment, in making the President the overseer of all the varied duties the Congress creates for government agencies to perform, including rulemaking. Yet our Constitution is equally clear in permitting Congress to assign duties to administrative agencies rather than the President. When it does, our President is not "the decider" of these matters, but the overseer of their decisions. As Attorney General Wirt advised President Monroe in 1823, when the President fails to honor that admittedly subtle distinction, he fails in his constitutional responsibility:

> [the President's role is to give] general superintendence [to those to whom Congress had assigned executive duties, as] it could never have been the intention of the constitution . . . that he should in person execute the laws himself. . . . [W]ere the President to perform [a statutory duty assigned to another], he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself."[2]

That is, the assignment of decisional responsibility to others is a part of those laws to whose faithful execution the President must see. And when agency officials treat the President as the person entitled to decide matters Congress has committed uniquely to their judgment, they too fail in their obligations to the law. Consult with him they must; but at the end of the day, they are the ones responsible for deciding any matters placed uniquely in their charge.

Underlying today's inquiry, I imagine, are aspects of the Environmental Protection Agency's relationship with the White House and, in particular, Susan Dudley's Office of Information and Regulatory Affairs over recent rulemaking, in particular the rulemaking concluded this past March setting primary and secondary national standards for ozone. From a variety of elements that have come to light – in good part, I must say, due to the welcome transparency of OIRA in its administration of Executive Order 12866[3] – one can conclude that both the White House and the leadership of

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[2] The President and Accounting Officers, 1 Op. Att'y Gen. 624, 624-25 (1823).

[3] As I told this committee when I appeared before it in February of last year, among the elements that have (continued...)

EPA regard the White House as having the final voice of decision on rulemakings statutorily committed to EPA's responsibility. Thus, in his recent confirmation hearings, the nominee to be General Counsel of the EPA resisted the suggestion that EPA should take an independent view, remarking that "Ultimately, the [EPA] administrator works for the president of the United States." Recent writings, from Charlie Savage's brilliant account of the signing statement controversy, "Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy," to Jack Goldsmith's chilling "The Terror Presidency: Law and Judgment Inside the Bush Administration," have made clear the strength of our President's claim to be "the Decider" across the breadth of government, and without regard to the particular assignments of authority that Congress may have enacted.

Internal and external communications that have come to public attention in the ozone rulemaking show how this attitude has prevailed. Within EPA, it is clear, scientific indicators from both inside and outside the agency pointed unequivocably in the direction of a secondary national standard for ozone that would differ from the primary standard. OIRA, it is equally clear, dug in its heels. The agency responded to OIRA's March 6 signal of unhappiness with a detailed memorandum March 7 explaining the scientific basis for its preferred course and objecting to OIRA's apparent introduction of the cost concerns EPA is forbidden by law to rely upon in its decisionmaking. Not content, even after EPA's close consultation with the White House, to permit the agency

[3] (...continued)
made the Executive Order regime acceptable to Congress, and I might add to much of the academic community, are the commitments it contains to a professionalized, unusually transparent and apolitical administration. Oral contacts with outside interests are limited to OIRA's senate-confirmed Administrator or his particular designee; agencies attend any meetings with outsiders; written communications from outsiders are also logged; and all of this information is publicly disclosed. My understanding is that Congress has properly insisted on these elements of transparency, as a condition of its acceptance of this generally valuable regime. The OIRA website, within a generally closed White House environment, has been a remarkable monument to the worth of this insistence, as is the revelation of the correspondence with EPA that I imagine to have helped prompt this hearing. I do understand that OIRA has not been fully as forthcoming as the Committee has wished, however.

to decide the matters Congress had left in its hands, OIRA then pushed the issue upstairs. The result was a remarkable letter from OIRA Administrator Dudley: "The President has concluded that, consistent with Administration policy, added protection should be afforded to public welfare by strengthening the secondary ozone standard" – an outcome that was never in doubt, although even following EPA's preference the strengthening would have been less than its scientific advisors had counseled – "and setting it to be identical to the new primary standard ... ." This, Administrator Dudley continued, would avoid "setting a standard lower or higher than is necessary."

While Administrator Dudley's letter gives the appearance of recognizing that "you intend to render your determination," all parties understood that she was communicating a presidential decision with an expectation of obedience. Under the current administration's notoriously strong theory of a unitary presidency, EPA had no choice; its obligation was to implement the President's conclusion. The reported reaction of the Solicitor General, that what the White House was doing ran afoul of positions his office had recently taken in the Supreme Court, only underscores the hazards these developments pose to the rule of law. As the Solicitor General had argued and the Court had agreed, EPA is forbidden to take costs into account in its Clean Air Act decisionmaking. One gets the strong sense that the Supreme Court sustained EPA's extraordinary range of authority over air quality issues, in good part, precisely because it concluded Congress had authorized that agency to act only on the basis of science, and not a broader array of political factors such a economic cost or impact. This makes it possible to regard the decision as one governed by law, and within the ambit of judicial review that can assure its legality. But if the President, relying on his strong theory of a unitary presidency, is issuing commands, and he and his appointees regard it as his right to do so – and, consequently, their duty to obey – any assurance we might have about legality disappears. Transparently, concern with economic impact and not with EPA's reasoning

from the scientific views in its rulemaking record, underlay the President's reported conclusion. And that, to my mind, sharply illuminates the deep problems of confusing the President's legitimate, indeed essential role as overseer of all executive government, with a right to decide matters that Congress has delegated to particular agencies. When a decision is taken out of the hands of the agency equipped to be expert about the science and constrained by Congress's instructions, and delivered to a White House motivated by a much larger array of essentially political considerations reaching well beyond those factors Congress has authorized, legality disappears and is replaced simply by power politics.

I should be clear that the issues here are not simple ones. Our Constitution does make clear that we have but a single chief executive. The President's politics stand behind appointments to high office, and he properly claims opportunities to discuss his administration's policy preferences with his appointees. Indeed, the Constitution's text is explicit that he may demand consultation, in writing, on matters within the duties of their offices. In my judgment, that makes clear his right to discipline any appointee – even one to an independent regulatory commission – who refuses to consult with him and hear his views. Insofar as it creates a framework for consultation, Executive Order 12866 reflects a sound view of executive authority. It would do so even if it were fully extended to the independent regulatory commissions, that it now reaches only in part. The difficulties arise when a President reaches past consultation, to demanding particular decisions. This is the subtle ground between hearing out the President and obeying him, and this is the issue that concerns me here.

In some contexts – for example, where Congress has empowered not one but two or three different agencies to deal with the same social issues – the government's practical need for coordination, for a view coherent across agency boundaries, can justify the President's assertion of

authority to decide. When the Occupational Safety and Health Administration acted to limit worker exposure to atmospheric benzene, for example, its authority to protect gas station attendants overlapped with the EPA's responsibility to protect citizens from the same hazard. It was the EPA's authority to protect citizens who might be pumping their own gas from the same fumes. Resolving that kind of conflict requires a central voice. But in the case of ozone, we really do not see that. Setting the secondary air quality standard for ozone is indisputably EPA's business, and the very same phrase of the Constitution that recognizes the President's right to consult with EPA also recognizes that the duty of *decision* lies with EPA. The President's right to an opinion is the right to an opinion about a matter within the *duty* of the Department.[4]

Finding the right balance between politics and law in our society, as any society, is achingly hard. I tell my Administrative Law students every year that this basically is what our subject is about. And clearly those who framed our Constitution understood that many of the constraints that operate on our government are properly those of politics, not law; yet where the constraints lie in politics, we ought to know politics is at work, not disguised as expertise. Moreover, law has its place, a place that is particularly important in the regulatory state with its enormous impacts on the economy and the public. Perhaps I can illustrate these points with two more vignettes from our early history.

The first is implicit in often-quoted passages from *Marbury v. Madison*,[5] Chief Justice Marshall's opinion that famously established the place of the courts in the constitutional order. Distinguishing between those acts that a court might control by law, and those that were not subject to

[4] U.S. Const. Art. II. Sec. 2, Cl. 1: "... he may require the Opinion, in Writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices."

[5] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166, 170 (1803).

legal constraint, he denied any purpose to reach acts the President was entitled to *command* from his subordinates. When an official

> "is to conform precisely to the will of the President [h]e is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. ... The province of the court is, solely, to decide on the rights of individuals, not to enquire 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."

The thing to note is that we would *never* describe rulemaking decisions of the Administrator of the EPA about air quality in the way Chief Justice Marshall describes decisions of the Secretary of State about foreign affairs. The Secretary of State is exercising discretion in its largest sense, cases in which there is no law to apply and which "can never be examinable by the courts." The great Chief Justice Marshall was not addressing the mixed questions of law and politics that are the everyday focus of administrative law and of judicial review for "abuse of discretion" under the APA. For those acts we actually depend on the possibility of effective judicial review to justify their legality; if standards did not exist permitting a court to assess the legality of the Administrator's acts, we would say an unconstitutional delegation had been made. These are *not* matters to be decided by politics, and they *are* questions examinable by the courts. And that brings us right back to the difficulty of having the President purport to decide them.

The second of my vignettes underscores the political constraints that operate on a President who better understands the importance of keeping politics and law apart. President Andrew Jackson had risked his reelection to a second term in office in 1832 with his successful veto of the bill that would have reauthorized the Bank of the United States. When he was then reelected by a wide margin, he took that as political vindication of his position on the Bank. He asked his Secretary of the Treasury, Louis McLane, to remove the government's funds from the Bank and deposit them in state

banks.[6] But the Bank's authority ran until 1836, and the relevant statute provided that government funds were to be kept in it "unless the Secretary of the Treasury shall at any time otherwise order and direct."[7] When Secretary McLane decided against removing the funds, Jackson removed him and appointed William Duane as his successor. Duane also proved resistant to Jackson's persistent demands, responding that "[i]n this particular case, Congress confers a discretionary power, and requires reasons if I exercise it. Surely this contemplates responsibility on my part." In September of 1833, after Duane had declined to remove the funds despite lengthy and fervent correspondence between them, Jackson removed him and appointed Roger Taney Acting Secretary. Almost immediately, Taney made the requested order. The result was a political furor. The Senate passed a Resolution of Censure and subsequently rejected Taney's nomination as Secretary—the first time in American history it had rejected a presidential nomination to the cabinet. When, in 1835, President Jackson nominated Taney to a seat as Associate Justice of the Supreme Court, that nomination, too, failed. Changes in Senate membership finally permitted his renomination and confirmation as Chief Justice months later, in 1836, and the eventual expungement of the Resolution of Censure.

The President thus did prevail, but only at the political cost of an open fight with Congress, that reacted by tightening controls over his appointments. If the President removes head of the EPA for not acting as he would prefer, that is likely to be a more public and politically costly act than having a subordinate write him "the President has concluded that ... " with the expectation of obedience on both sides. President Jackson's recognition that the discretion involved lay with the Secretary of the Treasury, not himself, gave the events high political visibility and animated the machinery of checks

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[6] This paragraph draws primarily on LEONARD D. WHITE, THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829-61, at 34-35, 37, 44, 110 (1954).

[7] Act of April 10, 1816, ch. 44, sec. 16, 3 Stat. 266, 274.

and balances. Such visibility might lead a President simply to accept his official's contrary-to-advice decision. To underscore the legal understanding where authority over the bank funds lay, recall that Jackson was the President who at about the same time famously responded to the Supreme Court's decision in *Worcester v. Georgia*[8] with "John Marshall has made his decision, now let him enforce it."[9]

Twentieth Century events reflect the same distinctions and concerns. Justice Hugo Black wrote for the Supreme Court, in assessing one of the century's most striking events of presidential overreaching, that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[10] Surely he knew how frequently executive agencies adopt regulations (currently about ten times as often as Congress enacts statutes). Strikingly, no one has drawn any connection between this holding and rulemaking; in my judgment, they have not drawn it precisely because they understand that agencies, and not the President, are the ones empowered to make rules. Agencies *are* lawmakers; except as Congress has authorized it, the President is not.[11] Similarly, mid-century events emphasized the political constraints attached to the President's having to fire someone with whose actions he disagreed, rather than simply put his own decision in place. During run-up to World War II, a time surely as testing as the present day, Attorney General Robert Jackson would advise President Franklin Roosevelt that it was his Secretary of the Interior, Harold Ickes,

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[8] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[9] 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 759 (rev. ed. 1926)).

[10] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

[11] The influential essay of Harvard Law School's Dean, Elena Kagan, Presidential Administration, 114 Harv.L.Rev. 2245 (2001), celebrating actions by President William Jefferson Clinton that somewhat anticipated President Bush's claims, argues that congressional authorization of presidential decisionmaking in rulemaking should ordinarily be presumed. Section 7 of President Clinton's E.O. 12866 might be taken to embody the same view, that Congress must explicitly forbid rather than authorize presidential decision in rulemaking. My own judgment is that Justice Black's observation is a good deal closer to both constitutional text, and our political safety from an over-ambitious White House.

who had the legal authority to permit the sale of helium to Germany. Roosevelt earnestly wished to permit that sale while we were still formally a neutral country, prior to our entry into World War II. Ickes, following his own star, would not permit it[12] In the end, Roosevelt preferred keeping Ickes in place, and the helium undelivered, to the alternative of replacing him. A not dissimilar series of events and highly politicized outcomes—with, as for President Jackson, two resignations from cabinet positions and two reappointments before the President achieved his purposes—attended President Richard Nixon's effort to debarrass himself of special prosecutor Archibald Cox. In this case, the President ultimately did not prevail.

Impressive recent contributions to the scholarly literature further underscore the importance for the integrity of rulemaking of keeping power politics out of it. Later this month two University of Texas Law School scholars, Thomas McGarity and Wendy Wagner, will be publishing "**Bending Science**" with Harvard University Press. It is a chilling account of the range of sophisticated legal and financial tactics political and corporate advocates use to discredit or suppress research on potential human health hazards. The economics-grounded political attack on the ozone regulation seems to fit right in. And it is hardly the only such episode in the newspapers today, as recent accounts about NOAA's efforts to secure protection for the right whale will attest;[13] they portray the Vice President's office delaying a final rule for more than a year by expressions of concern about the science involved. Of course the Vice President's office has no scientific expertise and responsibilities; the questions raised were quickly and emphatically answered; and the delays continue. Lisa Bressman and Michael Vandenbergh interviewed top political officials at the EPA during the

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[12] ROBERT JACKSON, THAT MAN (John Barrett, ed., 2003).

[13] E.g., Felicity Barringer, "Whale Protection Caught in Agency Rivalry, Files Show," http://www.nytimes.com/2008/05/01/washington/01whale.html?_r=2&ref=washington&oref=slogin&oref=slogin; Juliet Eilperin, "White House Blocked Rule Issued to Shield Whales," http://www.washingtonpost.com/wp-dyn/content/article/2008/04/30/AR2008043003189.html.

Bush I and Clinton administrations and found what is perhaps not surprising, that political interventions from the White House in the President's name on high-profile or high-stakes matters come from multiple voices and often enough in varying tones. One cannot always be sure that "the President has concluded" refers to the incumbent's decision, rather than a subordinate's or internal cabal's belief about what it ought to be. "According to EPA respondents, OIRA review and other White House involvement are unsystematic ... triggered in many cases not just by the need for centralized oversight of particular regulatory matters but also by the interest of the particular officials involved."[14] Professors Bressman and Vanderbergh also express skepticism that "presidential control facilitates political accountability. EPA respondents believed that they were more transparent and responsive than the White House. ... We conclude, somewhat paradoxically, that agencies, though not comprising elected officials, may better promote political accountability than the White House. ... If the White House shapes high-level issues, it ought to reveal in what manner and through which office or offices it does so. For now, agencies appear to better represent public preferences and resist parochial pressures—the asserted aims of political accountability."

You will likely hear arguments that the President is, after all, our chief executive, that our Constitution embodies the judgment that we should have a unitary executive, and so even if the result of OIRA's interventions is to convert agency judgments about rulemaking into presidential judgments, that only accomplishes what the Constitution commands. In my judgment it is not only an erroneous argument, but one dangerous to our democracy. The President is commander in chief of the armed forces, but not of domestic government. In domestic government, the Constitution is explicit that Congress may create duties for Heads of Departments – that is, it is in the heads of

[14] Lisa Schultz Bressman & Michael P. Vandenbergh, Inside the Administrative State: A Critical Look at the Practice of Presidential Control, 105 Mich. L. Rev. 47 (2006).

departments that duties lie, and the President's prerogatives are only to consult with them about their performance of those duties, and to replace them, with senatorial approval required of their replacements, when their performance of those duties of theirs persuades him that he must do so. This allocation is terribly important to our preservation of the rule of law in this country. The heads of departments the President appoints and the Senate confirms must understand that their responsibility is to decide – after appropriate consultation to be sure – and not simply to obey. We cannot afford to see all the power of government over the many elements of the national economy concentrated in one office.

Professor Peter Shane, a highly respected scholar of the presidency and a former lawyer in the Office of Legal Counsel, put the matter this way in a recent discussion of President Bush's use of signing statements, which I know is not our subject today.

> The Bush administration has operated until recently against the backdrop of Republican-controlled Congresses and a Supreme Court highly deferential to executive power. ... Not only has it insisted, in theory, on a robust constitutional entitlement to operate free of legislative or judicial accountability, but it also has largely gotten away with this stance. And that success – the administration's unusual capacity to resist answering to Congress and to the courts – has fed, in turn, its sense of principled entitlement, its theory that the Constitution envisions a presidency answerable, in large measure, to no one.
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> Critics of the Bush 43 administration have not infrequently charged that the administration's unilateralism is antagonistic to the rule of law. After all, the ideal of "a government of laws, and not of men" seems on its face to contradict President Bush's expansive claims of plenary authority. Yet, no sane President claims to be above the law, and ... it is doubtful that President Bush thinks himself antagonistic to the rule of law. He and his legal advocates presumably have a specific idea of what the rule of law consists of. But what the administration seems to believe in is a version of the rule of law as formalism. It is a rule of law that claims to be no more and no less than law as rules. Under the Bush administration's conception of the rule of law, Americans enjoy a "government of laws" so long as executive officials can point, literally, to some formal source of legal authority for their acts. They would presumably count this as the rule of law even if no institution outside the executive were entitled to test the consistency of those acts with the source of legal authority cited.
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> The Bush 43 administration's repeated utterance of its constitutional philosophy shapes

> executive branch behavior by solidifying allegiance to norms of hostility to external accountability. Like the torture memo or the rationalizations for warrantless NSA wiretapping of domestic telephone calls, the Bush 43 signing statements embody both a disregard for the institutional authorities of the other branches – especially Congress – and a disregard for the necessity to ground legal claims in plausible law. They are best understood as an attempt to invent law and as an exploitation of Congress's unwillingness, at least while in Republican hands, to allow the administration's more extreme theories of presidential authority to go unchallenged.[15]

What might Congress do about the simple affront President Bush's strong "unitary executive" theory appears to me to be to Congress's authority to confer organization and authority on elements of government by enacting statutes? You might enact by statute the judgment that EPA preferred; that would not only freeze matters probably best left to flexible administration, but also risk a presidential veto – the price you pay whenever you delegate authority to the executive branch. Politically, you hold the power of the purse. When the House attempted to exercise that power last summer, in connection with the President's remarkable amendments to Executive Order 12866 on which I have previously testified before you, I understand that OMB responded with the claim that a failure to appropriate funds for OIRA would be an unconstitutional intrusion on the President's constitutional authority – the power of the unitary executive. What a laughable claim that is! The President, like the King of England in his battles with Parliament, must rely on Congress for the funds he desires and if you find him abusing his authority you can withhold those funds. My late colleague Charles Black once wrote "My classes think I am trying to be funny when I say that, by simple majorities, the Congress could at the start of any fiscal biennium reduce the President's staff to one secretary for answering social correspondence ... but I am not trying to be funny; these things are literally true."[16] Why should Congress tolerate the expenditure of government moneys to fund

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[15] Peter Shane, Presidential Signing Statements and the Rule of Law as an "Unstructured Institution" 16 Wm. & Mary Bill of Rights J. 231, 232-33, 251 (2007).

[16] Charles Black, The Working Balance of the American Political Departments, 1 Hast.Con.L.Q. 13 (1974).

politicized White House operations by which the President or the Vice President purport to divert agencies from the tasks it has given them, to substitute power politics for law? This too, of course, is a political control – and it is precisely the kind of political control the framers of our Constitution put in place as a safeguard, inter alia, against monarchical pretension in presidential office.

Thank you for the opportunity to address you today. I would be happy to answer any questions you might have.