

Peter Shane and the Rule of Law

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I. INTRODUCTION

Peter Shane has had a long and varied career and his publications range over a host of topics. But there are common themes that animate many of his articles and books. One of these, and I would argue one of the most important, is a preoccupation with the idea of the rule of law. Or, perhaps I should say, a preoccupation with understanding what the rule of law means and with threats to the maintenance of the rule of law in the American legal system. Peter's concern has not been with violent and obvious threats such as those posed by the notorious storming of the U.S. Capitol on January 6, 2021, but with subtler threats to the culture of lawfulness—particularly those caused by the use of the forms of law in ways that actually undermine fidelity to rule of law values.

This body of work represents one of Peter Shane's most important contributions to the legal literature and one that deserves careful and sustained attention. We find ourselves, after all, in an era in which a prominent legal blog is entitled "Lawfare."¹ This title presumably invites us to imagine that law is used, not in the interests of justice or the pursuit of collective public interests, but in ways that are an analog to warfare. Law in this vision is law weaponized and deployed in contests between antagonists who seek whatever advantage the forms and processes of law might provide, with little or no regard for the collateral damage that their claims or adversarial techniques might cause to the legal system or to respect for the law itself. From this perspective legal argument is just another means for pursuing partisan or ideological goals, a pursuit that owes no allegiance to the maintenance of a legal system within which disputes can be settled on the basis of a common commitment to the rule of law itself.

Examples of this approach to law are not difficult to find. The Republican Attorney General of the state of Texas is reported to have described his job in something like the following terms: I get up in the morning, I go to the office, I sue the federal government (meaning, in context, the Democratic, Obama administration), and then I go home.² Tendentious legal arguments offered in

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¹ LAWFARE, <https://www.lawfareblog.com/> [<https://perma.cc/MYC3-Y3DR>].

² See, e.g., Sue Owen, *Greg Abbott Says He Has Sued Obama Administration* 25 *Times*, POLITIFACT (May 10, 2013), <https://www.politifact.com/factchecks/2013/may/10/greg-abbott/greg-abbott-says-he-has-sued-obama-administration-/> [<https://perma.cc/9B3C-GTEP>].

litigation can, of course, be countered by adversary parties and rejected by courts. The litigation record of former President Trump's lawyers in attempting to overturn the 2020 election results is a clear example of the legal system's capacity to reject lawsuits that are little more than a form of political harassment.³ But, that does not mean that the repetition of frivolous claims does not damage the underlying public belief in the integrity of the election laws and the electoral processes that these lawsuits attacked.

More damaging yet are official positions taken by government lawyers who give advice to public officials based on legal arguments meant merely to throw a thin veneer of legality over actions or claims of authority that a healthy respect for the rule of law would rule out of bounds.⁴ I say more damaging because these sorts of arguments are not subject to adversarial contestation and evaluation by a neutral decider. And, they give comfort to willful exercises of power that may themselves be virtually immune to legal challenge. Indeed, much of what government officials do is not subject to legal challenge in the courts and, if questions of legality have been addressed at all, they will have been addressed in legal advice that is not revealed in any systematic way to legislative overseers or the public at large.⁵ If we are to have a government of laws and not of men, maintaining a rule of law culture within the executive branch that is policed by its legal advisors is of critical importance.

But all of this assumes that we know what a rule of law culture looks like and can determine when its norms and values have been respected or breached. To test these assumptions we would be well advised to see what Peter Shane has had to say about them.

³ According to Wikipedia, the Trump campaign filed and lost 63 such lawsuits. *Post-Election Lawsuits Related to the 2020 United States Presidential Election*, WIKIPEDIA, https://en.wikipedia.org/wiki/Post-election_lawsuits_related_to_the_2020_United_States_presidential_election [https://perma.cc/AH86-M95L].

⁴ The Justice Department's defense of the George W. Bush administration's Terrorist Surveillance Program provides a good example. The letter from Assistant Attorney General William Moschella to the Chair and ranking minority Members of the Senate and House Select Committees on Intelligence is available in the DOJ Reading Room. Letter from William E. Moschella, Ass. Att'y Gen., Dep't of Justice, to Members of the House Permanent Select Comm. on Intel. & Senate Select Comm. on Intel. (Dec. 22 2005), <https://www.justice.gov/sites/default/files/ag/legacy/2007/01/11/surveillance6.pdf> [https://perma.cc/RPS5-EPX7] [hereinafter Moschella]. The egregiousness of this analysis is explained in a counter letter by a group of constitutional law scholars and one-time public officials. Letter from Const. L. Scholars & Former Gov't Offs., to Members of the House Permanent Select Comm. on Intel. & Senate Select Comm. on Intel. (Jan. 9, 2006), <https://cdt.org/wp-content/uploads/security/20060109legalexpertsanalysis.pdf> [https://perma.cc/E85F-5S77].

⁵ PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 103 (2009).

II. CONCEPTUALIZING THE RULE OF LAW

Peter has been particularly clearheaded about the difficulties of conceptualizing the rule of law both as an abstract ideal and as an operational guide to legitimate legal practice.⁶ One of the many places that Peter articulates this vision is his article entitled *The Rule of Law and the Inevitability of Discretion* published in the *Harvard Journal of Law and Public Policy* in 2013.⁷ The article begins by recognizing that the rule of law is a highly contested concept, one that has bedeviled legal philosophers for centuries.⁸ But, his particular target in that article was skepticism that the rule of law functioned at all in an administrative state organized like 21st-century American government.⁹ The skeptics with whom Peter was in conversation advanced a conception of the rule of law that constrained the exercise of governmental power through the promulgation of general rules that were predictable in their operation and subject to relatively straightforward judicial enforcement.¹⁰ As a very general matter this is relatively non-problematic. Peter's argument was with their view that the discretion provided to administrative implementers under much congressional legislation allowed officials to operate in an ad hoc and unpredictable fashion that failed these basic rule of law requirements.¹¹

Peter's claim was that the skeptic's critique was unrealistic.¹² That critique imagined that the discretion provided to Congress by Article I of the U.S. Constitution was somehow less open textured than the statutes that empower federal administrators.¹³ And it further assumed that courts interpreting congressional legislation would somehow have less discretion than administrative interpreters.¹⁴ Neither of those propositions could withstand serious analysis. But, that the skeptics relied on bad arguments did not tell us what a realistic view of the rule of law might look like. Peter articulated the problem in the following terms:

The challenge for those of us who believe in a Rule of Law, therefore, is not to blink at the inevitability of discretion or resign "Rule of Law" to the dustbin of empty slogans. The task is to articulate a compelling conception of the Rule of Law—a conception that is well-suited to the inevitability of discretion in the administrative state. That discretion is rooted in two realities: "One is that public officials, even if conscientiously attentive to law, will often find the written law applicable to their particular problems or opportunities to

⁶ See, e.g., Peter M. Shane, *The Rule of Law and the Inevitability of Discretion*, 36 HARV. J.L. & PUB. POL'Y 21, 21–23 (2013).

⁷ *Id.*

⁸ *Id.* at 21–22.

⁹ *Id.* at 21.

¹⁰ *Id.* at 22.

¹¹ *Id.* at 22–23.

¹² Shane, *supra* note 6, at 22–23.

¹³ *Id.*

¹⁴ *Id.* at 23.

be genuinely vague.” “The second . . . is that, with regard to a great deal—perhaps most—government activity, the chances are remote that law can and will be enforced against nonconforming behavior.” Our Rule of Law conception must have operational consequences even when the actual prospects of sanction for illegality are remote.¹⁵

This is not a challenge easily met. And while he does not put the argument precisely in these terms Peter’s approach is to make clear that “Rule” in “Rule of Law” is a verb not a noun. Law does not have to be *rulish* in order to be law. Borrowing from the work of Jeremy Waldron and Ronald Dworkin, Peter conceptualizes that a rule of law polity is one that subscribes to the particular set of cultural practices.¹⁶ Recognizing that legal rules or principles will inevitably engender disputes about their meaning and application, fidelity to the rule of law lies in a certain culture of argumentation and interpretation. Like any culture a rule of law culture is not easy to describe.

One aspect of that culture is that legal argument is focused on “antecedent legal materials rather than political” or personal advantage.¹⁷ Moreover this argument or interpretation must be embedded in a collective understanding that the contesting parties have a common interest in the maintenance of the integrity of the legal and constitutional order.¹⁸ And, in order for a rule of law culture to be maintained, it must be embedded in institutions and institutional arrangements that reinforce these commitments.¹⁹

Although much discussion of the rule of law among lawyers and legal academics focuses on courts, for Peter Shane the rule of law is not the rule of courts. To be sure opportunities for judicial review of official action are an important aspect of a rule of law culture. Courts, at least in the United States, represent our most independent and politically neutral governing institutions.²⁰ But, Peter Shane, as an administrative law scholar and former government lawyer, is acutely aware of the degree to which legal issues of official authority are solved in fora other than courtrooms.

Hence, whether the rule of law is alive and well in the administrative state must rely importantly on the way in which administrative institutions themselves are organized and the role that law is understood to play in shaping administrative action. This in turn demands constant attention to professional norms and practices that orient government lawyering toward pre-existing authoritative sources—statutes, judicial opinions, the Constitution and prior practices and opinions in the executive branch itself—rather than toward the

¹⁵ *Id.* (quoting SHANE, *supra* note 5, at 115).

¹⁶ *Id.*

¹⁷ *Id.* at 23 (quoting Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 147 (2002)).

¹⁸ Shane, *supra* note 6, at 23–24.

¹⁹ *Id.* at 24.

²⁰ *See id.* at 22 n.8 (quoting Richard A. Epstein, *Government by Waiver*, 7 NAT’L AFF. 39, 39 (2011)).

immediate demands of the present as represented by the policies and preferences of current officeholders. Understood in this way the rule of law is not a fact but a process, a constant struggle to maintain the integrity of law in the face of the insistent demands of those charged with making and implementing public policy. In Peter's words: "Under this institutional conception of the Rule of Law, to quote Justice Felix Frankfurter, 'the relevant question is not, has it been achieved, but, is it conscientiously and systematically pursued.'" ²¹

III. DO WE HAVE A RULE OF LAW CULTURE?

As mentioned earlier Peter Shane's scholarship comes back to the idea of the rule of law and its implementation in a number of different contexts.²² As a leading scholar of presidential power and its limits, he has been particularly concerned with the modern rise of presidential unilateralism and aggressive assertions of presidential authority.²³ His well-known and much-praised book, *Madison's Nightmare*, documents this phenomenon in the George W. Bush administration, but it has been characteristic of modern presidents, both Republicans and Democrats, at least since Reagan, and arguably before.²⁴ Conservative lawyers and legal scholars advising and defending the actions of Republican presidents have been particularly strong advocates of "presidentialism," but aggressive claims of foreign policy and military authority, not to mention government by executive order have characterized Democratic administrations as well.²⁵ And, while Peter was relatively sanguine about routine administrative state policy making and implementation, he has found the excesses of presidentialism much more threatening to his understanding of what it means to have a rule of law culture.²⁶

At one level, the reasons for this differential concern are not difficult to fathom. Line administrative agencies, after all, operate within a dense thicket of structural and procedural rules and significant opportunities for judicial and congressional review that are largely missing when actions are taken by presidents.²⁷ Procedural rules, backed by judicial review, require administrators to hear from outsiders, respond to their claims and give reasons both legal and factual justifying their exercises of authority.²⁸ Attention to the boundaries of administrative legal authority and opportunities for contesting authority claims are institutionalized by the Federal Administrative Procedure Act and decades

²¹ Shane, *supra* note 6, at 25 (quoting Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 235 (1955)).

²² *Id.* at 25–26.

²³ *See id.* at 27.

²⁴ SHANE, *supra* note 5, at 3–4.

²⁵ *Id.* at 3–5.

²⁶ *Id.* at 4–5.

²⁷ *Id.* at 20–21.

²⁸ *See id.* at 166.

of judicial review precedents that are the touchstones of legal argumentation concerning the lawfulness of administrative action.²⁹

None of these institutional checks necessarily attend presidential actions, or, if present, operate in highly attenuated forms. Presidential power is often justified in vague terms as authorized by Article II's "vesting" of the "executive power" in the president or the president's constitutional authority as "Commander-in-Chief" of the armed forces.³⁰ The APA does not apply to presidential acts and judicial review is rare.³¹ Even congressional oversight is often thwarted by claims of "executive privilege" or issues of "national security."³² Much decision-making in the Executive Office of the President is completely opaque to outsiders. In this environment a rule of law culture can thrive only if the administration itself, and the legal staff in the White House and the Justice Department's Office of Legal Counsel, institutionalize that culture. Does that culture exist? How would we know?

Of course, these worries might be overblown. At a very general level the common sense understanding of the rule of law is that persons in authority must act only within the law and for public purposes, not to pursue their own personal, political or ideological interests. And when one looks at exercises of presidential power one almost always finds a claim of legality. There are rare instances in American history in which presidents have admitted to exercising extralegal powers and have sought ratification through legislation.³³ Abraham Lincoln's suspension of the writ of habeas corpus and Thomas Jefferson's purchase of the Louisiana Territory from France are notorious examples.³⁴ But in virtually every case of an exercise of presidential power there is a claim of authority based on the citation of some arguably relevant statute or constitutional provision.³⁵ At that level presidents routinely exhibit fidelity to the rule of law. The crucial question, of course, is whether that fidelity is window dressing on exercises of power that rightfully understood are beyond the pale.

To be clear, the question that Peter Shane's work on the rule of law puts to us is not whether presidents are always right in their claims to proper legal authority. They will of course sometimes be mistaken and occasionally be brought up short by a judicial determination that their actions were unlawful.³⁶ Respect for the rule of law cannot mean always getting it right or never losing

²⁹ William Powell, *Policing Executive Teamwork: Rescuing the APA from Presidential Administration*, 85 MO. L. REV. 71, 71 (2020).

³⁰ SHANE, *supra* note 5, at 43, 53.

³¹ Powell, *supra* note 29, at 71.

³² SHANE, *supra* note 5, at 31, 103.

³³ Sherrill Halbert, *The Suspension of the Writ of Habeas Corpus by President Lincoln*, 2 AM. J. LEGAL HIST. 95, 101–03 (1958).

³⁴ *Id.*; Eberhard P. Deutsch, *The Constitutional Controversy over the Louisiana Purchase*, 53 A.B.A. J. 50, 53 (1967).

³⁵ Deutsch, *supra* note 34, at 57.

³⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) is often cited as the most prominent example. But its prominence owes something to the rarity of Supreme Court opinions striking down presidential exercises of unilateral authority.

in litigation. The question is a much subtler one of whether the way in which claims of authority are made and discussed shows real respect for the standard conventions of legal analysis and a willingness to temper claims of authority and desires for action on the basis of those analyses. How are we to judge whether a presidential administration shows real respect for rule of law values?

A central thesis of *Madison's Nightmare* is that the George W. Bush administration often failed to respect the rule of law.³⁷ And, while that book does not provide a crisp set of criteria for determining whether actions do or do not show respect for the rule of law,³⁸ attention to how Peter goes about his argument reveals something like a set of operational tests.

Chapter Four examining the Bush administration's response to the 9/11 attacks is particularly instructive. One aspect of that response was to initiate a massive Terrorist Surveillance Program (TSP) that enabled the National Security Agency to eavesdrop on virtually any electronic communication to or from anyone without bothering to obtain the authorization of the Foreign Intelligence Surveillance Court established specifically for this purpose.³⁹ The TSP was secret and we have no information concerning what legal advice the administration received prior to establishing it beyond a very general OLC memorandum suggesting that the 9/11 attacks might justify enhanced intelligence operations.⁴⁰ Here we have an initial danger signal, the administration's willingness to act without explicit and focused legal advice or the unwillingness to make known the advice on which it acted. To be sure, the desire, perhaps necessity, to keep the program secret may have justified the lack of transparency that would have enabled outsiders to know of and critique the administration's legal position. But, as Peter points out, where secrecy is essential, respect for law counsels rigorous attention to internal routines for deliberation and argument that normally attend the preparation of legal opinions.⁴¹

The Bush administration's counter terrorism actions here and in other instances put up another warning flag. Legal advice was in essence managed out of the office of the Vice President's Chief of Staff who consulted only lawyers thought sympathetic to the administration's claims of authority and who made clear that there would be retribution for failure to toe the administration's line.⁴² The capacity for legal advice to constrain problematic action was virtually eliminated. Avoiding or corrupting the institutional arrangements meant to maintain the integrity of government lawyering is not respect for the rule of law.

³⁷ See SHANE, *supra* note 5, at 112.

³⁸ *Id.* at 115–21 (articulates how the author understands the concept).

³⁹ *Id.* at 89.

⁴⁰ *Id.* at 91–92; see also Moschella, *supra* note 4 (setting forth the DOJ's position).

⁴¹ SHANE, *supra* note 5, at 91.

⁴² See *id.* at 84, 91.

And “problematic action” vastly understates the disrespect for law that was ultimately revealed.⁴³

An operation as large as TSP is hard to conceal, although the Bush administration managed to do so for three years.⁴⁴ Once the operation was revealed demands were made on the administration to reveal its legal justification.⁴⁵ The administration’s response provided yet a third indication that, at least as concerned the administration’s attempts to deal with the threat of terrorism a rule of law culture was not operating. To put the matter in general terms what the OLC’s legal arguments revealed was a willingness to make extreme, almost laughable, analyses. This is not the place to go into detail concerning those arguments—Peter does so to great effect⁴⁶—but a skeletal outline of the government’s claims is probably sufficient to convince most law trained persons that if these arguments were offered in court they might well lead to sanctions on the government’s lawyers.

In general terms the first claim was that a very specific statute, the Foreign Intelligence Surveillance Act (FISA), that by its own terms limited the government’s authority to engage in electronic surveillance to the procedures and criteria specified in that statute unless superseded by a specific statutory exception, was superseded by the very general Authorization for the Use of Military Force (AUMF) which nowhere mentions intelligence gathering.⁴⁷ Should that argument fail, which under standard rules governing the interpretation of statutes it surely would if advanced in litigation, then FISA itself was unconstitutional. Why? Because under Article II of the Constitution the President is the Commander-in-Chief of the Armed Forces.⁴⁸ The extensive powers of Congress under Article I to declare war, to raise and supply the Army and Navy and to regulate the use of military force are simply ignored.⁴⁹

The willingness of the Bush administration to make extreme claims concerning presidential power were hardly limited to its activities concerning the so-called war on terror.⁵⁰ Chapter 5 of Madison’s Nightmare goes on to describe that administration’s claims concerning executive privilege and the startlingly large number of claims in presidential signing statements that particular sections of a statute represented an unconstitutional invasion of

⁴³ The machinations of the administration are detailed in a report of the Offices of the Inspector Generals of the Department of Justice, Department of Defense, Central Intelligence Agency, National Security Agency and the Office of the Director of National Intelligence. *See generally* OFFS. OF INSPECTORS GEN. OF THE DEP’T OF DEF. ET AL., REP. NO. 2009-0013-AS, UNCLASSIFIED REPORT ON THE PRESIDENT’S SURVEILLANCE PROGRAM (July 2009), <https://irp.fas.org/eprint/psp.pdf> [<https://perma.cc/J4YT-VMJA>].

⁴⁴ SHANE, *supra* note 5, at 89.

⁴⁵ *Id.* at 91.

⁴⁶ *Id.* at 84–97.

⁴⁷ *Id.* at 92.

⁴⁸ *Id.* at 93.

⁴⁹ *Id.* at 120.

⁵⁰ SHANE, *supra* note 5, at 121.

presidential authority.⁵¹ These signing statements go on to announce that the statute in question will be interpreted to make them consistent with the President's view of his constitutional authority, or if a limiting interpretation was unavailable, implemented as if the offending sections did not exist.⁵² Neither sorts of claim are unique to the George W. Bush administration, but as Peter's analysis demonstrates, many of those claims flew in the face of established law.⁵³ More importantly for present purposes these sorts of claims render a president's or an administration's actions unaccountable using the traditional means for legal or political accountability.

Refusal to provide information to Congress or to the courts in litigation is in essence a claim to unaccountable authority. In theory legally unsustainable claims to secrecy can be challenged in court, but as a practical matter stonewalling often stymies congressional investigations and derails litigation. Signing statements that have the effect of rewriting statutes can be challenged only in the rare situation in which failure to implement the provision declared unconstitutional invades a private right that gives some litigant standing to complain.⁵⁴ Systematic attempts to evade legal and political accountability are yet another indication of an administration that holds itself out as above the law.

Extrapolating then from Peter Shane's analysis in *Madison's Nightmare*, he has given us a series of tests or danger signals that suggest that a rule of law culture is breaking down.⁵⁵ Administrations that are reluctant to reveal the legal bases for their actions, that evade or corrupt the standard institutional practices for giving and receiving legal advice, that make extreme, verging on unprofessional, legal claims in the analyses that they do provide, and that seek to shield themselves from accountability in ways that amount essentially to "lawfare", do not take the rule of law seriously. They may use the forms of law, but those formalities are substantively empty. To be sure many of these criteria for determining respect for the rule of law require judgments about what is acceptable behavior in particular contexts. But, as Peter Shane's work insists, that is simply the nature of the rule of law enterprise. To be ruled by law is a cultural practice whose integrity is judged by norms that are necessarily imprecise and open to argument. To maintain a rule of law culture we must be willing as Peter Shane has been to engage in those arguments in ways that insist that law matters while recognizing that we have no privileged access to what it means.

⁵¹ *Id.* at 132–42.

⁵² *Id.*

⁵³ *See id.*

⁵⁴ *See generally* Zivotofsky v. Kerry, 576 U.S. 1 (2015) (epitomizing a recent example of this rare breed).

⁵⁵ *See generally* SHANE *supra* note 5 (laying out the series of tests used by Peter Shane).