

BAAS Keynote Speech A Passion for Democracy: Proximity to Power and the Sovereign Immunity Test

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In the run-up to the 2004 presidential election, a Bush administration official memorably explained to *New York Times* reporter Ron Suskind, “when we act, we create our own reality. And while you’re studying that reality ... we’ll act again ... We’re history’s actors ... and you ... will be left to ... study what we do.”¹ This comment was taken both as the administration’s assessment of the intellectual left, and as a window into Bush’s executive philosophy. Then many believed then that a different President – a liberal or progressive President – would renounce such unilateralism. But these arguments didn’t evidence the peculiarity of George W. Bush’s *Machtspolitik*. Rather, they draw on a deep and relatively unnoticed tradition in US political history and government, of the ever more aggressive executive expansion of presidential powers. That expansion has come through the ambitions, machinations, and moxie of individual Presidents – some of them impressively gifted leaders. It has also come through the active and passive consent of citizens, Congress, and the Supreme Court. The President has come to symbolize both our democratic process and our national power: citizens see him simultaneously as democracy’s heart and its avenging sword. That trust, trained into US citizens from our earliest days in school, reinforced by popular culture and by the media, makes citizens *want* to give the President more power, regardless of the Constitutional checks and balances we also learn to treasure as schoolchildren. Over time, this accumulating consent to ever-increasing presidential power means that Presidents are free to act – even in ways that upset the Constitution’s balance of

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¹ Ronald Suskind, “Without a Doubt,” *New York Times Magazine*, 17 Oct. 2004, 44–51; 64; 102; 106.

power – and that citizens by and large approve, and those who don't are left studying what they did.

Contrary to familiar wisdom, then, it's not particular Presidents who are a problem for democracy. Rather, as I argued in my 2008 book *Bad for Democracy* (from which the introduction and first section of this essay are drawn), the problem is the shape presidentialism has taken over time both in the US Constitutional system and within US political society.² “Presidentialism” is the term I used there to describe the symbolic power that works unconsciously on citizens, and the institutional preeminence the office assumes within US government. Though the hallmark of Constitutional government is the checking function of the three branches, our desires for democratic reform go insistently toward the President. Legislatures and courts are factually more likely to assist than to impede the President. But on the few occasions when they do seek to check him, these branches are cast as *interfering* with the power of the President (as, for instance, in the many negative responses to the open letter that forty-seven US senators sent to Iran in March of 2015).

Presidentialism, simply put, is bad for US democracy. Its problems come in multiple dimensions, as I explained at length in my book. Presidentialism works against peoples' civic cultivation of democratic skills, training citizens to want the President to take care of democracy for us instead of remembering that democracy, properly defined, is *our* job. Presidentialism trains people to see democracy as being both led and symbolized by a single person, a strong leader standing for a strong consensus, leading us to overemphasize democracy as unity. This ideal makes people fundamentally uncomfortable with disagreement, one of the most important motors for political freedom and agency, keeping us from realizing that a decently functioning *disunity* can provide better solutions, and make an even stronger polity. Presidentialism encourages people to see democracy as a winner-take-all endeavor in world politics and in the domestic sphere. It teaches citizens to see negotiation and compromise as the weakness, not the strength, of democracy.

US citizens' civically trained desire to see our President as “the most powerful man in the world” has had the effect of allowing individual Presidents steadily to increase the power of their branch, most recently in the aftermath of 9/11, when Congress gave to the executive their branch's right to supervise war powers (a Constitutional power that Congress has in fact not exercised since 8 December 1941). Viewing this record of Congressional concession and executive aggrandizement, one could plausibly argue that presidentialism

² Dana D. Nelson, *Bad for Democracy: How the Presidency Undermines the Power of the People* (Minneapolis: University of Minnesota Press, 2008).

is quietly colonizing United States constitutional democracy for its own powers and aims, depending on citizens to keep believing that the executive's power lends us strength instead of remembering that the truth is exactly otherwise.

This essay first recaps my book's arguments in chapter 4 about the unitary executive as a background for the discussion that follows. The next section updates those arguments in the context of the Obama administration. The final section addresses a worrisome trend in scholarship and intellectual political culture that I've noticed over the many years I've worked on this project.

I. THE UNITARY EXECUTIVE AND PRESIDENTIAL POWER TOOLS

In ways that were simply unprecedented, Reagan moved, from his very first days in office, to take wide-reaching control of the executive branch. Reagan administration officials, in coordination with the Heritage Foundation and Federalist Society lawyers, began elaborating a broad new model of presidential power, the "unitary executive," which aimed to get control of the regulatory state and entitlement spending, to lower taxes, and to win the Cold War by boosting defense spending. The idea was that only a strong President could accomplish the project of limiting big government. Drawing on a model for "unitary" *corporate* leadership, where the CEO also served the company as the chair of the board (advocates insist that unitary corporations outperform those with divided board and company leadership), the unitary executive model was an aggressive brief for strong and undivided presidential control of the executive branch, and expanded unilateral powers. It staked an avowedly adversarial relation with Congress. Counselor to the President and later Attorney General Edmund Meese began voicing publicly – usually to great outrage – some basic tenets of this new theory. He insisted, for instance, that the President had the power of nonacquiescence to Supreme Court decisions; that the president had a right, co-equal with the other three branches, to interpret and decide on Constitutionality; and that the administration had the right to disregard laws.

Despite loud protest against particular manifestations of the theory, there was little formal register of the unitary executive theory per se during Reagan's presidency. Members of Reagan's administration and conservative legal professionals began working to provide this theory with the cover of a Constitutional basis and history. Drawing (deceptively) on Constitutional Convention debates about whether the presidency should be limited to one person (the framer's term for this option was "unitary") or should involve three people (one from each national region – they termed this a "plural" executive), Federalist Society legal scholars like Steven Calabrese and

Christopher Yoo have insisted that the Framers intended the adoption of their late twentieth-century corporate model of hierarchical executive power from the nation's very beginning.³

As Richard Pious recently summarized, the Hamiltonian argument about prerogative power that undergirds unitary executive theory "is the antithesis of Madisonian principles: it involves governance by *fait accompli*."⁴ Operating on the theory's principle that Presidents usually get to keep the powers they seize (Ryan Barilleaux calls this "venture constitutionalism"⁵), Reagan used executive orders to create policy he couldn't move through Congress: on family, on intergovernmental review of programs, and on eminent domain. And as subsequent Congressional hearings would reveal, Reagan also secretly used national security directives – ostensibly aimed at foreign relations – to accomplish *domestic* aims. As Philip J. Cooper summarizes from a General Accounting Office study, "there were as many Reagan orders that had domestic impact as there were with military impact and more than that number with a foreign policy impact" – including National Security Decision Directive (NSDD) 189, which constrained the sharing of scientific research.⁶

Regan notably expanded the use and aims of presidential signing statements. As many have observed, the use of signing statements has escalated radically since the Nixon era. Christopher Kelley documents a total of 994 from Washington to LBJ, and 1,103 from Nixon to Clinton.⁷ This trend looks exponential: to date President George W. Bush issued signing statements challenging over 1,100 provisions of federal law. Under the unitary executive theory, Presidents have begun acting as if these statements have the force of law, in effect nullifying key provisions of legislation and exercising what the

³ Steve G. Calabrese, "Some Normative Arguments for the Unitary Executive," *Arkansas Law Review*, 48 (1995), 23–104; Steven Calabrese and Christopher S. Yoo, "The Unitary Executive during the First Half-Century," *Case Western Reserve Law Review*, 47 (1996–97), 1451–1561; Calabrese and Yoo, "The Unitary Executive during the Second Half-Century," *Harvard Journal of Law and Public Policy*, 26, 3 (Summer 2003), 667–801; Steven Calabrese, Christopher S. Yoo and Laurence Nee, "The Unitary Executive during the Third Half-Century," online pdf at http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1784&context=faculty_scholarship, accessed 18 Aug. 2015.

⁴ Richard M. Pious, "Why Do Presidents Fail?," *Presidential Studies Quarterly*, 32, 5 (2002), 724–42, 734.

⁵ For his definition of the phrase see Ryan Barrilleaux, "Venture Constitutionalism and the Enlargement of the Presidency," in Christopher Kelley, ed. *Executing the Constitution: Putting the President Back into the Constitution* (Albany: State University of New York Press, 2006), 37–52.

⁶ Philip J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (Lawrence: University Press of Kansas 2002), 195–96.

⁷ Christopher Kelley, "The Significance of the Presidential Signing Statement," in Kelley, 73–89.

Supreme Court has explicitly disallowed, a line-item veto. This practice has become controversial enough that in July 2006, the American Bar Association formally denounced the practice as presenting “grave harm to the separation of powers doctrine, and the system of checks and balances, that have sustained our democracy for more than two centuries.”⁸ In these ways, Reagan’s presidency profoundly reoriented theories about presidential power. And, notably, every President since has worked to uphold and grow the power of the unitary executive. I have a lot to say about that in my book *Bad for Democracy*. For the sake of economy, here, I’ll skip over the forty-first and forty-second presidencies, and turn to our forty-third.

Republican party nominee George W. Bush was widely heralded by the corporate community in the run-up to the 2000 election as the nation’s first MBA President. Proponents of the unitary executive theory hoped that the President’s CEO style would translate into ongoing strengthening for executive powers. They were not disappointed. From his first days in office, Bush demonstrated his commitment to the strongest possible version of the unitary executive theory. He began with a salvo of executive orders that included the creation of a White House Office of Faith-Based and Community Initiatives; the reclassification of presidential materials that had previously been made publicly accessible, altering scholars’ as well as the public’s access to presidential records and thereby deepening the realm of executive privilege beyond the immediacy of a President’s years in office; and finally reversals of Clinton policies on the environment, labor, and health. And though many observers were surprised by the Bush administration’s support for Clinton’s late-term executive orders that set aside thousands of acres for national monuments in the face of legal challenges, Solicitor General Theodore Olson’s arguments before the Supreme Court, suggesting that the Court had no standing whatsoever to question Clinton’s orders, beamed the Bush administration’s commitment to a beefed-up theory of the unitary executive.

The attack of Islamic radical terrorists on the World Trade Center and Pentagon in September 2001 authorized President Bush to take on the mantle of commander in chief. Creating the Department of Homeland Security by executive order, Bush began pushing both in public and in secret for vast expansions of presidential powers, through the Patriot Act, national security directives, and military orders. As early comments by UN

⁸ Michael S. Greco, president, American Bar Association, Opening Statement News Conference on the Report and Recommendations of the ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine National Press Club, 24 July 2006, <http://www.americanbar.org/content/dam/aba/publishing/abanews/1273177630signstateremarks.authcheckdam.pdf>, 3, accessed 18 Jan. 2016.

ambassador John Negroponte suggested and the National Security Strategy of 2002 would confirm, the Bush doctrine depended heavily not just on US unilateralist preemption in the “War on Terror,” but specifically on presidential unilateralism. As political scientist Michael Cairo details, the Bush Doctrine’s proactive stance is the basis for expanded presidential power. The entire strategy is based on the presumption that a president can and must act to prevent future attacks on the United States or U.S. interests ... it denies the necessity for congressional action of any kind in the use of force.⁹

Other “Unitarians” proved willing to go further. Harvard law professor Harvey Mansfield argued in a May 2007 *Wall Street Journal* editorial that the President not only should not be subordinate in any way to Congress, but also should be above the rule of law. Making the President follow the law unnecessarily weakens the executive and, Mansfield dramatically insisted, a weakened executive leads inevitably to a weakened United States.¹⁰ Indeed, as the National Security Agency (NSA) warrantless-wiretapping controversy revealed, President Bush had not considered himself bound by the rule of US law, any more than had his advisers, urged on by the Office of Legal Council’s John Yoo, had found him to be bound by international war rules, treaties, or the Geneva Conventions in deciding the method for dealing with foreign combatants or US citizens captured in the so-called War on Terror.

The Bush administration pushed the theory of the unitary executive toward its logical conclusion. Earlier debates about the theory relied on an at least apparently democracy-friendly theory of branch equality – each branch has its separate and “equal” powers; the president has an “equal” right to interpret the Constitution. Thus Unitarians could claim that they were simply working to make interbranch relations more fairly competitive. But these claims to democratic “equality” for the President’s power could hardly restrain the unitary executive’s *Machtropolitik* aim for branch supremacy. The OLC’s John Yoo energetically advocated for the legality as well as the necessity of unchecked powers, and in a 2002 *Chicago Law Review* article he mapped an explicitly monarchical genealogy for presidential war powers. Drawing on Lockean theories of a *king’s* “executive” powers, Yoo insists that while the Framers may have “altered other plenary powers of the King, such as treaties and appointments,” they nevertheless meant to give “all other unenumerated

⁹ Michael Cairo, “The ‘Imperial Presidency’ Triumphant: War Powers in the Clinton and Bush Administrations,” in Kelley, 199–217, 211.

¹⁰ Harvey C. Mansfield, “The Case for the Strong Executive” *Opinion Journal* (from the *Wall Street Journal* opinion page), 4 May 2007, available at <http://opinionjournal.com/federation/feature/?id=110010014>.

executive powers to the President.”¹¹ In other words, the very fact that the Framers *did not say* they were giving monarchical powers to the President in the text of the Constitution is for Yoo the exact evidence that they *intended* the President to have these powers.

Identifying these claims as (laughably) bad history and logic is simple enough. But we should wonder why “Unitarians” are willing publicly to argue for granting a king’s power to a democratically elected President: are Americans really hungry for a king? Or maybe proponents of a unitary executive are just betting that we’ve become so enamored of the idea that our President should have “enough” power that we might be willing passively to acquiesce to the idea that “the most powerful man in the world” should, really, get to have the *powers* of a king.

This new assertion of royal executive supremacy is precisely what Mansfield offers. Making his “Case,” he redescribes US Constitutional government in new terms altogether, insisting that the essential checking contest lies *not* between the three branches, but between “the strong executive and its adversary, the rule of law.” Our Constitution, according to Mansfield, actually provides for “one-man rule” insofar as its Federalist proponents designated the President as government’s “source of energy.”¹² The fact that this language is not in the legal document of the Constitution and indeed is *contradicted* by its provisions does not trouble Mansfield. From my perspective, this looks like a flat-out war on democratic self-government, in the name of “democracy.” Ironically, its success depends on US citizens embracing the idea that our President should always have enough power to defeat all those he identifies as his adversaries, foreign *and* domestic.

II. OBAMA’S SOVEREIGN IMMUNITY

As a candidate, at a town hall event in Lancaster, Pennsylvania on 31 March 2008, Obama promised to restore the executive to the rule of law, insisting that “[t]he biggest problems that we’re facing right now have to do with George Bush trying to bring more and more power into the executive branch, and not go through Congress at all.” In office, however, Obama has cultivated the exact extralegal unilateralism he excoriated Bush for wielding, pushing more aggressively than his predecessor.

Let me offer a quick overview of three areas that offer significant indicators of such extralegal unilateralism: signing statements and other executive maneuvers, administrative transparency, and war powers.

¹¹ John Yoo, “War and the Constitutional Text,” *University of Chicago Law Review*, 69, 4 (Fall 2002), 1639–84, 1677.

¹² Mansfield.

1. Signing statements and other maneuvers in executive lawmaking

Presidential candidate Barack Obama criticized George W. Bush for his use of signing statements, insisting in another campaign appearance,

That's not part of his power, but this is part of the whole theory of George Bush that he can make laws as he goes along. I disagree with that. I taught the Constitution for 10 years. I believe in the Constitution and I will obey the Constitution of the United States. We're not going to use signing statements as a way of doing an end-run around Congress.¹³

President Obama has not kept his promise to honor the simple either-or choice he presented for Bush: signing bills or vetoing those with which he disagrees. Though President Obama has used signing statements, he has without question significantly backed down their pace – to date issuing thirty statements challenging some one hundred provisions of laws passed by Congress – a markedly lower total and rate than his predecessor. If these numbers don't reveal complete consistency between candidate and President Obama, they do at least seem to signal a higher deference in this President to the Constitutional process he outlined on the campaign trail, which assigns lawmaking to Congress. So we might feel encouraged that if he has not put a stop to the theory that, as he put it, the President “can make laws as he goes along,” he is at least doing a better job of honoring the Constitution's balancing act between Congress's legislative and the President's executive powers.

That would be one way of looking at these numbers. But we might notice a couple significant factors. First is the possibility that these numbers more neutrally evidence President Obama's concession to the level of controversy over signing statements that developed during the Bush presidency. As political scientist Kevin Evans underscores, “It is entirely possible that the Obama administration decided to use other tools of the presidency to avoid increased scrutiny and publicity ... like Statements of Administrative Policy and opinions from the OLC [Office of Legal Council].”¹⁴ Second, due to a combination of Republican filibustering and Harry Reid's refusal to allow amendments on bills proceeding to the floor, there haven't been nearly as many bills for President Obama to sign as there were for President Bush: the 112th Congress passed the lowest number of laws in modern history, fewer than 250, with roughly a fifth of those concerning such trivial acts as post office naming and commemorations.

¹³ Real Clear Politics, “Obama 2008: Bush Used Signing Statements to ‘Accumulate More Power’” (18 April 2011), at http://realclearpolitics.com/video/2011/04/18/obama_2008_bush_used_signing_statements_to_accumulate_more_power.html.

¹⁴ Kevin Evans, “Why the Obama Administration has Issued Fewer Signing Statements,” University of Virginia Miller Center blog, 4 Feb. 2013, at <http://millercenter.org/blog/obama-administration-signing-statements-evans>, accessed 10 Aug. 2015.

In 2007, candidate Obama answered a questionnaire from *Boston Globe* reporter Charlie Savage on executive power with regard to signing statements this way:

While it is legitimate for a president to issue a signing statement to clarify his understanding of ambiguous provisions of statutes and to explain his view of how he intends to faithfully execute the law, it is a clear abuse of power to use such statements as a license to evade laws that the president does not like or as an end-run around provisions designed to foster accountability. I will not use signing statements to nullify or undermine congressional instructions as enacted into law. The fact that President Bush has issued signing statements to challenge over 1100 laws – more than any president in history – is a clear abuse of this prerogative.¹⁵

If the lower numbers of signing statements suggest that this President is possibly backing off from this particular tool on principle, the fact is that scholars and watchdogs characterize the tenor of Obama's statements not as a clarification of "his understanding of ambiguous provisions of statutes and to explain his view of how he intends to faithfully execute the law," but rather as, in short, "indistinguishable" from Bush's. In other words, Obama has in fact demonstrated his willingness to use signing statements precisely to end-run Congress, for instance when, in May of 2014, he released five Taliban commanders from the detention center in Guantánamo, Cuba without the legally stipulated thirty-day notice to Congress, after registering in a signing statement attached to the 2014 National Defense Authorization Act just months prior that he considered this legal provision potentially unconstitutional. His actual behavior, then, suggests that Evans's theory about Obama's avoiding their controversy might be the better explanation for this President's diminished reliance on signing statements than his stated respect for the Constitution's separation of powers. The Congressional Research Service elaborates, observing in 2012 that though this President's statements never invoke the theory of the unitary executive or even executive privilege as a basis for the arguments he makes about provisions of law, "the types of objections within [Obama's] signing statements ... have generally mirrored" those of his immediate predecessors.¹⁶ If his statements do not explicitly advance the theory touted by President George W. Bush, Garvey notes, they do nevertheless continue in a tradition that began notably with Reagan, of asserting presidential authority in ways that set the stage for "substantive actions taken to establish that authority" (thus Garvey concludes that Congress might better attend to presidential action resulting from

¹⁵ Charlie Savage, "Barack Obama's Q&A," *Boston Globe*, 20 Dec. 2007, at www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA, accessed 10 Aug. 2015.

¹⁶ Todd Garvey, "Presidential Signing Statements: Constitutional and Institutional Implications," Congressional Research Service, CRS Report for Congress, 4 Jan. 2012, 11.

signing statements than obsessing over the production of the statements themselves).¹⁷

Human Rights First's senior counsel Daphne Eviatar hazards that Obama's conception of presidential prerogative and executive power in signing statements seems quite possibly to exceed that of his predecessor. She notes of Obama's 2011 National Defense Authorization Act signing statement the President's exception to Senators John McCain and Lindsey Graham's controversial provision providing Afghan detainees the right to a military defense lawyer and a neutral military judge to evaluate the lawfulness of their detention. As she puts it, Obama rejected this provision "in a particularly cynical manner, claiming that Congress is interfering with executive power" in the simple act of detailing the provisions of the law the President should execute.¹⁸ In other words, Congress can pass a law, but they interfere with executive power according to President Obama if they dare to suggest that the executive should have to account for his execution of the law.

If President Obama is highlighting fewer points of opposition and downplaying presidential prerogative in his signing statements, that has not stopped him from using that prerogative in the execution of law – in some cases literally to rewrite legal provisions, which is to say, to exercise Congressional branch powers. This has been controversially so in the administration's implementation of the Affordable Care Act, where President Obama changed law through rule-making numerous times without statutory authorization. President Obama himself highlighted the controversy over presidential lawmaking in disparate pronouncements about the President's authority to change the law in the run-up to his decrees on the Immigration and Nationality Act. In 2011, he insisted to a visiting group at an Hispanic roundtable, "This notion that somehow I can just change the laws unilaterally is just not true." But immediately after his 20 November 2014 Executive Order on Immigration, President Obama reprimanded protesters at a speech explaining his executive order by telling them that it didn't "make any sense to yell at me right now," continuing, "There have been significant numbers of deportations. That's true. But what you're not paying attention to is the fact that I just took action to change the law." His assertion contradicted not just his pronouncement of three years prior, but also his own insistence in delivering the executive order six days before that his action was not, in fact, changing law. The courts, so far, have agreed with the President Obama who responded to the hecklers.

¹⁷ *Ibid.*, 31.

¹⁸ Daphne Eviatar, "Promises, Promises: President Obama's NDAA Signing Statement," *Huffington Post*, The Blog, posted 3 Jan. 2012, available at www.huffingtonpost.com/daphne-eviatar/promises-promises-preside_b_1182067.html, accessed 10 Aug. 2015.

In February 2015, Texas federal judge Andrew Hanen issued a preliminary injunction against the rule changes in a narrowly focussed ruling, noting that the President's actions violate the Administrative Procedures Act in their attempt to bypass the regulatory rule-making public review process.

Obama's actions here flag what seems to be his growing predilection for executive lawmaking through the regulatory process. His administration has latched onto rule-making – particularly through the putatively independent EPA – to accomplish environmental action he's not been able to persuade Congress or a majority of the American people to support. His Clean Power Plan, announced in its final version in August of 2016, while winning approval from environmentalists and climate-change activists, promises to meet with a storm of opposition from the states, not just for the way these rules promote expensive solar and wind technologies while forcing reductions in coal power, but also for how the administration plans to force its much stricter final version on states that resist compliance (even by denying federal highway funds), essentially scrapping the model of cooperative federalism that has governed energy policy in the US since the New Deal. Critics argue not only that the level of federal commandeering of state governments aimed at in the new Clean Power Act violates the fundamental principles of Constitutional federalism, but also that it blocks political accountability for what are essentially political decisions. Activists, frustrated by the administration's lack of legal progress on the environment (for instance the resounding defeat of cap and trade policies early in the Obama administration) applaud Obama for invoking what he calls the executive's "prosecutorial discretion" (invoking, in essence, the president's leeway in enforcing law) over the inaction on or active hostility of Congress toward any particular legislation. Prosecutorial discretion is a sound enough administrative agency principle, but because it's typically applied in case-by-case instances rather than categorically, to broad policy issues like immigration and climate reform, opponents have called this "executive overreach."

That is probably to be expected in any partisan context. But in the case of the Clean Power Plan, his opposition is not simply those legendary evil Republicans who love to roadblock his every initiative. President Obama's former Harvard law professor, Laurence Tribe, a solidly credentialed liberal, has filed comments with the EPA accusing the President, as the *Wall Street Journal* summarizes, of "abusing statutory law, violating the Constitution's Article I, Article II, the separation of powers, the Tenth and Fifth Amendments, and in general displaying contempt for the law."¹⁹ Tribe is

¹⁹ Opinion, "Lawrence Tribe Takes Obama to School," *Wall Street Journal*, 4 Dec. 2014, available at www.wsj.com/articles/professor-tribe-takes-obama-to-school-1417824105, accessed 12 Aug. 2015.

not concerned with the merits of the Clean Power Plan's policy aims, but rather insists in his testimony to Congress (17 March 2015) that the EPA lacks both statutory and constitutional authority for adopting this plan. He argues that the EPA's legal justifications for the plan are deceptive, since Clean Air Act provisions give the EPA the right only to monitor individual plants, and not to enforce policy across all the states. As he puts it,

EPA possesses only the authority granted to it by Congress. It lacks "implied" or "inherent" powers. Its gambit here raises serious questions under the separation of powers, Article I, and Article III, because EPA is attempting to exercise lawmaking power that belongs to Congress and judicial power that belongs to the federal courts. The absence of EPA legal authority in this case makes the Clean Power Plan, quite literally, a "power grab."

EPA is attempting an unconstitutional trifecta: usurping the prerogatives of the States, Congress and the Federal Courts – all at once. Burning the Constitution should not become part of our national energy policy.²⁰

Tribe takes particular aim at the plan's claim that its authority can be found in Section 111 of the Clean Air Act (which pertains to new sources of energy not already regulated under that Act), accusing the drafters of distorting history and the laws of the land, as well as those of logic and grammar.²¹ As he argues, "It's not often that an agency manages to engineer a power grab that simultaneously usurps not just the authority of the states but also the constitutional authority of both Branches of the Federal Government outside the Executive."²² At bottom, he concludes, "The EPA's proposal hides political choice and frustrates accountability ... [and] thumbs its nose at democratic principles by confusing the chain of decision-making between federal and state regulators to avoid transparency and accountability." The EPA should not, he adds, be "permitted to behave as if it were a junior varsity legislature."²³ As Tribe put the point in a *WSJ* opinion piece days later, "the EPA, like every administrative agency, is constitutionally forbidden to exercise powers Congress never delegated to it in the first place."²⁴

It's worth noting that administrative agencies issue about ten times as many rules as Congress passes statues per year. Agencies in their regulatory role – the "regulatory state" – have long concerned scholars and commentators concerned with democratic legitimacy and questions of public accountability.

²⁰ Testimony of Laurence Tribe before the House Committee on Energy and Commerce, Subcommittee on Energy and Power, on the EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues, 17 March 2015, ii.

²¹ *Ibid.*, 8.

²² *Ibid.*, 14.

²³ *Ibid.*, 22, 32.

²⁴ Laurence Tribe, "The Clean Power Plan Is Unconstitutional," *Wall Street Journal*, 22 Dec. 2014, available at www.wsj.com/articles/laurence-tribe-the-epas-clean-power-plan-is-unconstitutional-1419293203, accessed 12 Aug. 2015.

As John Postell summarizes the problem, “both independent regulatory commissions *and* executive agencies create the same constitutional problems.”²⁵ Largely civil service employees, people administering laws and policy as such are difficult to fire. Only the tiniest percentage (less than 1 percent) are political appointees. Thanks to Congressional reforms in the 1960s and 1970s, regulatory agencies are now pulled in many directions – by Congress, the judiciary, and the executive – and the tug of war, rather than clarifying accountability, has actually made it more difficult to know which branch is definably accountable for particular decisions. Because regulations define how laws are shaped and enforced (as Postell points out, when Nancy Pelosi told reporters that Congress would have to pass the Affordable Care Act for people to know what was in it, she didn’t mean the bill was too long to read, but rather that people would have to wait to see how Health and Human Services would create policy for its enactment²⁶), a great deal of law-making in this country happens through agencies that are simply unaccountable to the allegedly sovereign people – the *source* of government under our constitutional democracy.

Professor Tribe’s testimony highlights the problems involved for constitutional democracy when Presidents begin to commandeer the regulatory process. Scholars have recently begun urging that the presidential policy takeover of regulatory agency rule-making (both independent and executive) is a serious challenge to democratic legitimacy. There are structural, political, and ethical issues in “permitting unelected officials to create binding legal texts,” as Peter Strauss outlines in his work on the regulatory state.²⁷ As Presidents have come to exercise widening command over the agency rule-making apparatus, and as executive agencies have become more politicized, questions of accountability are more prominent. One might think the *President* is accountable to voters and that the expansion of his executive influence over rule-making might help clarify lines of accountability, but, as Strauss points out, if we compare the US President to the European parliamentary system, we get a neat reality check for US voters’ capability to challenge presidential rule-making:

In parliamentary democracies, many or all ministers may be elected ... and all must answer directly to parliament. The government may fail at any moment ... [and] it will be the cabinet, not the Prime Minister alone, that collegially rejects (or accepts) a minister’s proposal for what we call rulemaking ... Our Cabinet Secretaries, in

²⁵ John Postell, “From Administrative State to Constitutional Government,” special report from B. Kenneth Simon Center for Principles and Politics, Heritage Foundation, 116, 7 Dec. 2012, 9, original emphasis.

²⁶ Ibid., 2.
²⁷ Peter L. Strauss, “Legislation that Isn’t: Attending to Rulemaking’s ‘Democracy Deficit,’” *California Law Review*, 98, 4 (Aug. 2010), 1351–70, 1352.

contrast, answer only to the President and White House staff. Congress can require their presence at hearings and refuse desired boons, statutory or budgetary, but its resources are slim. Our government never “fails” in the parliamentary sense; our election dates are firmly fixed into the next millennium and ... we never, as such, elect the government ... should a simple majority of Congress conclude that a rule the President *favored* politically was undesirable, any attempt to reverse the rule would fail ... if the President favors a rule one of his agencies has adopted, super-majorities would have to be mustered to overcome his expectable veto of a congressional act disapproving it ... Whatever the President does, voters must await a subsequent election.²⁸

And we need be concerned not just about rules that Presidents favor, but also about the black box of the process of regulatory review itself. As Peter Ketchum-Colwill argues in “Presidential Influence over Agency Rulemaking through Regulatory Review,” Presidents since Reagan have used the Office of Information and Regulatory Affairs (OIRA) both to gain power over all regulations and to obfuscate their involvement as such – and this despite issuing orders, such as Clinton’s Executive Order 12866, that are meant to address concerns about executive interference with rule-making. As practice currently stands, Ketchum-Colwill observes, “the President’s control over administrative policy-making through OIRA review [is] functionally indistinguishable from general directive power.”²⁹ He elaborates that the informal requirement of gaining OIRA approval before agencies can even submit actions to OIRA for review “[p]erhaps more than any other feature of OIRA review as currently practiced ... provides the White House with immense control over agency actions with nearly no accountability.”³⁰

We should note that President Obama frequently characterizes Congress as an inefficient and inept institution, often as a way to justify his increasing late-term unilateralism. Without engaging debates over whom to blame for Congress’s alleged failures, we do need to ask what it means for *democracy* – for government of, *by* and for the people – when the President touts Congress’s “failure” as a license for executive *lawmaking*. As more and more lawmaking moves into the realm of executive power, giving a single person the power to, as Obama once framed the point, “make the laws as he goes along,” we witness the undoing of the Constitution’s checking scheme. However much some may approve of particular executive legal decisions, the fact is that voters are left without clear paths for information or accountability regarding the laws that govern them, with their putative consent.

²⁸ *Ibid.*, 1360–61.

²⁹ Peter Ketchum-Colwill. “Presidential Influence over Agency Rulemaking through Regulatory Review,” *George Washington Law Review*, 82, 5 (Oct. 2014), 1422–1653, 1646.

³⁰ *Ibid.*, 1649.

2. Transparency Concerns about regulatory black boxes take us neatly into questions about administrative transparency. Senator Barack Obama promised that, if elected, he would enact sweeping reforms to dramatically increase transparency and accountability in government. Soon after his election he appointed an “ethics czar”: Norm Eisen, one of the cofounders of Citizens for Responsibility and Ethics in Washington, or CREW. To this day, the President takes credit for putting “in place the toughest transparency rules in history,” and some analysts, while declining to award him the “best ever,” still give him some credit for trying.³¹ Other observers, though, are skeptical of Obama’s credibility in the face of what Glenn Greenwald characterizes as “the extreme, often unprecedented, commitment to secrecy that this president has exhibited.”³² In a 2014 AP analysis, “the government’s own figures from 99 federal agencies covering six years show that halfway through its second term, the administration has made few meaningful improvements in the way it releases records.”³³ One year later, in 2015, Bridis reported, their record was exponentially *worse*. For example, the Obama administration admitted that “in nearly 1 in 3 cases that its initial decisions to withhold or censor records were improper under the law – but only when it was challenged,” and that its “backlog of unanswered [Freedom of Information Act] requests at year’s end grew remarkably by 55 percent to more than 200,000.” As he elaborates in this report, in 2014,

Citizens, journalists, businesses and others made a record 714,231 requests for information. The U. S. spent a record \$434 million trying to keep up. It also spent about \$28 million on lawyers’ fees to keep records secret ... the government responded to 647,142 requests, a 4 percent decrease over the previous year. It more than ever censored materials it turned over or fully denied access to them, in 250,581 cases or 39 percent of all requests. Sometimes, the government censored only a few words or an employee’s phone number, but other times it completely marked out nearly every paragraph.³⁴

As Arnold notes, observers shouldn’t blame President Obama solely for the acts of “thousands of bureaucrats, who make countless decisions that never

³¹ See, for example, Jason Ross Arnold, “Has Obama Delivered the ‘Most Transparent’ Administration in History?”, *Washington Post*, 16 March 2015, available at www.google.com/search?client=safari&rls=en&q=obama+administration+transparency+washington+post&ie=UTF-8&oe=UTF-8, accessed 17 Aug. 2015.

³² Glenn Greenwald, “Remember When Obama Vowed to Protect Whistleblowers?”, *Altnet*, 15 March 2013, at www.altnet.org/glenn-greenwald-remember-when-obama-vowed-protect-whistleblowers, accessed 17 Aug. 2015.

³³ Ted Bridis and Jack Gillum, “US Cites Security More to Censor, Deny Records,” Associated Press, 17 March 2014.

³⁴ Ted Bridis, “Administration Sets Record for Withholding Government Files,” Associated Press, 18 March 2015.

enter the White House's orbit," but it's hard to shield the President from blame altogether.³⁵ As Bridis's 2015 AP report notes, in a set of emails obtained from the National Archives and Records Administration, one employee observed, regarding administration responses to Freedom of Information Act requests, "We live in constant fear of upsetting the WH [White House]."³⁶

Along with the administration's response to FOA requests, there is what political scientist Danielle Brian pithily summarizes as its "Jekyll-and-Hyde handling of whistleblowers." As she summarizes this point,

only months after we applauded ... President Obama's unprecedented directive in the fall of 2012 [which] extended whistleblower protections to federal workers in the intelligence and national security sectors ... his signing statement for the National Defense Authorization Act objected to whistleblowers making unclassified disclosures to Congress, outrageously claiming that whistleblower disclosures "threaten to interfere with my constitutional duty to supervise the executive branch."³⁷

Observers have denominated his response to whistleblowers a "war" – his administration's eight prosecutions have more than doubled the number of prosecutions that came before him – and have accused him of aggressively prosecuting only those who lack political power and connections like Stephen Kim and Chelsea Manning, while allowing higher-level figures like Leon Panetta and John Brennan to walk away with slaps on the wrist and even promotions.³⁸

Others cite this administration's dislike of the press as a source for its aggressive prosecution of whistleblowers, as well as for its surveillance of reporters – to the extent that the United States dropped a dramatic sixteen places over two years in Reporters without Borders' annual ranking of countries for press freedom: from thirty-second place in 2013 to forty-ninth place in 2015. The 2014 report, which saw the US drop thirteen places in a single year, cites a number of factors for the United States' dramatic fall in the rankings, including the prosecution of Chelsea Manning and the aggressive pursuit of Edward Snowden, as well as several other factors:

US journalists were stunned by the Department of Justice's seizure of Associated Press phone records without warning in order to identify the source of a CIA leak. It served as a reminder of the urgent need for a "shield law" to protect the confidentiality of

³⁵ Arnold.

³⁶ Bridis.

³⁷ Danielle Brian, "The Transparent Obama Administration?", *Public Administration Review*, 74, 1 (Jan.–Feb. 2014), 8–9.

³⁸ See Spencer Ackerman and Ed Pilkington. "Obama's War on Whistleblowers Leaves Administration Insiders Unscathed," *The Guardian*, 16 March 2015, available at www.theguardian.com/us-news/2015/mar/16/whistleblowers-double-standard-obama-david-petraeus-chelsea-manning, accessed 17 Aug. 2015.

journalists' sources at the federal level. The revival of the legislative process is little consolation for James Risen of the *New York Times*, who is subject to a court order to testify against a former CIA employee accused of leaking classified information. And less still for Barrett Brown, a young freelance journalist facing 105 years in prison in connection with the posting of information that hackers obtained from Statfor, a private intelligence company with close ties to the federal government.³⁹

Rather than transparency, reporters feel they are facing a notably more hostile climate under this President.

3. War powers President Obama issued Executive Order 13491 Ensuring Lawful Interrogations after just days in office, putting an end to Bush-era torture policies. He closed the notorious CIA black sites, where such techniques were practiced outside the protections of the United States. But evidence shows his administration has used Afghanistan and Somalia for rendition practices, thus avoiding, as historian Alfred McCoy puts it, “the political stigma of torture, while tacitly tolerating such abuses and harvesting whatever intelligence can be gained.”⁴⁰ Though he kept military tribunals at Guantánamo, his controversial surge of prisoner releases (as when he released five Taliban prisoners without the legally required thirty-day notice to Congress) indicates at least his renewed interest in emptying and closing it down (the population will soon be in the seventies, after a high of some seven hundred). And though Senator Obama promised *Boston Globe* reporter Charlie Savage that “the President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation,” he in fact unilaterally waged a military operation to unseat Libya’s Muammar Qaddafi without Congressional authorization (instead claiming legal support from the UN Security Council and from NATO).⁴¹ This decision to act unilaterally, as presidential scholar Louis Fisher observes, and without seeking Congressional authority, “eventually forced the administration to adopt legal interpretations that were not only strained, but in several cases incredulous” (177). When the sixty-day clock defined by the War Powers Resolution (WPR) ran out in June of 2011, the Obama administration rebutted the idea that its action fell under the purview of the WPR, insisting that if the actions do not “involve ... US casualties or a serious threat thereof,” then “hostilities” do not exist. Scoffs Fisher, “under that interpretation, a nation with superior military force could pulverize another country – including the use of nuclear weapons – and there would be neither hostilities

³⁹ Reporters without Borders, “World Press Freedom Index, 2014,” at <https://rsf.org/index2014/en-index2014.php#>, accessed 17 Aug. 2015.

⁴⁰ Alfred McCoy, “Impunity at Home, Rendition Abroad,” *The Nation*, 14 Aug. 2012, available at www.thenation.com/article/impunity-home-rendition-abroad, accessed 17 Aug. 2015.

⁴¹ Savage, “Barak Obama’s Q&A.”

nor war.”⁴² The administration’s claim that it took military action in Libya with a mandate from the *United Nations* does not offer legal justification under the US Constitution, which, as Fisher summarizes, permits only one form of mandate in the use of US military force against another nation: from *Congress*. However weak the administration’s proffered legal defense, though, Fisher underscores that “those legal precedents are likely to broaden presidential power for future military action.”⁴³ Here again, we see a President engaging in what Ryan Barrileaux so aptly termed “venture constitutionalism.”

It’s true that in early 2015, President Obama requested that Congress authorize *limited* war powers for the executive pursuit of a war against ISIS, an act that he hopes will rescind the 2002 Authorization for War against Iraq. This Act, if passed, would also impose a three-year limit on any American action, and rule out large-scale ground combat operations. But as supporters praise Obama for seeking to limit executive powers (and conservative critics condemn the move), it’s important to note that the President has safeguarded wartime executive unilateralism in two ways: both by insisting that he has Constitutional authority to wage the war with or without Congressional authorization, and by seeking to keep in place the more sweeping 2001 Authorization for Military Force against Terrorists. As Harvard law professor and former Bush DOJ appointee Jack Goldsmith put it in an interview with Peter Baker, President Obama has been “talking during his entire presidency about wanting to restrain himself. But in practice, he’s been expanding his power.”⁴⁴

In a similar vein, Obama’s administration has exponentially expanded the use of drone warfare. To date, President Obama has authorized 347 strikes (to Bush’s forty-eight), with a total kill count of between 1,844 and 3,048 (compare to Bush’s 378–557 – and, to be fair, under Obama the military has killed a far lower percentage of civilians as part of its strikes, though the total count is obviously higher). This administration’s expansion of drone warfare has occasioned little controversy in the United States, perhaps because of American’s sense that it involves no toll on US lives, or, as one caller on an NPR talk show incredibly put it, no “human costs.” In its attempt to honor promises to close Guantánamo, in its attempt to avoid the controversies of extraordinary rendition, and in its desire to avoid negotiating targeted military strikes within countries like Pakistan and

⁴² Lou Fisher, “Military Operations in Libya: No War? No Hostilities?,” *Presidential Studies Quarterly*, 42, 1 (March 2012), 176–89, 177, 182.

⁴³ *Ibid.*, 177.

⁴⁴ Peter Baker, “Obama’s Dual View of War Power Seeks Limits and Leeway,” *New York Times*, 11 Feb. 2015, available at www.nytimes.com/2015/02/12/us/obama-war-authorization-congress.html, accessed 17 Aug. 2015.

Afghanistan – with all the concomitant danger of information leaks – this administration has adopted a policy that experts summarize as “kill-not-capture.” Public pushback has been minimal – perhaps because the left, the group most likely to protest war actions in the US, have tamped down their objections in favor of supporting their Democratic President.

This bland US acceptance of drone warfare has extended, even more incredibly, to strikes targeting United States citizens. As Glenn Greenwald pithily frames the point, “the most extremist power any political leader can assert is the power to target his own citizens for execution without any charges or due process.”⁴⁵ In September 2011, a US drone strike in Yemen killed US citizen Anwar al-Awlaki and fellow US citizen Samir Khan. Two weeks later, another killed al-Awlaki’s sixteen-year-old American son, Abdulrahman. The President described his decision to kill al-Awlaki as “an easy one.” Presumably a Muslim cleric who has left the US and who is preaching jihad against it, who has declared himself his country’s enemy, is self-evidently exempt from the President’s promise to uphold the US Constitution. What is less clear is what Abdulrahman al-Awlaki did to draw the President’s order for a “targeted kill.”⁴⁶ This young man had not seen his father for two years and was indeed searching for him when his drone strike was ordered. The President has not deigned to explain his decision and, apparently, Americans feel that granting the President the right to take American lives as he sees fit keeps them safe enough that they don’t need to protest or even question this new policy that Tom Junod denominates the “Lethal Presidency.”⁴⁷

As the *Washington Post*’s Greg Miller reported in 2012, these strikes drew attention to the existence of an executive target list of terrorists that includes both US citizens and foreigners, an operation that in Miller’s analysis transforms “ad-hoc elements into a counterterrorism infrastructure capable of sustaining a seemingly permanent war.”⁴⁸ This program has been conducted in

⁴⁵ Glenn Greenwald, “Chilling Legal Memo from Obama DOJ Justifies Assassination of US Citizens,” *The Guardian*, 5 Feb. 2013, available at www.theguardian.com/commentsfree/2013/feb/05/obama-kill-list-doj-memo, accessed 17 Aug. 2015.

⁴⁶ See Charlie Savage, *Power Wars: Inside Obama’s Post-9/11 Presidency* (New York: Little, Brown and Company, 2015), chapter 6, “Targeted Killing,” 224–90, for the best account – in so far as it is possible to account past the shield of executive secrecy – for the timeline and the decision concerning the assassination of al-Awlaki.

⁴⁷ Tom Junod, “Obama’s Administration Killed a 16-Year-Old American and Didn’t Say Anything about It. This Is Justice?” Guest Post, *Esquire*, 19 July 2012, available at www.esquire.com/news-politics/news/a14796/abdulrahman-al-awlaki-death-10470891, accessed 21 Sept. 2015.

⁴⁸ Greg Miller, “Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Names to Kill Lists,” *Washington Post*, 23 Oct. 2012, available at www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408fbc6a4b_story.html, accessed 17 Aug.

near-absolute secrecy, with sealed indictments, secret operations, and plans for suspects beyond the reach of drones. As Greenwald underscores, “Not only is the entire process carried out solely within the Executive branch – with no checks or oversight of any kind – but there is zero transparency and zero accountability,” with the administration refusing to disclose even the legal principles undergirding these supposed executive powers to violate citizens’ Constitutional rights and end their lives.⁴⁹

In the name of wartime national security, President Obama’s Attorney General Eric Holder argued in 2009 that the Patriot Act gave Presidents the unfettered right to spy on citizens with no requirement for any public accounting for such actions. The Holder DOJ appeals to the authority of the Patriot Act for its invention of a new executive tool for the protection of executive secrecy, “sovereign immunity,” a claim that tops any kind of secret immunity claimed for the executive by the Bush administration. According to Holder, this “immunity” frees the executive to approve any kind of surveillance, even if it is blatantly illegal, and bars citizens *and* courts from any recourse or review, unless the government has “willfully disclosed” what it learns. This is, as Glenn Greenwald notes in his essay “New and Worse Secrecy,” a claim for the President’s absolute power.⁵⁰ The legal genealogy of this claim should be underscored. As Wikipedia summarizes,

Sovereign immunity, or crown immunity, is a legal doctrine by which the sovereign or state cannot commit a legal wrong and is immune from civil suit or criminal prosecution. This principle is commonly expressed by the popular legal maxim “*rex non potest peccare*,” meaning “the king can do no wrong.”

In claiming sovereign immunity, the Obama administration is asserting precisely the checking contest between the executive and the rule of law framed by Mansfield. Obama has become fond of jokingly reminding senators who recall his early opposition to unilateral executive powers that “things look different from this side of the desk” – the precise lesson the Bush team promised his administration would learn. And so we have ample evidence – yet again – to conclude that electing a new President (progressive, outsider, whatever) has done exactly nothing to arrest or even decelerate these trends. That’s my point (if anyone cares): the executive brief against democratic self-rule, in the name of democracy, has nothing to do with the particular principles and

2015. It’s worth noting that Charlie Savage (*Power Wars*) has questioned the sourcing of Miller’s account, and provides an alternative timeline to Miller’s for the decision to execute al-Awlaki. Savage doesn’t repudiate, however, the idea that the administration does have kill lists. See Savage, 231.

⁵⁰ Greenwald, “New and Worse Secrecy and Immunity Claims from the Obama DOJ,” *Salon*, 6 April 2009, available at www.salon.com/2009/04/06/obama_91, accessed 17 Aug. 2015.

personalities of individual Presidents: it's structural, as I explained in my book, and it's going to be hard to check. We might do well to start wondering how.

III. WHO CARES? OR, IF IT'S "OUR" GUY MAYBE IT'S A GOOD THING!

I began working on this book in the late 1990s, in the Clinton era. I could barely get my academic colleagues to listen to my arguments (though talks for audiences at libraries and bookstores always had more traction). Back in those days, lefty scholars like Elena Kagan, Lewis Lessig, and Cass Sunstein, who had complained about Reagan and George Herbert Walker Bush's executive unilateralism, were publishing articles arguing that unilateralism could be a good thing in the hands of the right guy. Aptly rejecting Calebresi and Yoo's "mythical" account of the unitary executive, Lessig and Sunstein offered their own putative brief for the unitary executive relying "on the best reading of the framers' structure translated into the current, and radically transformed, context," and making the case that the move to bureaucratic administration since the New Deal, and the increasing politicization of regulation, necessitate clearer lines of administrative accountability. This, they urged, could most profitably be realized in a strong unitary executive.⁵¹

This academic optimism about presidential power roughly vanished when George W. Bush came into office. By year six of Bush's administration, there were *reams* of journal articles and special issues devoted to critiquing his unilateralist power grabs on every level. I have literally boxes of those articles in my office. But not so for this administration. The critiques are few and far between, with notable exceptions: presidential scholar Louis Fisher has been steady in his criticism. But more characteristic is Mark Tushnet's 2010 "Political Perspective on the Theory of the Unitary Executive," which makes a distinction between Reagan, Bush I and Bush II exercises, and Clinton's enlightened modification of those theories into what he denominates, following Elena Kagan, "presidential administration." Clinton's form "differs importantly from the theory of the unitary executive because it employs [a different technique, not controlling but displacing bureaucracy] to accomplish the goal, shared by both approaches, of overcoming bureaucratic and legislative resistance" to the President's agenda.⁵² This is what we could term the academic

⁵¹ Lawrence Lessig and Cass Sunstein. "The President and the Administration," *Columbia Law Review*, 94, 1 (1994), 1–123. See also Elena Kagan, "Presidential Administration," *Harvard Law Review*, 114, 2245 (2001), 2245–2385.

⁵² Mark Tushnet, "A Political Perspective on the Theory of the Unitary Executive," *Journal of Constitutional Law*, 12, 2 (Feb. 2010), 313–29, 325.

left's Goldilocks approach to executive aggrandizement – when conservatives do it, it it's too hot, but when the left does it? It's "*just right*."

Indeed, the trend of the scholarship on executive unilateralism and power tools these days is to soften and even repudiate the alarmism of the Bush era. For instance, Andrew Rudalavige tells us that we don't need to worry about unilateralism when it comes to executive orders: as he puts it, "permutations of power play out along crooked paths."⁵³ Indeed. To summarize Rudalavige: executive orders might *sound* unilateralist since they are issued as "orders" but *really* they are consultative, dialogic, and "responding to requests": all that dialogue must *surely* confirm their democratic *intentions*. Since they require the President to "cajole" lots of people to execute them, and because, as Clinton complained, "I'd issue all these executive orders and then you can never be 100 percent sure they were implemented," they can't really be defined as "unilateral."⁵⁴ Then law professors Curtis Bradley and Trevor Morrison argue that we're wrong to see the President's assertions that he's above the law to mean he's *lawless* – they point out that "the executive branch contains thousands of lawyers" (I hardly find that reassuring but maybe some do).⁵⁵ Bradley and Morrison insist that even when the executive apparently opposes existing law he is still moved by its "rhetorical salience": "legality apparently ha[s] enough salience for the executive branch to attend to it and to do so in a way that could hope to seem persuasive or at least plausible to interested audiences" (note that the scavenging for legal justifications that they describe here is what Tribe alternately characterized as evidencing an actual "contempt" for law).⁵⁶ Or there's Marine Captain Richard Sala, who teaches law in Vermont, and argues that the tempest over the unitary executive is "illusory" since in fact Congress and the Courts have seemingly acquiesced to putatively unilateral actions, making them both Constitutional and *not* unilateral in any Constitutionally harmful way (as I argued in my book, the Court and Congress have very little ability to block unilateral executive actions whether or not they care to, so apparently we are to construe their structural inability to respond as confirming the Constitutionalism of executive overreach).⁵⁷ What we see here as academics soften their position on executive overreach when they feel comfortably proximate to presidential

⁵³ Andrew Rudalavige, "The Contemporary Presidency: Executive Orders and Presidential Unilateralism," *Presidential Studies Quarterly*, 42, 1 (March 2012), 138–60, 142.

⁵⁴ *Ibid.*, 152.

⁵⁵ Curtis Bradley and Trevor Morrison, "Presidential Power, Historical Practice, and Legal Constraint," *Columbia Law Review*, 113, 4 (May 2013), 1097–1162, 1132.

⁵⁶ *Ibid.*, 1144; 1142.

⁵⁷ Richard Sala, "The Illusory Unitary Executive: A Presidential Penchant for Jackson's *Youngstown* Concurrence," *Vermont Law Review*, 38 (2013), 155–97.

power suggests not only that there may be some validity to charges from the political right that academia leans left, but also that academics – people who pride themselves on their critical and objective thinking – are just as unable to think through their political biases as the regular public whose political ignorance and biases they like to study.

IV. CONCLUSION

If you voted for and have supported the presidency of Barack Obama, but find yourself now in sympathy with my arguments about the bad effects of his overreach while in office, consider this: your emerging impatience with the President you harnessed your hope to (Yes we can!) is utterly predictable. Instead of solving the world's problems, he turned out to be one of "those guys." This is, as presidential approval ratings track, a *perdurable* trend among supporters of sitting Presidents in their lame-duck year. Your dismay with Obama at this point in my article may be the result of what you've read here, or it may just be (and missing my point altogether) the structural moment – this king, Obama, is lame-duck, past the point, all but dead, and we've got a new field of possible presidential saviors. The American public as I write this conclusion is experimenting in definably quixotic ways with a field of political outsiders – Bernie Sanders the democratic socialist; Donald Trump, real-estate developer and television personality; Carly Fiorina, the former HP CEO; Ben Carson, neurosurgeon. Voters are, they tell reporters, sick of business as usual (and this on the left whether or not they voted or Obama). Whether these particular candidates have any hope of being effective Presidents, though, is in fact a minor debate. Because the truth is, *all* the current presidential candidates – businessmen and -women, doctors, governors, and senators alike – are promising to run the world unilaterally: stopping everything from Putin to gun crime to Wall Street, to big banks, to climate change (an impossible promise if ever there was one – they may as well promise to fix the sun at a single point in the sky). And voters are excited to believe that the candidates will have such superheroic, unilateralist, and unconstitutional powers conferred on them the day they are confirmed as President. And we might as well go ahead and believe, because every President does manage to build on the unprecedented and unconstitutional powers accrued by the previous officeholder. Which is just to say, if you think executive overreaching will end with the election of a *really* good President – you know, the one who will say yes to the "right" kinds of power and no to the "wrong" kinds – you'll be wrong.

At the six-year point of George W. Bush's presidency, journalist Jeffrey Rosen predicted that "conservatives are reaping the consequences of the Leviathan state that they once warned against: once executive power is

viewed as absolute, centralized, and indivisible, it tends inevitably to grow.”⁵⁸ Here’s my point and it’s a nonpartisan one: no President has consented or ever will consent to giving up the powers accumulated within the executive: every President believes he needs such powers and more to accomplish his mandate and protect his legacy. Indeed, executing the powers of the office, protecting the powers of the executive branch, is how the oath of office begins. The threat that presidentialism brings to democratic government – of the people, *by* the people, for the people – will never be fixed by putting the “right” person in office. And, worse, this fantasy, that the President has or should have the power to fix anything that needs fixing, now corroborates our political culture’s worst trends. Presidentialism’s increasing unconstitutional unilateralism, its supremacy over our nation of laws and the lives of its citizens, has contributed mightily to reversing the truism that war is politics by other means. Now, intellectuals, party officials, and political commentators on both sides of the political divide proceed as though politics were *war by other means*, seeking politically to destroy the “enemy’s” fighting ability, and militarizing our political culture, on behalf of securing the presidency for their party. It is precisely this ethos that encourages presidential candidate Hillary Rodham Clinton to rank Republicans alongside *Iranians* as enemies she is proud to have made – and to draw the loudest applause of the evening at the first Democratic Presidential Candidate debate in October 2015.

Here’s the problem with seeing members of other political parties in a democracy as your enemy: a commitment to democracy means committing to the continued negotiation – and even the *cultivation* – of political disagreement. Eliminating your opposition is *antidemocratic*. Eliminating your opposition is what nondemocratic governments – authoritarian, totalitarian, fascist, communist – seek to do. Disagreement is *good* for democracy: from differences of opinion, studies demonstrate over and over again, come better decisions than ones made among those who already agree – see Surowiecki for a useful summary of some of these studies.⁵⁹ In other words, disagreement is by no means the fundamental problem of democracy: it is in fact its *strength*.

If you think democracy can only happen when your team is running the show, you’re aiming at *Machtpolitik*, not democracy. Democracy, I’m arguing, is not a winner-take-all game, it’s an *ethic*. This ethic demands that democracy is not just for the people whose views you like but also for ones

⁵⁸ Jeffrey Rosen, “Power of One: Bush’s Leviathan State,” *New Republic*, 24 July 2006, 8.

⁵⁹ James Surowiecki, *The Wisdom of Crowds: Why the Many are Smarter than the Few and How Collective Wisdom Shapes Business, Economies, Societies and Nations* (New York: Doubleday, 2004).

whose views you despise. The downward *Machtpolitik* spiral of presidentialism pulls us ever further away from being able to remember that democratic power is the power of *all* the people (and not just some): it's what we the people delegate to the President, not the other way around. And to the extent that we forget, we lose the radical promise of democratic self-governance that mobilized this nation's revolutionary resistance to the British monarchy. Instead, we resign ourselves to electing the king who makes us feel safest, letting him use the authority of our power for his increasingly sovereign and secret designs. If we're going to do anything about this trend, we need to turn away from the siren call of the presidency and look elsewhere for the solutions that can navigate us back toward something that genuinely rests on, safeguards, and continues cultivating the power of the people.

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