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Overseer, or "The Decider"? The President in Administrative Law

Peter L. Strauss
Columbia Law School, strauss@law.columbia.edu

FOREWORD

Overseer, or "The Decider"? The President in Administrative Law

Peter L. Strauss*

The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.[1]

All will agree that the Constitution creates a unitary chief executive officer, the President, at the head of the government Congress defines to do the work its statutes detail. Disagreement arises over what his function entails. Once Congress has defined some element of government and specified its responsibilities, we know that the constitutional roles of both Congress and the courts are those of oversight of the agency and its assigned work, not the actual performance of

* Betts Professor of Law, Columbia University School of Law. Special thanks to Jeffrey Vernon for his imaginative, thorough, and insightful research assistance; my Columbia colleagues for their thoughtful observations in two faculty colloquia and many conversations; and Professors Harold Bruff, John Manning, Trevor Morrison, and Kevin Stack for their helpful comments. Mark Knights of *The George Washington Law Review* has been a thoughtful and careful editor; the *Law Review* has provided a number of footnotes and parenthetical characterizations it found useful.

This paper was initially presented, with the *Law Review*'s sponsorship, as a talk to the November 2006 meeting of the ABA Section of Administrative Law and Regulatory Practice; much has changed since then—and will doubtless continue to change. No effort has been made to deal with developments or literature appearing after March 15, 2007.

1 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

that work. But is it the same for the President? When Congress confers authority on the Environmental Protection Agency ("EPA") to regulate various forms of pollution, on the Occupational Safety and Health Administration to regulate workplace safety, or on the Food and Drug Administration to regulate the safety of food, drugs, and medical devices, is it in the law's contemplation giving the President the authority to *decide* these matters, or only to oversee the agencies' decision processes?

One might think this a fairly elementary question, yet it has divided Attorneys General from the beginning of the Republic[2] and divides scholars still.[3] In his recent, encyclopedic study of separation of powers, Harold Bruff, long a leading scholar of the field, reveals the debates in detail, ultimately taking much the same position as this essay does.[4] Yet the difference between oversight and performance is

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2 The contrast often given in the literature is between the advice of Attorney General Wirt to President Monroe and the advice of Attorney General Cushing to President Pierce. Attorney General Wirt advised that the President's role is to give "general superintendence" to those to whom Congress had assigned executive duties, as

> it could never have been the intention of the constitution . . . that he should in person execute the laws himself. . . . [W]ere the President to perform [a statutory duty assigned to another], he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.

The President and Accounting Officers, 1 Op. Att'y Gen. 624, 625 (1823). Attorney General Cushing advised that "no Head of Department can lawfully perform an *official* act against the will of the President," as a contrary view would permit Congress so to "divide and transfer the executive power as utterly to subvert the Government," albeit that "all the ordinary business of administration" is, in statutory terms, placed under the authority of the Department, not the President, and "may be performed by its Head, without the special direction or appearance of the President." Relation of the President to the Executive Departments, 7 Op. Att'y Gen. 453, 469–71 (1855). These opinions, with helpful commentary, may be found in H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 29–34, 131–48 (1999); the story is also told in HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 456–59 (2006).

3 CONSTITUTION CONFERS DECISIONAL AUTHORITY: see, for example, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 549–50 (1994); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 730 (2005).

CONSTITUTION DOES NOT CONFER DECISIONAL AUTHORITY, BUT IT SHOULD BE PRESUMED CONGRESS INTENDS IT, GIVEN THE REALITIES OF MODERN ADMINISTRATION: see, for example, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–3 (1994).

PRESIDENT, UNLESS DIRECTLY AUTHORIZED, IS ONLY AN OVERSEER: see, for example, Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987–89 (1997); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 984–86 (1997).

4 BRUFF, *supra* note 2, at 455–59.

often unremarked. For example, in their groundbreaking account of the EPA-White House interface from the perspective of EPA political appointees (both Republican and Democrat), Lisa Bressman and Michael Vandenbergh refer repeatedly to "presidential control" without being explicit whether their EPA correspondents viewed requests from the White House as political guidance (however emphatic) or binding directives.[5] Does it deny the unity of the American presidency to suggest that in relation to the general concerns of administrative law, and absent actual congressional delegation of decisional authority to the President, his role is limited to executive oversight of the agency on which that authority is statutorily conferred?[6] Courts know the distinction between oversight and primary responsibility well, and often insist upon it in relation to their own functions.[7] The basic editorial of this Essay is that the same distinction is to be observed in presidential relations with administrative agencies.

That recent years have witnessed presidential blurring of the distinction may not be surprising politically, given the temptations posed by frequently divided government. A President who cannot readily win the cooperation of Congress can often protect himself by his veto from its disapproval; and a Republican President in this position,

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5 Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 47–52 (2006).

6 The *Yale Law Journal* recently hosted a symposium issue on the question of executive authority generally that did not focus on the questions under discussion here. Symposium, *The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law: A Symposium on Executive Power*, 115 YALE L.J. 2218 (2006). A notable exception was an essay by Professor Cass Sunstein arguing that the President's participation in law interpretation gave the Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), special force. Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2587–89 (2006). Some of my arguments here appeared informally in a debate with Professor Sunstein in the *Yale Law Journal*'s Pocket Part. Peter L. Strauss, *Within* Marbury*: The Importance of Judicial Limits on the Executive's Power to Say What the Law Is*, 116 YALE L.J. POCKET PART 59 (2006), http://www.thepocketpart.org/2006/09/27/strauss.html; Cass R. Sunstein, *The Virtues of Simplicity*, 116 YALE L.J. POCKET PART 70 (2006), http://www.thepocketpart.org/2006/09/27/strauss.html; Peter L. Strauss, *Exploiting Simplicity*, 116 YALE L.J. POCKET PART 77 (2006), http://www.thepocketpart.org/2006/09/27/strauss.html; Cass R. Sunstein, *Costing* Mead, 116 YALE L.J. POCKET PART 79 (2006), http://www.thepocketpart.org/2006/09/27/strauss.html; Peter L. Strauss, *The Virtue of Checks*, 116 YALE L.J. POCKET PART 81 (2006), http://www.thepocketpart.org/2006/09/27/strauss.html. It is not hard to draw from the *Journal* issue generally the conclusion that a strong unitary executive is far from a necessary condition of effective governance, and often enough a threat to democratic values.

7 *E.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) ("The court is not empowered to substitute its judgment for that of the agency.").

wrestling with a largely Democratic civil service, may think that he is only insisting on *his* politics in attempting to substitute his view for that of an "expert" agency.[8] Other factors may contribute as well: intellectual trends highlighting the roles of politics over those of "law" or "expertise" in relation to administrative work; the challenges posed by the explosion of economically significant administrative rulemaking in the wake of the health and safety statutes of the 1970s; or a self-conscious political agenda to "return" strength to a presidency weakened by Watergate and political reactions to the war in Vietnam.[9]

The trend would be enough to warrant making this question the subject of this first Foreword to the planned *Annual Review of Administrative Law* issue of this law review. Recent developments give it added force. Two Supreme Court decisions essentially bracketing its 2005 Term address the legality of presidential decision, one directly and one by strong implication. In *Hamdan v. Rumsfeld*,[10] decided on the final day of the Term, the Court repudiated by the narrowest of margins the President's claim that his constitutional authority as Commander in Chief, taken together with vaguely worded statutes, empowered him to create tribunals with life-and-death authority over noncitizen detainees, operating procedurally and substantively outside the frameworks established by the Uniform Code of Military Justice[11] and the United States' obligations under the Third Geneva Convention (concerning the treatment of prisoners of war).[12] In one of the first decisions of the Term, *Gonzales v. Oregon*,[13] the Court assessed the legal effect of an opinion of the Attorney General—that official on whose judgment about the law presidential interpretations might most often rest, and who claims for his judgments the government-wide legal authority we are exploring for the President—interpreting

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8 Thanks to my colleague Avery Katz for suggesting this argument.

9 This was the burden of the well-publicized memorandum written by Justice Alito as a young attorney in the Office of Legal Counsel in the first years of the Reagan administration. Memorandum from Samuel A. Alito, Jr., Deputy Ass't Att'y Gen., Office of Legal Counsel, to The Litig. Strategy Working Group (Feb. 5, 1986) (citing the need to reassert presidential authority as its *raison d'être*), *available at* http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf; *see also* JAMES MANN, RISE OF THE VULCANS: THE HISTORY OF BUSH'S WAR CABINET (2004).

10 Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

11 Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2000).

12 *Hamdan*, 126 S. Ct. at 2786–98; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

13 Gonzales v. Oregon, 126 S. Ct. 904 (2006). The reader is entitled to know that I appeared as an amicus curiae supporting Oregon in this case.

the Controlled Substances Act[14] to render felonious a physician's prescription of morphine to help her patient end her life, even though that prescription was made in full conformity with the procedures of Oregon's Death With Dignity Act.[15] The opinion, in the form of instructions to federal prosecutors, had been rendered without public consultation of any kind, countermanded a predecessor's earlier contrary interpretation, ignored the role of the Department of Health and Human Services in matters concerned with federal regulation of the medical profession *and* profession-relevant aspects of the Controlled Substances Act, and in effect created a new federal crime. Five Justices of the current Court, plus Justice O'Connor, found it without authority; the remaining three Justices sitting—all joiners also of the *Hamdan* dissents and enthusiasts for executive authority—dissented, concluding that it was entitled to control.[16]

Hamdan, of course, also suggests questions of presidential authority in relation to the "war on terror," the use of military forces in Afghanistan and Iraq, and the treatment of detainees from these conflicts—all evoking the President's authority as Commander in Chief and the unusual breadth of his authority over the nation's foreign affairs. These issues, connected to other constitutional text and often constituting the exercise of discretion in its largest sense,[17] are not my concern here. Questions of presidential authority also arise dramatically in a purely domestic, administrative sphere, and these are the questions to which this essay's attention is directed.

Consider, for example, President Bush's recent objections to congressional requirements that appointees to leadership in the Postal Service or the Federal Emergency Management Administration ("FEMA") be experienced managers and that these appointees file certain informational reports with both Congress and the President (that is, without prior White House approval), on the ground that these provisions undercut the President's necessary constitutional authority.[18] These are among only the most recent outcroppings of the contretemps in the newspapers, the blogosphere, and even the American Bar Association[19] over presidential use of signing statements rather than vetoes to express concerns and understandings about leg-

14 Controlled Substances Act, 21 U.S.C. §§ 801–904 (2000).

15 Oregon Death With Dignity Act, OR. REV. STAT. § 127.800–.995 (2005).

16 *Gonzales*, 126 S. Ct. at 939 (Scalia, J., dissenting). Chief Justice Roberts and Justice Thomas joined Justice Scalia's dissent.

17 *See infra* note 62 and accompanying text.

18 *See infra* notes 113–15 and accompanying text.

19 Am. Bar Ass'n Task Force on Presidential Signing Statements & the Separation of Pow-

islation Congress had presented for approval.[20] If these are *simply* statements, one might wonder why anyone would be troubled about them. If, on the other hand, they have some legal force, one can perhaps find in them "the accretion of dangerous power," departures from the marvelous system of checks and balances that has so long kept American government on the rails.[21]

Issues about presidential authority in relation to agency decisionmaking appeared strikingly in January 2007 when President Bush issued Executive Order 13,422,[22] a series of amendments to the longstanding Executive Order 12,866[23] concerning regulatory planning and review. The amendments both added to and subtracted from preexisting provisions respecting the Regulatory Policy Officers ("RPO") that Executive Order 12,866 required each agency to create to assist in regulatory planning and analysis. Added were requirements that an RPO must be a "presidential appointee,"[24] whose identity is regularly coordinated with the Office of Management and Budget ("OMB"), and that "[u]nless specifically authorized by the head of the agency, no rulemaking shall commence nor be included on the [agency's regulatory] Plan without the approval of the agency's Regulatory Policy Office[r]."[25] Subtracted was previous language stating that an agency's RPO "shall report to the agency head"[26] and that the agency's regulatory plan "shall be approved personally by the agency head."[27] Taken

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ers Doctrine, Recommendation (adopted by the ABA House of Delegates Aug. 7–8, 2006), *available at* http://www.abanet.org/leadership/2006/annual/dailyjournal/20060823144113.pdf.

20 The debates find full expression in a forthcoming symposium issue of the *William & Mary Bill of Rights Journal*. Symposium, *The Last Word? The Constitutional Implications of Presidential Signing Statements*, 16 WM. & MARY BILL RTS. J. 1 (2007), *details at* http://www.wm.edu/law/publications/wmborj/Symposium07.shtml.

21 Trevor Morrison suggests, for example, that a signing statement may represent an attempt on the part of an administration to effect a "unilateral alteration of the legislative bargain." Trevor Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1249 (2006). In effect, Professor Morrison notes, where the President objects to the substance of a proposed bill but fears the political consequences of a veto—due either to lack of popular support or likely congressional override, or both—he may sign the bill into law, but use a signing statement to invoke constitutional concerns with potential future applications and effectively "read an implicit exception" into the law. *Id.* at 1248. *See generally id.* at 1245–50.

22 Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007).

23 Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2000).

24 Exec. Order No. 13,422 § 5(b), 72 Fed. Reg. 2763, 2764 (Jan. 18, 2007).

25 Exec. Order No. 13,422 § 4(b), 72 Fed. Reg. 2763, 2764 (Jan. 18, 2007).

26 *Compare* Exec. Order No. 13,422 § 5(b), 72 Fed. Reg. 2763, 2764 (Jan. 18, 2007), *with* Exec. Order No. 12,866 § 6(a)(2), 58 Fed. Reg. 51,735, 51,740 (Sept. 30, 1993).

27 *Compare* Exec. Order No. 13,422 § 4(b), 72 Fed. Reg. 2763, 2764 (Jan. 18, 2007), *with* Exec. Order No. 12,866 § 4(c)(1), 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993).

as a whole, these changes threaten the control of agency heads over their agencies' agendas and effect a dramatic increase in presidential control over regulatory outcomes—an increase effected by the President's own unilateral action and not authorized by Congress. By requiring the approval of an official loyal to the administration before an agency takes action, these changes threaten to disturb the difficult but necessary balance between politicians and experts, between politics and law, that characterizes agency rulemaking.

Our most recent Presidents, if not their predecessors, seem to have been at pains to convey the impression that they are personally responsible for the conduct of domestic governance, to a degree that extends to the resolution or decision of particular administrative issues;[28] and their cabinet officials sometimes speak as if they were following binding presidential orders, rather than exercising their own statutory powers.[29] These developments, too, are our concern. Scholars such as Chicago's Professor Cass Sunstein and Harvard's Dean Elena Kagan have argued that although, in their judgment, the Constitution does not compel these developments, the contemporary circumstances of government support them in the absence of explicit congressional instructions to the contrary.[30] Along with Professor Bruff,[31] Professors Jerry Mashaw[32] and Kevin Stack,[33] exploring Congress's early practice and subsequent patterns, raise considerable doubts whether any such presumption of presidential empowerment (beyond what the Constitution requires) is warranted.

The Constitution itself is at best ambivalent on the question. On the one hand, the opening words of Article II locate all executive

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28 *See generally* Strauss, *Presidential Rulemaking*, *supra* note 3. Dean Kagan of Harvard Law School subsequently confirmed, and celebrated, this phenomenon. *See* Kagan, *supra* note 3. *But cf.* Bressman & Vandenbergh, *supra* note 5 (taking a more critical view of the benefits of presidential control); Robert Pear, *Bush Accepts Rules to Protect Privacy of Medical Records*, N.Y. TIMES, Apr. 13, 2001, at A1.

29 *See, e.g.*, Anthony Shadid, *U.S. Bolsters the Power of Patients to Guard Privacy of Personal Data*, BOSTON GLOBE, Apr. 13, 2001, at A3 (quoting Secretary of Health and Human Services Tommy Thompson, who, on announcing the promulgation of medical privacy rules, "said *the president had decided* it was 'time to act'" (emphasis added)).

30 *See* Kagan, *supra* note 3; Lessig & Sunstein, *supra* note 3.

31 BRUFF, *supra* note 2.

32 Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006).

33 Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006); *see also* Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2074–75 (2005) (arguing against the notion that control of the administrative apparatus by elected officials such as the President is the only way to ensure that agencies are held accountable to the public for their actions).

power in the President,[34] and the Philadelphia convention famously and emphatically rejected any idea of a collegial executive.[35] Those who take the strongest perspective on what it means to have a unitary chief executive thus argue that when Congress assigns a matter for decision to a constituent element of the executive branch, it does so only for convenience—that, as a matter of constitutional power, the President has the right to decide it.[36] On the other hand, the Constitution twice refers to "duties" or "powers" assigned to other officers.[37] Article II in terms gives the President only the right to seek from those officers a written opinion about *their* exercise of those duties (i.e., it does not say he may *command* their exercise of the duties assigned to them),[38] and it concludes that he is responsible to see to it that the laws "*be* faithfully executed"[39]—i.e., as if by others. From this perspective, as some (but not all) Attorneys General have concluded, when Congress creates duties in others, that act creates in the President constitutional obligations not only to oversee but also to respect their independent exercise of those duties.[40] Just as he must respect a statutory framework that assigns care for the national parks to the Department of the Interior, and care for the national forests to the Department of Agriculture, on this view, he must respect a statutory framework that assigns actual decision making about particular issues affecting air quality to the EPA; he is entitled only to his (inevitably political) oversight.

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34 U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

35 *See* Notes of James Madison on the Federal Convention (June 1, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911), at 65–66 (describing the debate in the Convention as to whether there should be a single or collegial executive); *id.* at 88–89 (notes of June 2, 1787 on the same); *id.* at 96–97 (notes of June 4, 1787 on the same); *see also* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 599–602 (1984).

36 *See, e.g.*, Calabresi & Prakash, *supra* note 3, at 549–50; Yoo, Calabresi & Colangelo, *supra* note 3, at 730.

37 Article I, Section 8, Clause 18 confers on Congress the authority to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other *Powers vested* by this Constitution in the Government of the United States, or *in any Department* or Officer thereof," and Article II, Section 2, Clause 1 provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the *Duties of their respective Offices*" (emphases added).

38 U.S. CONST. art. II, § 2, cl. 1 (President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating *to the Duties of their respective Offices*" (emphasis added)).

39 U.S. CONST. art. II, § 3, cl. 3 (emphasis added).

40 *See supra* note 2 and accompanying text.

The difference between oversight and decision can be subtle, particularly when the important transactions occur behind closed doors and among political compatriots who value loyalty and understand that the President who selected them is their democratically chosen leader. Still, there is a difference between ordinary respect and political deference, on the one hand, and law-compelled obedience, on the other. The subordinate's understanding which of these is owed, and what is her personal responsibility, has implications for what it means to have a government under laws. I cannot improve on the characterization of the problem given half a century ago by Professor Corwin:

> Suppose . . . that the law casts a duty upon a subordinate executive agency *eo nomine,* does the President thereupon become entitled, by virtue of his "executive power" or of his duty to "take care that the laws be faithfully executed," to substitute his own judgment for that of the agency regarding the discharge of such duty? An unqualified answer to this question would invite startling results. An affirmative answer would make all questions of law enforcement questions of discretion, the discretion moreover of an independent and legally uncontrollable branch of the government. By the same token, it would render it impossible for Congress, notwithstanding its broad powers under the "necessary and proper" clause, to leave anything to the specially trained judgment of a subordinate executive official with any assurance that his discretion would not be perverted to political ends for the advantage of the administration in power. At the same time, a flatly negative answer would hold out consequences equally unwelcome. It would, as Attorney General Cushing quaintly phrased it, leave it open to Congress so to divide and transfer "the executive power" by statute as to change the government "into a parliamentary despotism like that of Venezuela or Great Britain with a *nominal* executive chief or president, who, however, would remain without a shred of actual power."[41]

This is the concern that motivates this writing. As in earlier scholarship,[42] my own conclusion is that in ordinary administrative law contexts, where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the Presi-

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41 EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957, at 80–81 (4th rev. ed. 1957) (quoting the opinion cited *supra* note 2).

42 *E.g.*, Strauss, *The Place of Agencies in Government*, *supra* note 35; Strauss, *Presidential Rulemaking*, *supra* note 3.

dent's role—like that of the Congress and the courts—is that of overseer and not decider. These oversight responsibilities, in my judgment, satisfy the undoubted constitutional specification of a unitary chief executive, while avoiding the executive tyranny horn of Corwin's dilemma.

I. The Developing Understanding

One might have thought that the course of events would shape answers to questions a brief text could not determine. Madison, writing in the Federalist Papers about federalism, and Hamilton, writing about the judiciary there, expected such an outcome: "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[43] "Time only can mature and perfect so compound a system, liquidate the meaning of all the parts, and adjust them to each other in a harmonious and consistent WHOLE."[44] If differing views of presidential authority were occasionally expressed,[45] both important events and implicit understandings of our first two centuries appeared to settle on a construction of President as overseer and not decider in relation to ordinary administration.

First as Attorney General, and then as Acting Secretary of the Treasury and Supreme Court nominee, Roger Taney would directly experience both the dilemma and the political consequences that could flow from recognition that Congress might place decisional authority in other than presidential hands. His initial encounter came in a foreign relations setting, where one might suppose presidential authority at a maximum. In a customs action, the U.S. Attorney in New York sought the forfeiture to the United States of jewels that had been stolen from the Princess of Orange. She appealed directly to President Andrew Jackson for their return. As Attorney General, Taney advised President Jackson that he could lawfully direct the United States Attorney to discontinue the forfeiture action, but acknowledged as well that "[t]he district attorney might refuse to obey the President's order; and if he did refuse, the prosecution, while he remained in office, would still go on."[46] That is, the President could

43 THE FEDERALIST NO. 37, at 6 (James Madison) (J. & A. M'Lean eds., 1788).

44 THE FEDERALIST NO. 82, at 606 (Alexander Hamilton) (John Hamilton ed., 1866).

45 *See supra* note 2.

46 The Jewels of the Princess of Orange, 2 Op. Att'y Gen. 482, 489 (1831). To similar

assure the faithful execution of the laws only through removal of one who failed to follow his directions, rather than substitution of his own decision.

The issue soon recurred in a particularly dramatic form. Jackson had risked his reelection to a second term in office with his successful veto of the bill that would have reauthorized the Bank of the United States. When he was then reelected by a wide margin, he asked his Secretary of the Treasury, Louis McLane, to remove the government's funds from the Bank and deposit them in state banks.[47] But the Bank's authority ran until 1836, and the relevant statute provided that government funds were to be kept in it "unless the Secretary of the Treasury shall at any time otherwise order and direct."[48] When Secretary McLane decided against removing the funds, Jackson removed him and appointed William Duane as his successor.[49] Duane also proved resistant to Jackson's persistent demands, responding that "[i]n this particular case, Congress confers a discretionary power, and requires reasons if I exercise it. Surely this contemplates responsibility on my part."[50] When Duane declined to remove the funds after lengthy and fervent correspondence between them, Jackson removed him in September of 1833, and appointed Taney Acting Secretary. Almost immediately, Taney made the requested order.[51] The result was a political furor. The Senate passed a Resolution of Censure and subsequently rejected Taney's nomination as Secretary—the first time in American history it had rejected a presidential nomination to the cabinet.[52] When, in 1835, President Jackson nominated Taney to a seat as Associate Justice of the Supreme Court, that nomination, too, failed.[53] Changes in Senate membership finally permitted his renomination and confirmation as Chief Justice months later, in 1836, and the eventual expungement of the Resolution of Censure.[54] The President thus did prevail, although not without cost. But, to underscore the legal

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effect, Taney would shortly issue an opinion treating the statutes conferring authority on accounting officers in the Treasury Department as making their decision controlling, subject only to the President's removal power. Accounts and Accounting Officers, 2 Op. Att'y Gen. 507, 509 (1832); *see also* LEONARD D. WHITE, THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829–1861, at 167–69 (1954) (describing this incident).

47 WHITE, *supra* note 46, at 34–35.

48 Act of Apr. 10, 1816, ch. 44, § 16, 3 Stat. 274.

49 WHITE, *supra* note 46, at 34–35.

50 *Id.* at 37.

51 *Id.*

52 *Id.* at 44, 110.

53 *Id.* at 110.

54 *Id.*

understanding where authority over the bank funds lay, recall that Jackson was the President who at about the same time famously responded to the Supreme Court's decision in *Worcester v. Georgia*[55] with "John Marshall has made his decision, now let him enforce it."[56]

The main point to note here is how President Jackson's recognition that the discretion involved lay with the Secretary of the Treasury, not himself, gave the events high political visibility and animated the machinery of checks and balances.[57] Such visibility might lead a President simply to accept his official's contrary-to-advice decision. About a century later, following Taney's lead, Attorney General Robert Jackson would advise President Franklin Roosevelt that it was his Secretary of the Interior, Harold Ickes, who had the legal authority to permit the sale of helium to Germany. Roosevelt earnestly wished to permit that sale while we were still formally a neutral country, prior to

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55 Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

56 *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 399 (1998) (citing 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 759 (rev. ed. 1926)); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 345 n.159 (1994).

White's account reveals in detail Jackson's acceptance of the proposition that his control lay only over the officeholder and was not a power of decision. WHITE, *supra* note 46, at 35–39. Not long after Taney became Chief Justice, the Supreme Court would decide *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), in which it would remark that

> [t]he executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly cannot be claimed by the President.
>
> There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character.

Id. at 610. While Chief Justice Taney dissented from the opinion, he did so only on the basis of a statutory question not related to this passage. *Id.* at 626–41 (Taney, C.J., dissenting).

57 In their vigorous account of the same events, in the first installment of their four-part series, Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1537 (1997), Professors Yoo and Calabresi appear to elide the distinction between presidential authority oneself to take a decision assigned to another, and presidential authority to remove an officer who would not effectuate a desired policy, a distinction that all participants in the events, including Taney, acknowledged and respected. *Cf. supra* note 47.

our entry into World War II. Ickes, following his own star, would not permit it.[58] In the end, Roosevelt preferred keeping Ickes in place, and the helium undelivered, to the alternative of replacing him. A not dissimilar series of events and highly politicized outcomes—with, again, two resignations from cabinet positions and two reappointments before the President achieved his purposes—attended President Richard Nixon's effort to debarrass himself of special prosecutor Archibald Cox. In this case, the President ultimately did not prevail. And as this essay is entering the final stages of the editorial process, highly politicized debates over the propriety of removing eight U.S. Attorneys from office are threatening the tenure in office of the Attorney General. All agree that there is no legal requirement to assert "cause" for these removals; yet, in the view of many, the suggestion of inappropriately political control of prosecutions made these removals highly corrosive to rule-of-law considerations. The right to remove and the authority to decide are not to be conflated.

Fortuitously, perhaps, the courts have had few if any occasions to confront directly the question of presidential decisional authority in conventional administrative law contexts. Prominent statements from outside the field suggest the problems. Justice Hugo Black, who must have known how frequently executive agencies adopt regulations (currently about ten times as often as Congress enacts statutes), famously remarked in his majority opinion for the Court in *Youngstown Sheet & Tube Co. v. Sawyer*[59] (a context that had nothing to do with presidential direction of rulemaking), that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[60] Chief Justice Marshall's important distinction between discretionary and nondiscretionary acts of government in *Marbury v. Madison*[61] made clear that he meant discretion in its largest sense—DISCRETION!—those cases in which there is no law to apply and which "can never be examinable by the courts."[62] Characterizing

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58 ROBERT JACKSON, THAT MAN 116–17 (John Q. Barrett ed., 2003).

59 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

60 *Id.* at 587.

61 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

62 *Id.* at 166. The full passage makes the limited target of Marshall's invocation of "discretion" the more evident:

> [The Secretary of State, in administering foreign affairs] is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.
>
> But when the legislature proceeds to [direct] . . . that officer . . . peremptorily to perform certain acts [on which individual rights turn] . . . he is so far the officer of the law . . . and cannot at his discretion sport away the vested rights of others.

an official who exercised DISCRETION! as "the mere organ by whom [the will of the President] is communicated," Marshall was not addressing the mixed questions of law and politics that are the everyday focus of administrative law and of judicial review for "abuse of discretion" under the Administrative Procedure Act ("APA").[63] Similarly, Chief Justice (and former President) Taft, writing for a narrow majority in *Myers v. United States,*[64] included this in his lengthy opinion:

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.[65]

This 5-4 decision was written by a former President and is often taken as a particularly strong evocation of the unitary presidency. Note, however, that both the context and this language, as it may properly be read,[66] involved an assertion only of supervisory, not decisional, authority. It addresses the President's right to remove the Postmaster of Portland, Oregon from office, not a claim himself to take some decision Congress had assigned to that official. Even as to removal authority the Court was careful to reserve contexts as to which that degree of political intrusion in law administration might be inappropriate. And it would soon enough retreat in confusion from the ap-

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> . . . [W]here the heads of departments are . . . to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. . . .
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> . . . .
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> . . . The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

Id. at 166, 170.

63 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

64 Myers v. United States, 272 U.S. 52 (1926).

65 *Id.* at 135.

66 "[G]*eneral* administrative control" (emphasis added) need not connote a right to substitute decision; similarly, the phrase "supervise and guide" suggests a role conceived as oversight, rather than direct responsibility to direct, command or decide. The Court had no need to decide the question, given the context in which it was acting.

parent breadth of its holding.[67] Today, the opinion is understood to have turned on Congress's effort to reserve to itself a measure of participation in an act of executive oversight (through required senatorial confirmation of the removal), rather than on any proposition about the scope of presidential authority simpliciter.[68]

The issue was more directly presented to the Ninth Circuit in *Portland Audubon Society v. Endangered Species Committee*,[69] in which the court confronted allegations that the first President Bush had covertly told the members of an agency body how they should vote on a desired exemption from the Endangered Species Act.[70] The agency consisted of three cabinet secretaries, two administrators of important federal agencies (one freestanding and one intradepartmental), the Chair of the President's Council of Economic Advisors, and presidentially appointed state representatives. Virtually all these officials served him at will, and thus could have been removed from office at any time, for any reason. Yet the particular decision they were taking was one Congress had said should be taken "on the record."[71] That was enough in the court's view to preclude his ex parte intervention.[72] It did not matter that he was the chief executive, nor that the issue was strictly one of policy administration and not in any sense one of individual right. The laws he was to execute included the law assigning decision to this (highly political!) body, following a congressionally specified procedure whose integrity would be destroyed by his *sub rosa* intervention.[73]

The cases most directly casting doubt on presidential direction, like this one, involve administrative actions Congress has assigned to on-the-record adjudication. Yet that hardly seems limiting, since, as in

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67 *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

68 Morrison v. Olson, 487 U.S. 654, 686 (1988) ("[T]he essence of the decision in *Myers* was that the Constitution prevents Congress from drawing to itself the power to remove or the right to participate in the exercise of that power." (internal quotations and alterations omitted)).

69 Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534 (9th Cir. 1993).

70 *Id.* at 1537 n.1, 1538.

71 *Id.* at 1540 n.14.

72 *See id.* at 1541 ("Because Committee decisions are adjudicatory in nature, are required to be on the record, and are made after an opportunity for an agency, we conclude that the APA's ex parte communication prohibition is applicable."); *id.* at 1546 (holding that "the President and his staff are covered by [the APA's prohibition] and are not free to attempt to influence the decision-making processes of the Committee through ex parte communications").

73 To similar effect, see *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (holding that where the Attorney General had created a procedure by regulation, he could not dictate a particular decision even to individuals he had appointed, who served at his will and whose judgments were subject to his ultimate review). *See generally* Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569 (2006).

Portland Audubon, the cases do not require that those complaining of presidential intervention have *personal* claims of entitlement to on-the-record procedure, as they might if issues of due process were involved. The important propositions are that Congress (validly) assigned decision *here* and specified that decision should be taken by *this* official, following *these* procedures, within *these* legal constraints. It is *this* committee Congress has authorized to act, not the Department of Agriculture (generally responsible for the national forests) or the President. And it has authorized the committee to act only upon making specified findings following an on-the-record proceeding. The adequacy of these limiting instructions, enforced by judicial review of the resulting decision and its stated rationale for legality, is the coin by which such delegations are sustained.[74] Why aren't such placements, procedures, and substantive standards for decision *always* part of the laws the President is charged to see will "be faithfully executed"? Given that in these cases there *is* law to apply, and the courts do regard these decisions as "examinable by the courts," on what basis is one to conclude that these agency actors are the "mere organ by whom [the will of the President] is communicated"?

Cases involving documented congressional, rather than presidential, interference in agency decisionmaking confirm that political preferences simpliciter will not suffice to support decisions subject to judicial review. Thus, in *Hazardous Waste Treatment Council v. EPA*,[75] the EPA had explained a rulemaking choice concededly within EPA's authority to have chosen as the choice that "best responds" to congressional comments it had received.[76] This explanation, said the court,

> is inadequate. It should go without saying that members of Congress have no power, once a statute has been passed, to alter its interpretations by post-hoc "explanations" of what it means . . . . An agency has an obligation to consider the comments of legislators, of course, but on the same footing as those of other commenters; such comments may have, as Justice [Jackson] said in a different context, "power to persuade, if lacking power to control."[77]

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74 *E.g.*, Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly—and courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits . . . .").

75 Hazardous Waste Treatment Council v. EPA, 886 F.2d 355 (D.C. Cir. 1989).

76 *Id.* at 358–59.

77 *Id.* at 365 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

Judge Silberman, concurring, characterized the agency's simple acquiescence to the approach desired by "formidable political forces," without offering its own "statutory/policy rationale," as "behavior [that] is intolerable as a matter of administrative law."[78] Strikingly, the cases he cited in support of this forceful criticism, premised on the proposition that the duty of decision lies *with the agency*, included *Sierra Club v. Costle*,[79] the most prominent D.C. Circuit discussion of *presidential* "prodding."

To raise these questions is to doubt neither that procedural requirements will sometimes permit private presidential consultations that they do not permit in on-the-record proceedings, nor that when those consultations occur, "undisclosed presidential prodding may direct an outcome that *is* factually based on the record, but different from the outcome that would have obtained in the absence of presidential involvement."[80] Rather, the question is where legal responsibility for the decision lies. In what frame of mind is this presidential prodding received? Does the recipient of such communications receive them as political wishes expressed by the leadership of her administration respecting how she will exercise a responsibility that by law is hers? Does she think, "In this particular case, Congress confers a discretionary power, and requires reasons if I exercise it. Surely this contemplates responsibility on my part"?[81] Or does she take it as a command that she has a legal as well as a political obligation to honor, and for whose justifications she thus has no particular responsibility?

This is precisely the difference between the oversight and the decisional presidency. In that difference, one may find an ineffable but

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78 *Id.* at 375 (Silberman, J., concurring). To similar effect, see *D.C. Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1245–46 (D.C. Cir. 1971) (decrying the "extraneous pressure" from members of Congress that "intruded into the calculus of considerations" affecting the Secretary of Transportation's decision to approve a bridge project, and remanding the case to the Secretary to "make new determinations . . . completely without regard to any considerations not made relevant by Congress in the applicable statutes"), and *Pillsbury Co. v. FTC*, 354 F.2d 952, 956–64 (5th Cir. 1966) (vacating a divestiture order of the Federal Trade Commission due to Senate subcommittee hectoring of a prior Chairman of the FTC about the FTC's decision at an earlier stage in its consideration of the case).

79 Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981). David C. Vladeck, *Delay, Unreasonable Intervention: The Battle to Force Regulation of Ethylene Oxide*, *in* ADMINISTRATIVE LAW STORIES 191, 219–26 (Peter L. Strauss ed., 2006), further illustrates the proposition with *Public Citizen v. Mineta*, 340 F.3d 39 (2d Cir. 2003) (changes in proposed regulation prompted by OMB render it arbitrary and capricious) and *Public Citizen v. Federal Motor Carrier Safety Ass'n*, 374 F.3d 1029 (D.C. Cir. 2004) (same), as well as the litigation that was the principal subject of his essay, *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479 (D.C. Cir. 1986).

80 *Sierra Club*, 657 F.2d at 408.

81 *See supra* text accompanying note 50.

central question about the psychology of office. Administrative law straddles the difficult, indistinct, inevitable line between politics and law. Save in some inconceivable cyber-age, we could never have a government purely of laws; and we surely do not wish a government just of men.[82] At issue is how we can succeed in applying the constraints of law to the world of politics; and in the argument for a decisional presidency one finds a strong move in the "political" direction. The congressionally specified decision maker, where she is not the President, operates at the head of a professionally staffed agency, charged with decision (and explanation of decision) in accordance with stated and generally transparent procedures and a particular statutory framework. But the President to whom decisional presidency theorists accord a right of decision acts outside these procedures and laws, without their transparency, and subject only to limited political check.

Scholars and courts writing about the exercise of executive authority often seem careless about the relationship between political and legal authority,[83] but one can see that its dimensions are hardly trivial. As Corwin remarked, finding *legal* authority in the Presidential apparatus, free of the APA's constraints of transparency, reasonableness, participation, and limited bases for judgment

> would make all questions of law enforcement questions of discretion, the discretion moreover of an independent and legally uncontrollable branch of the government. By the same token, it would render it impossible for Congress, notwithstanding its broad powers under the "necessary and proper" clause, to leave anything to the specially trained judgment of a subordinate executive official with any assurance that his discretion would not be perverted to political ends for the advantage of the administration in power.[84]

Professor Todd Rakoff reinforces these doubts by connecting them to the residual force of the delegation doctrine.[85] He reminds us of the important political differences between delegations to an agency in oversight relationships with the President *and* Congress *and* courts, and delegations to the President himself. Although generally authorized to act in a variety of modes (quasi-legislative, quasi-execu-

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82 This is, of course, the age-old metaphor; today, "a government of laws and not of men and women."

83 *See, e.g.*, *supra* note 57.

84 CORWIN, *supra* note 41, at 80.

85 Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 11 TEL AVIV U. STUD. L. 9, 22–24 (1992).

tive, quasi-judicial), the agency is competent to act only on a defined subject; if omnipowered, it is only unicompetent, and its outcomes must be explained in the terms suggested by its competency. The President, by contrast, is omnicompetent, capable of acting upon a nearly limitless range of subjects. It is too hazardous to render him also omnipowered. "If the maxim that the only safe power is divided power is indeed a cultural norm, what would be taboo would be the creation of an organ of government at once omnipowered and omnicompetent."[86]

Distinguishing the legal from the political not only reinforces the psychology of office for the administrator, with its arguable contributions to the reasoned decisionmaking and application of expert judgment that remain major rationales of the administrative state. For presidential administration, it also arms the checks and balances instinct in the necessities of publicly firing a recalcitrant officer, enduring the resulting political reaction, and persuading the Senate to confirm her more compliant replacement. So dramatic a step is not likely to follow from a single disagreement between President and administrator (or, the much likelier situation, presidential staff and agency administration); ordinarily, that will require repeated mismanagement or departures from policies of central importance. These checks are missing if both sides of the conversation inside the executive branch understand and accept that, by law, the President is "the decider" of particular matters.

In the real world, one might argue, this is a rather fragile distinction—imperiled by the tendencies both of some leaders to appoint yes-men, and of other appointees (those not meeting this description) to feel the impulses of political loyalty to a respected superior and of a wish for job continuity. An administrator may imagine that the President might not be willing to pay the political cost of her dismissal, and still have no certainty about it. People will differ in their estimation of what bluffs are worthy of being called, knowing that an error in that estimation could produce a sudden loss of position and income. And yet Secretary Duane's case was hardly the last to be noted in the literature;[87] and knowledge of the relative position and stakes—as com-

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86 *Id.* at 22.

87 For example, FDR's experience with Secretary Ickes, *supra* note 58; and consider the following from Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 994–95 (2001) (citing DAVID KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY 56–57, 67–71 (2001)) (internal citations omitted):

> President George H. W. Bush became directly involved in a few regulatory

pared to believing that one has an *obligation* of obedience, that it is the President's *right* to command—opens these political possibilities. Moreover, as Professors Bressman and Vandenbergh make clear in their remarkable study, the guidance that comes from White House offices—as many as nineteen of them—is often conflicting, not unidirectional; cacophonous rather than a single "voice of authority."[88] Knowing who is actually speaking "for the President," if indeed anyone is, can be challenging indeed.

II. Common Ground: The President as Overseer

Some exercises of presidential authority readily fit the "oversight" mold and/or may have been explicitly conferred by Congress. They need be addressed only briefly here. Extended discussions can be found elsewhere in the literature, as in Professor Bruff's fine recent book.[89]

Appointments: Save as Congress has explicitly provided otherwise for appointment by the courts or the heads of departments,[90] any officer of the United States must be appointed by the President, acting either alone or with senatorial confirmation.

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decisions, including a dispute over Food and Drug Administration (FDA) regulations to implement the Nutrition Labeling and Education Act of 1990. David Kessler, the commissioner of the FDA, has described how OMB (with the support of the Department of Agriculture) tried to require the FDA to modify its proposed food labeling regulations to mollify the meat industry, which wanted to obscure information about the fat content of foods. At a White House meeting, Health and Human Services Secretary Louis Sullivan showed the president a McDonald's restaurant tray liner that contained nutritional information consistent with the FDA's approach. Sullivan argued that the FDA could not adopt the meat industry's proposal because it was not supported by the rulemaking record. This reportedly surprised President Bush, who stated:

> "I'm a little puzzled. I'm being told that I can't just make a decision and have it promptly executed, that the Department can't just salute smartly and go execute whatever decision I make. Why is that?"

Kessler reports that he and Sullivan were prepared to resign if the White House ordered the FDA to issue the rules sought by the meat industry. Instead, to their surprise, the president directed that the regulations preferred by the FDA be promulgated, though he did not accept the FDA's proposal to apply them to restaurants. This appears to be an example of the president's dictating a decision to an agency head. However, because he chose the decision generally favored by the agency, the agency head accepted the decision and did not resign in protest.

88 Bressman & Vandenbergh, *supra* note 5, at 49–50, 68.

89 BRUFF, *supra* note 2.

90 Congress's authority runs to creation of the civil service—including senior civil service positions with significant policy responsibilities. *See* Freytag v. Comm'r, 501 U.S. 868, 877–78 (1991); *see also infra* note 124.

Removals: As prior discussion has already reminded us, in the absence of a statutory provision limiting removals, such as the civil service laws, officers of the executive branch serve at will, and may be removed from office by their superiors, including the President, for any reason.[91] Congress cannot reserve its own participation in this process. It can restrict, and has restricted, removal in a wide range of circumstances, and an officer's role as adjudicator in on-the-record decisionmaking has been taken to imply restrictions on removal;[92] the restrictions reserve the possibility of removal if specific "cause" exists, and (as in the case of the civil service) Congress may also be able to specify the procedures to be followed for "for cause" removals. If the commissioners of independent regulatory commissions are "Heads of Departments,"[93] one cannot say that Congress is unable to limit the removal of Heads of Departments to "cause."[94] Congress, perhaps fortunately, has not since the Civil War tested the limits of this authority in respect of those cabinet officials (like the Secretary of State) who predominantly serve as the "mere organ" through whom presidential will is expressed, outside the dimensions of the administrative state.[95] Its closest approach came in the setting of the Independent Counsel,[96] where a decent historical case could be made for the legitimacy of vesting appointment authority in the courts,[97] and prior precedent reached a similar result respecting a Department of Justice regulation.[98] If the President or a cabinet official can by regulation

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91 *See supra* text following note 65.

92 *E.g.*, Wiener v. United States, 357 U.S. 349 (1958).

93 This seems a necessary proposition, albeit one both inconsistent with and explicitly reserved by the Supreme Court's troubling decision in *Freytag*, 501 U.S. at 887 n.4. *See infra* text accompanying note 124.

94 Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).

95 The Civil War test came with the Tenure in Office Act, that came within one vote of producing the impeachment of President Andrew Johnson—a near miss doubtless helping to motivate the subsequent Supreme Court decision in *Myers*. *See* Bowsher v. Synar, 478 U.S. 714, 762 (1986) (White, J., dissenting) ("[T]here are undoubtedly executive functions that, regardless of the enactments of Congress, must be performed by officers subject to removal at will by the President.").

96 *See* Morrison v. Olson, 487 U.S. 654 (1988); *see also* Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 62–64 (1983).

97 *See generally* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989).

98 United States v. Nixon, 418 U.S. 683, 694–96 (1974) (noting, of a regulation giving the Special Prosecutor the power to contest the invocation of executive privilege, that "[s]o long as this regulation remains in force the Executive Branch is bound by it"); *see also* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954); *In re* Sealed Case, 829 F.2d 50, 57 (D.C. Cir. 1987); Nader v. Bork, 366 F. Supp. 104, 108 (D.D.C. 1973).

create law constraining the executive branch at its highest levels while it remains effective, it is hard to imagine why Congress (the body that constitutionally must delegate such authority to the executive branch) cannot also do so. What might constitute "cause" remains unsettled, perhaps fortunately so,[99] but is clearly linked to the constitutional necessity of effective presidential oversight.[100]

Coordination: The Constitution in terms recognizes the President's right to consult with those who exercise the legal authority Congress delegates in establishing government agencies. He may "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[101] Note, however, that these words do not say that he has the authority to command how these duties "*of their respective Offices*" must be exercised. Sensibly for a government as large and diffuse as ours, Congress has provided for coordination by the President or agencies reporting directly to him across a wide range of governmental activities: budget proposals, property and acquisitions management, paperwork requirements, analyses of the environmental and economic impacts of government actions, litigation, etc.[102] And it has regularly appropriated significant sums for White House offices as well as the government agencies directly responsible for actions affecting the public.

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99 *See generally* Strauss, *The Place of Agencies in Government*, *supra* note 35. Correspondence with my friend and former colleague John Manning generated the following passage, on which I believe we both agree:

> What constitutes insubordination of an IRC officer, a necessarily satisfactory element of "cause" in my judgment, is a nice question I hope never to see resolved. But I suppose if the President asserted he had cause to fire Commissioner Jones because she did not accept his direction to interpret a statute as not reaching X, a court should uphold him if it agreed that X was not an available meaning; but if X was an available but not necessary meaning (i.e., a *Chevron*-qualifying meaning) it should say that the President did NOT have cause, because Congress had delegated that issue to the Commissioner, not to him. In either case, we have a judicial check on Congress's assignment of responsibility—in the first, reinforcing the President in "taking care" that the Commissioner does not overstep the bounds of her delegated authority; in the second, protecting that authority from displacement by him.

E-mail from Peter Strauss to John F. Manning, Professor of Law, Harvard Law School (Dec. 14, 2006, 05:03 EST) (on file with the author).

100 *Morrison*, 487 U.S. at 692–93. That history might have persuaded one that proper application of this test should have produced a different result in *Morrison*, as Justice Scalia argued so forcefully in his dissent from that decision, *see id.* at 705–10 (Scalia, J., dissenting), should not obscure its holding that the possibility of effective oversight is the proper constitutional test.

101 U.S. CONST. art. II, § 2, cl. 1.

102 *See* Strauss, *The Place of Agencies in Government*, *supra* note 35.

The President has used executive orders and OMB directives (the OMB being the principal although hardly the only instrument of his coordinating activities[103]) to create supplementary coordinating regimes of a generally uncontroversial character. Conflicts between executive agencies about their delegated authority are resolved in processes involving OMB or the Department of Justice's Office of Legal Counsel ("OLC"). OMB oversees coordination of legislative testimony, legislative proposals, agency regulatory agendas, and a variety of analytic regimes having some, but incomplete support in legislative requirements. The President and the White House apparatus directly responsible to him regularly constitute working groups to develop government-wide initiatives ranging from electronic government to energy policy.

Political synergy: Wholly apart from questions of legal responsibility, the President's place as leader of his party and patron of appointees assures strong incentives to follow his wishes. Ordinary instincts of political loyalty will subordinate questions of legal authority in many contexts. One who values her job and understands that the President can send her home at any time, for any reason, or that the success of her operations depends on the support of the White House at budget time, may also feel strong reasons beyond a sense of legal duty to follow his lead.

Here, of course, there may be countervailing considerations. Realists understand that much presented to them as the President's wishes may in fact be only the imaginings of a White House functionary pursuing her own agenda. Presidential discipline is not costless to the President, and one charged with leadership of a specialized agency must deal as well with the morale of her own organization. The political indiscipline of members of Congress, and their availability to counter White House pressures, in themselves create space for agency heads to pursue their own responsibilities. For those whose appointments are confirmed by the Senate—generally those most responsible for an agency's conduct of business—political obligations to the Senate, even promises made, may create back-currents that can stiffen resolve against presidential prodding. When does the appointee have a legal obligation to follow the wishes of her President, and when, rather, is that a matter of politics? When is the President entitled to decide? What is he entitled not merely to supervise and seek to reason about, but to control?

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103 *See id.*; Bressman & Vandenbergh, *supra* note 5, at 49.

III. Staking New Territory—Signing Statements and Rulemaking Controls

Presidential assertions of controlling authority come in a variety of forms: Executive Orders such as established the Federal Legal Council[104] or the obligation of economic impact analysis under the OMB's Office of Information and Regulatory Affairs ("OIRA") supervision,[105] OMB circulars requiring preclearance of legislative testimony and recommendations, generalized directives concerning regulatory business (such as moratoria and requirements to reexamine existing regulations imposed by the Presidents Bush), and President Clinton's agency-and-subject-specific directives revealed and celebrated by Harvard's Dean Elena Kagan.[106] The increasing reach of all these assertions marks the trend underlying the present paper. One hotly disputed context for such claims today is provided by the signing statements Presidents may issue on approving legislation that, despite their formal approval of the bill (making it law), express judgments that some elements are unconstitutional and hence not "law," or that the law should be interpreted in a manner its enactors would probably find surprising. President Bush has built on his predecessors' practice in this regard, but issued such statements with remarkable frequency, even while Congress was in his party's control.[107] A second context may be found in President Bush's very recent Executive Order 13,422,[108] the latest step in presidential measures tightening White House controls over agency rulemaking that reach as far back as the

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104 Exec. Order No. 12,146, 3 C.F.R. 409 (1979), *reprinted as amended in* 28 U.S.C. § 509 (2000); *see infra* note 195 and accompanying text.

105 This obligation, readily traced back into the Nixon administration if not before, became prominent in the Reagan administration with the adoption of Executive Order 12,291, 3 C.F.R. 127 (1982), *reprinted as amended in* 5 U.S.C. § 601 (2000), to replace President Carter's more limited Executive Order 12,044, 43 Fed. Reg. 12,661 (Mar. 23, 1978); it was subsequently strengthened by President Clinton in Executive Order 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2000), and slightly amended by President George W. Bush in Executive Order 13,258, 3 C.F.R. 204 (2003).

106 Kagan, *supra* note 3.

107 On October 9, 2006 (that is, *before* the recent election put Congress into Democratic party control, and during a period of remarkable Republican party discipline), Christopher S. Kelley—a political scientist who has given much of his career to observing the use of signing statements—reported that President Bush had passed the 1000 mark in statutory sections challenged, a frequency well beyond that of any of his predecessors. Posting of Christopher Kelley to Media Watch, http://www.users.muohio.edu/kelleycs/2006_10_01_medihistory.html (Oct. 9, 2006, 22:28 EST).

108 Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007); *see supra* text accompanying note 22.

Nixon administration,[109] and that are now generally associated with President Clinton's Executive Order 12,866.

A. Presidential Signing Statements

Professors Curtis Bradley and Eric Posner have published a careful empirical study of presidential signing statements in the Winter issue of Constitutional Commentary.[110] Their study makes clear both that signing statements have been with us for a long time, and that President Bush's use of them is distinguished principally by the number of statutory provisions he has attached them to, and by the strength of his claims about the breadth of the President's constitutional authority. Their principal argument, hard to disagree with in general, is that signing statements, in and of themselves, are unexceptionable. By making known presidential views that he could readily express by other, perhaps less transparent, means, signing statements offer political and even legal advantages. The legitimate questions about them concern not their existence, but their legal force (if any), and the substantive validity of any legal views they express. Professors Bradley and Posner are at pains to demonstrate that the views of the President's authority underlying President Bush's signing statements are little different from those invoked with some frequency by President Clinton. This proposition is not so surprising, given the breadth of presidential view exposed to us by Dean Elena Kagan's influential account of presidential directives during the Clinton presidency.[111]

Professors Bradley and Posner do not explore the merits of the signing statements' claims to executive authority. Brief exposure of them and their breadth may be worthwhile. That exposure may help to suggest, if not a radical departure from prior understandings, at least "the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."[112]

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109 *See supra* note 105.

110 Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. (forthcoming 2007).

111 Kagan, *supra* note 3, at 2290–99.

112 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

1. *Appointments and Removals*

In the wake of the Hurricane Katrina scandals, Congress enacted and the President signed legislation limiting appointment of the head of the FEMA to a person who has

> (A) a demonstrated ability in and knowledge of emergency management and homeland security; and
> (B) not less than 5 years of executive leadership and management experience in the public or private sector.[113]

Not long after, Congress enacted and the President signed legislation concerning the Postal Service, limiting appointments to leadership positions to persons with experience managing large labor forces.[114] President Bush objected to both these requirements as unconstitutionally "rul[ing] out a large portion of those persons best qualified by experience and knowledge to fill the office."[115]

As remarked above, the President's dominant constitutional role in selecting and disciplining the officers of the United States who work in the executive branch is uncontroversial. Yet, other than the President and Vice President, no executive branch office exists without legislation; the Philadelphia convention replaced an initial effort to define government departments in the constitutional text itself with congressional responsibility to define them under the broad language of the Necessary and Proper Clause:[116]

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.[117]

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113 Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, § 611(11), 120 Stat. 1355, 1397 (2006) (to be codified at 6 U.S.C. § 313(c)(2)).

114 Postal Accountability and Enhancement Act of 2006, Pub. L. No. 109-435, 120 Stat. 3198.

115 Statement on Signing the Department of Homeland Security Appropriations Act, 2007, 42 WEEKLY COMP. PRES. DOC. 1742, 1743 (Oct. 4, 2006); Statement on Signing H.R. 6407, the "Postal Accountability and Enhancement Act," 42 WEEKLY COMP. PRES. DOC. 2196 (Dec. 20, 2006).

116 Strauss, *The Place of Agencies in Government*, *supra* note 35, at 598–99; *see also supra* note 35.

117 U.S. CONST. art. I, § 8, cl. 18. That the text says "Constitution" and does not refer to statutory vesting is best understood as a residue of the change that eliminated the constitutional definition of departments. The Constitution as such vests *no* power in *any* department; the only officers in whom it vests powers are the President, the Vice President, and the Justices of the Supreme Court. (A similar residue, presuming the existence and duties of the departments that in fact are missing from the constitutional text, appears in Article II, Section 2, Clause 1, the "opinions in writing" clause.) A more literal reading, regarding the Necessary and Proper Clause as giving Congress plenary "necessary and proper" authority over the powers of the

It is on this basis that Congress creates the detailed structures of government. To what extent can this legislation constitutionally control qualifications for and tenure in appointments to executive office? As others have richly shown,[118] Congress's practice from the outset has been highly varied—sometimes referring to presidential control of decision (and more often not), sometimes imposing qualifications on officers ("learned in the law") (and more often not), sometimes creating fixed terms of office for officers (and more often not), sometimes giving them reporting relations to Congress (and more often not). May it fix qualifications for appointment and/or safeguard officers against removal at will?

Article II, Section 2, Clause 2 of the Constitution provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Armed in part with the Incompatibility Clause's clear instruction that Members of Congress may have no part in law execution,[119] the courts have firmly rejected on constitutional grounds congressional efforts to participate in the nomination of persons holding executive office—whether directly[120] or by statutory designation that sharply constrains the President's choices to those whom members might influence.[121]

President and Vice President (that is, over the powers of the only officers the Constitution actually does mention), would be as disturbing to governmental balance as the expansive views of presidential authority discussed in the text.

118 *E.g.*, BRUFF, *supra* note 2; Lessig & Sunstein, *supra* note 3; Mashaw, *supra* note 32; Stack, *supra* note 3.

119 U.S. CONST. art. I, § 6, cl. 2; its implications and relation to the Court's jurisprudence is well developed in BRUFF, *supra* note 2, at 393–95.

120 Buckley v. Valeo, 424 U.S. 1, 109–43 (1976) (holding that because the Federal Election Commission was partially composed of officials appointed by the Speaker of the House and the President pro tempore of the Senate, it could not perform "administrative functions," which were properly left to "Officers of the United States," that is, those appointed by the President or Heads of Departments and located within the executive branch).

121 Hechinger v. Metro. Wash. Airports Auth., 36 F.3d 97 (D.C. Cir. 1994) (rejecting Congress's effort to evade the teaching of *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265–77 (1991), that members of Congress

They have rejected congressional participation in removals.[122] They have worried about constraints on the President's seeking advice about appointments,[123] and suggested—in language that imperils appointment authority granted the heads of the CIA, the EPA and the independent regulatory commissions—that the last five words, "in the Heads of Departments," can only mean cabinet departments.[124] What the Court has *not* suggested is that a statutory limitation of appointment to widely held qualities readily understood as qualifications for office—that the Surgeon General must have "specialized training or significant experience in public health programs,"[125] that the Solicitor General be a person "learned in the law,"[126] that only a bare majority of the members of independent regulatory commissions may be drawn from one political party—could not be as much an element of Congress's "necessary and proper" authority in relationship to those "Officers . . . which shall be established by Law," as its placement of the National Park Service and Bureau of Land Management in the Department of the Interior but the Forest Service in the Department of Agriculture.[127]

Professors Bradley and Posner rightly point out that President Clinton as well as President Bush objected on constitutional grounds to limitations on the President's appointment authority. They cite as examples a Clinton signing statement objecting to a requirement that four of the five members the Secretary of Transportation was to appoint to a committee with responsibilities for historic federally owned

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could not sit on a Board of Review with the authority to veto decisions made by directors of the Metropolitan Washington Airports Authority).

122 Morrison v. Olson, 487 U.S. 654, 686 (1988); Bowsher v. Synar, 478 U.S. 714, 722–23, 726–27 (1986); Myers v. United States, 272 U.S. 52, 163–64 (1926).

123 Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 466 (1989) (construing the Federal Advisory Committee Act, requiring public meetings of all "advisory committees" established to render advice to the President or agencies, to not extend to the ABA Standing Committee on Federal Judiciary, which gave the Department of Justice advice on potential nominees for judgeships, because this would present "formidable constitutional difficulties"). Justice Kennedy, as Professor Bruff points out, BRUFF, *supra* note 2, at 395–96, grounded his concurrence in emphatic separation of power terms. *See Public Citizen*, 491 U.S. at 482–89 (Kennedy, J., concurring in judgment).

124 Freytag v. Comm'r, 501 U.S. 868, 886 (1991). The apparent implications of the Court's reasoning are withdrawn without explanation in note four of Justice Blackmun's opinion for the Court. *Id.* at 887 n.4.

125 42 U.S.C. § 205 (2000).

126 28 U.S.C. § 505 (2000).

127 *See Myers*, 272 U.S. at 128–29 (while lacking a role in the removal of executive-branch officials, Congress may "prescrib[e] . . . reasonable and relevant qualifications" for office); *id.* at 265–74 (Brandeis, J., dissenting).

lighthouses in Maine must be persons recommended or designated by certain Maine officials or organizations,[128] and another[129] protesting a restriction on appointments as U.S. Trade Representative to persons who had never "directly represented, aided, or advised a foreign entity (as defined by section 207(f)(3) of Title 18) in any trade negotiation, or trade dispute, with the United States"[130]—"a broad group of the most knowledgeable and experienced practitioners in the field of international trade," as a subsequent OLC memo characterized the matter.[131]

The reach of the recent signing statements is nonetheless remarkable. The earlier statements seem directed at significant narrowings of presidential discretion,[132] or inappropriate limitations on the qualities to be desired in an appointee. Perhaps, as Bradley and Posner speculate, their reach is merely a symptom of an inclination in the present Justice Department to thoughtless bureaucratic routine,[133] but it also suggests a view of the illimitable nature of the President's authority that has currency in scholarly circles today.[134]

2. *Recommending Legislation and Providing Congress with Requested Information*

A similar view is reflected in another aspect of President Bush's signing statement respecting the Department of Homeland Security

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128 Bradley & Posner, *supra* note 110 (citing Statement on Signing the Coast Guard Authorization Act of 1996, 32 WEEKLY COMP. PRES. DOC. 2112, 2113 (Oct. 19, 1996) (arguing that the Appointments Clause does not permit such restrictions and directing the Secretary of Transportation to regard the recommendation as advisory)).

129 Statement on Signing the Lobbying Disclosure Act of 1995, 2 PUB. PAPERS 1907 (Dec. 19, 1995).

130 19 U.S.C. § 2171(b)(3) (2000).

131 Constitutionality of Statute Governing Appointment of United States Trade Representative, 20 Op. Off. Legal Counsel 279, 279 (1996). Though the opinion concluded that this was "an unconstitutional intrusion on the President's power of appointment," *id.*, conflict of interest concerns might still have sustained the "necessary and proper" character of the limitation.

132 Thus, President Reagan objected to a provision that could be read to require the FEMA director to appoint an individual nominated by one of six private organizations, stating that the provision would be interpreted to mean that private organizations' nominations were advisory, Statement on Signing H.R. 558 into Law, 23 WEEKLY COMP. PRES. DOC. 842 (July 22, 1987); and President George H.W. Bush expressed concerns about tight multiple limitations on appointment of trustees to a scholarship board, Statement on Signing the Morris K. Udall Scholarship and Excellence in National Environmental and Native American Public Policy Act of 1992, 28 WEEKLY COMP. PRES. DOC. 507 (Mar. 19, 1992).

133 Bradley & Posner, *supra* note 110.

134 *See, e.g.*, Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215 (2005) (reviewing HAROLD J. KRENT, PRESIDENTIAL POWERS (2005)).

Appropriations Act of 2007.[135] In addition to its limitation on the qualifications of the FEMA Director, it remarks:

> Section 503(c) of the Homeland Security Act of 2002, as amended by section 611 of the Act, provides for the appointment and certain duties of the Administrator of the Federal Emergency Management Agency. . . . [S]ection 503(c)(4) purports to regulate the provision of advice within the executive branch and to limit supervision of an executive branch official in the provision of advice to the Congress. The executive branch shall construe section 503(c)(4) in a manner consistent with the constitutional authority of the President to require the opinions of heads of departments and to supervise the unitary executive branch. Accordingly, the affected department and agency shall ensure that any reports or recommendations submitted to the Congress are subjected to appropriate executive branch review *and approval* before submission.[136]

Here, the President explicitly claims the right to approve reports and recommendations to Congress as a condition upon their being made, and explicitly invokes a strong unitary executive branch theory in its support. As leading exponents of such a theory have explained,

> three devices generally viewed as necessary to any theory of the unitary executive [are] the president's power to remove subordinate policy-making officials at will, *the president's power to direct the manner in which subordinate officials exercise discretionary executive power, and the president's power to veto or nullify such officials' exercises of discretionary executive power.*[137]

In addressing the President's relationship with Congress, Article II frames one far less intimate than the prime minister of any parliamentary democracy would enjoy:

> He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consider-

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135 Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, 120 Stat. 1355 (2006).

136 Statement on Signing the Department of Homeland Security Appropriations Act, 2007, 42 WEEKLY COMP. PRES. DOC. 1742, 1742–43 (Oct. 4, 2006) (emphasis added). To similar effect, see the signing statement on the Postal Accountability and Enhancement Act, *supra* note 115.

137 Yoo et al., *supra* note 3, at 607 (emphasis added). In a subsequent essay, Jack Goldsmith and John Manning argue similarly, if circumspectly, for a presumption that the President may decide issues delegated for decision to others, absent congressional signals more explicit than the delegation itself. Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280 (2006).

> ation such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper . . . .[138]

This language obliges the President to keep Congress informed of the state of the union—to provide it "from time to time" with information—and to recommend to it what he imagines will be useful legislation. But beyond the threat of a possible veto, the strings of party loyalty, and the possible implications of his limited capacity to keep Congress in session or send it home, he has no power over legislative business. His proposals have no greater standing as a legal matter than recommendations that might be made by the National Association of Manufacturers or the Sierra Club. None becomes legislative business without a congressional sponsor. That sponsor is free to alter the terms of a proposal as she will before submitting it to the clerk.

Can one find in this language of weak and remote relationship (or in the grant to the President of executive power generally) a constitutional prohibition against statutes that ask government agencies to make legislative proposals, to adopt within a stated time frame regulations on stated subjects, or to provide Congress with studies or information on defined subjects? Must any such communication be routed through the White House, and submitted only if it wins presidential approval? Recall that on appropriations, which the Constitution makes clear must be *annual* legislative business, it was not until 1921 that Congress made appropriations the subject of coordinated presidential recommendation;[139] previously, budget communications occurred between Congress and relevant departments. And Congress exacted a price for this recognition of a presidential role, balancing creation of the Bureau of Budget as a White House office with the simultaneous creation of Congress's General Accounting Office ("GAO"). As part of this general arrangement, GAO (that is, at least arguably congressional[140]) bureaucrats have resided continuously in government agencies ever since, soliciting as well as investigating information from them.

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138 U.S. CONST. art. II, § 3, cl. 1.

139 Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C.).

140 The matter was one of the confusions underlying *Bowsher v. Synar*, 478 U.S. 714 (1986).

Presidents have long used the Bureau of the Budget and its modern successor, the OMB, as coordinating bodies for all legislative proposals, not merely budgetary ones,[141] and Congress has generally cooperated—providing only occasionally, as for independent regulatory commissions, that budgetary proposals are to be submitted directly to it. OMB circulars require preclearance of testimony at congressional hearings and submissions in response to requests for information as well as legislative matters.[142] The politics here are easy to understand—the politics of agency compliance as well as those of presidential command—but are the obligations legal ones, and obligations so firmly grounded in the Constitution that Congress could not alter them?

As a matter of logic, the President's right to submit to Congress such proposals and information as he wishes does not entail the right to resist statutory provisions seeking from other government officials proposals and/or information he might not independently wish to generate. Much less does it entail the legal power to forbid other officers of the government to respond to statutes requiring *them* to submit proposals, information or advice. What the Constitution says is that the President may "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating *to the Duties of their respective Offices*,"[143] not that he may keep those officers from performing any such duty as the Congress may statutorily have assigned to them (and not to him). Of course, the President could not be constrained from giving Congress his own views of the state of the nation, or telling Congress whether he thought an agency head's invited legislative recommendations "necessary and expedient." Nor can one deny the practical utility (as well as the constitutional right) of the President informing himself what his departments are telling or recommending to the Congress, and presenting on his own behalf a coordinated view. But the modest descriptions of presidential role to be found in Article II do not easily support the assertion that the Constitution requires that he have *exclusive* authority—that only presidentially *approved* statements or rec-

141 *See* Percival, *supra* note 87, at 982–97.

142 *See, e.g.*, OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-19, § 7(a), LEGISLATIVE COORDINATION AND CLEARANCE (Sept. 20, 1979); the current text of this and other OMB circulars may be found at http://www.whitehouse.gov/omb/circulars/index.html.

143 U.S. CONST. art. II, § 2, cl. 1 (emphasis added).

ommendations may be made, in the face of statutes providing otherwise.

Note the limited nature of the argument. It assumes the existence of a statute calling upon an agency to submit information or proposals directly to Congress, as the Homeland Security Act Appropriations Act did.[144] In the budget context, the Budget and Accounting Act[145] gives the President a general claim to be the exclusive spokesperson to Congress, subject to the exceptions Congress occasionally makes for independent regulatory commissions. Even for those commissions, one may concede, the Opinions Clause entitles the President to be informed in advance of the agency's submission. Absent congressional instruction, and where the issue may be resolving policy questions of broad scope, the President's claim to control as well as to consultation is considerably stronger; one is no longer talking about "the Duties of their respective Offices." But is there merit to that claim where Congress has enacted (and the President has assented to or been overriden in his objections) a statute placing responsibility in a specific agency's hands?

Professors Bradley and Posner demonstrate that Presidents have long been claiming an inherent right of control, as objections to statutory directions.[146] Still, it may be useful to observe the spreading reach of these claims. In 1988, President Reagan wrote that "the President enjoys plenary and exclusive authority to determine whether and when *he* should propose legislation to the Congress."[147] Three years later the first President Bush made a stronger and broader claim: "Article II, [S]ection 3 of the Constitution vests the President with exclusive authority to decide whether and when *the executive branch* should propose legislation . . . ."[148] Next, consider the example Professors Bradley and Posner use from President Clinton's signing statements:

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144 *See supra* note 136 and accompanying text.

145 Budget and Accounting Act of 1921, Pub. L. No. 67-13, §§ 201, 206, 42 Stat. 20, 20–21 (codified as amended in scattered sections of 31 U.S.C.).

146 Bradley & Posner, *supra* note 110.

147 Statement on Signing the Price-Anderson Amendments Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1075, 1076 (Aug. 20, 1988) (emphasis added).

148 Statement on Signing Legislation to Study the Feasibility of Establishing a Native American Cultural Center, 27 WEEKLY COMP. PRES. DOC. 1795, 1796 (Dec. 9, 1991) (emphasis added). Thanks to Professor Trevor Morrison for pointing out this progression from a presidential claim of authority to control his own recommendations, to one asserting control over all executive branch communication.

> Section 4422 of the bill purports to require the Secretary of Health and Human Services, to develop a legislative proposal for establishing a case-mix adjusted prospective payment system for payment of long-term care hospitals under the Medicare program. I will construe this provision in light of my constitutional duty and authority to recommend to the Congress such legislative measures as I judge necessary and expedient, and to supervise and guide my subordinates, including the review of their proposed communications to the Congress.[149]

Note that this statement does not explicitly assert the authority to obstruct the requested proposal. Supervision, guidance, and review need not imply a claim of right to prevent communication; one supposes, too, that the President need not himself submit a proposal, and could readily cause the Secretary to attach to his submission a note indicating that the President did not regard the proposal as "necessary and expedient."[150]

Now recall President Bush's insistence, in his signing statement on the Department of Homeland Security Act, on his right of "*approval* before submission."[151] Quoting the Yoo, et al. statement already referred to,[152] Professors Bradley and Posner remark on President Clinton's failure explicitly to make the same claims: "The theory itself is quite controversial in academia, and it is probably no coincidence that Clinton did not use the term itself."[153] As the most prominent academic celebrator of President Clinton's practice understood presidential authority,[154] Congress was constitutionally free to specify his rights of control if it so chose; the argument was that Congress should be understood presumptively to have accepted presiden-

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149 Statement on Signing the Balanced Budget Act of 1997, 33 WEEKLY COMP. PRES. DOC. 1190, 1191 (Aug. 5, 1997).

150 Compare *Sullivan v. United States*, 395 U.S. 169, 170 n.2 (1969), an action under the Soldiers and Sailors Civil Relief Act, 50 U.S.C. app. § 514 (1940), amended by 50 U.S.C. app. § 574, requiring the Department of Justice to represent service members in their disputes with local taxing authorities. The government's brief was submitted without the signature of either the Solicitor General or the Assistant Attorney General in charge of the Tax Division, and with a prefatory statement from them noting both the statutory obligation, and their disagreement with the position taken in the brief. The case was argued by another government attorney, who perhaps unsurprisingly lost the case by unanimous vote. *See* Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 120 (2000).

151 *Supra* note 136 and accompanying text.

152 *Supra* note 136 and accompanying text.

153 Bradley & Posner, *supra* note 110, n.75.

154 Kagan, *supra* note 3.

tial control. President Bush's language makes clear the breadth of his claims to presidential authority, as a matter of illimitable right.

3. Directing Outcomes, Not Merely Effort

In directing officials what he wished them to do, even with specificity, President Clinton seems to have been careful not to assert that he had the authority himself directly to act, rather than to discipline an official who failed to do what he properly requested. Consider, for example, two passages from his statement on signing the Fiscal Year 2001 Appropriations Legislation.[155] The first passage of note expresses regret that Congress had used the appropriations process—that device by which it so frequently handcuffs the presidential veto—to restrict certain environmental projects:

> I am disappointed . . . that the final bill includes anti-environmental riders that my Administration opposed. I continue to oppose the use of the budget process to adopt these kinds of proposals without the benefit of full and open public debate through the regular legislative process. I urge Congress to refrain from sending me any additional anti-environmental riders on remaining bills. Although I am signing this legislation into law with these riders attached, I am directing the agencies to consider ways to implement them that will have the least harmful effect on the environment.[156]

The presidential direction neither denies the law Congress has enacted, nor tells responsible officials precisely what they are to do; it gives them an impulse to administer within the possibilities that the enacted text permits, and accepts that these specific judgments are theirs to make.

The second passage addresses an element of the same complex appropriations bill limiting the term of an Under Secretary of Energy, and further providing that this official could be removed from office only for inefficiency, neglect of duty, or malfeasance in office.[157] Given "the Under Secretary's significant executive authority and responsibility in nuclear security," the President wrote, "I understand the phrase 'neglect of duty' to include, among other things, a failure to comply with the lawful directives or policies of the President."[158]

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155 Statement on Signing Fiscal Year 2001 Appropriations Legislation, 3 PUB. PAPERS 2348 (Oct. 27, 2000).

156 *Id.* at 2349.

157 *Id.* at 2351.

158 *Id.*

While this may seem a strong assertion of presidential prerogative, note how central to issues of national security (not just administration) the official's responsibilities were[159] and, even in this freighted context, the concessions inherent both in the use of the word "lawful" and in the President's choice of remedy—substitution of a new actor, and not substitution of the desired decision. This position is fundamentally the same as was reflected in President Jackson's and Secretary Duane's understanding respecting who had authority to transfer government deposits in the U.S. Bank: "In this particular case, congress confers a discretionary power, and requires reasons if I exercise it. Surely this contemplates responsibility on my part."[160]

Where President Jackson ultimately accepted Secretary Duane's observation, President Bush claims the right not merely to know, but formally to approve the FEMA Administrator's performance of his statutory obligation. In effect he asserts that, however Congress may choose to create executive duties, the responsibility and right of fulfilling them is his. The line between overseer and decider seems now definitively to have been crossed—and this during a time when, as Professor Peter Shane has noted in a forthcoming commentary on signing statements, "the Bush Administration has operated . . . [with]

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159 That is, this is an official at least some of whose important duties might fall within the strong-discretion ambit evoked by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803). *See supra* note 62. Compare Justice White's dissent in *Bowsher v. Synar*, 478 U.S. 714, 760–62 (1986) (White, J., dissenting) (internal citations omitted), emphasizing

> what it is that the Court quite pointedly and correctly does *not* hold: namely, that "executive" powers of the sort granted the Comptroller by the Act may only be exercised by officers removable at will by the President. The Court's apparent unwillingness to accept this argument, which has been tendered in this Court by the Solicitor General, is fully consistent with the Court's longstanding recognition that it is within the power of Congress under the "Necessary and Proper" Clause to vest authority that falls within the Court's definition of executive power in officers who are not subject to removal at will by the President and are therefore not under the President's direct control. . . . [W]ith the advent and triumph of the administrative state and the accompanying multiplication of the tasks undertaken by the Federal Government, the Court has been virtually compelled to recognize that Congress may reasonably deem it "necessary and proper" to vest some among the broad new array of governmental functions in officers who are free from the partisanship that may be expected of agents wholly dependent upon the President.
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> . . . [T]here are undoubtedly executive functions that, regardless of the enactments of Congress, must be performed by officers subject to removal at will by the President.

160 See WHITE, *supra* note 46, at 37.

Republican Congresses and a Supreme Court highly deferential to executive power."[161]

> Critics of the Administration have not infrequently charged that the Administration's unilateralism is antagonistic to the rule of law. After all, the ideal of a "government of laws, not of men" seems conspicuously at odds with a President's expansive claims of plenary authority. . . . I doubt that President Bush thinks himself antagonistic to the rule of law; he just has a different idea of what the rule of law consists of. . . . It is the rule of law reduced to "law as rules." Under the Bush Administration's conception of the rule of law, Americans enjoy a "government of laws" so long as executive officials can point to some formal source of legal authority for their acts, even if no institution outside the executive is entitled to test the consistency of those acts with the sources of legal authority cited. . . .
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> The Bush signing statements, like the doctrines they advocate, are a rebuke to the idea of the rule of law as norms or process. They are a testament to the rule of law as law by rules, preferably rules of the President's own imagination.[162]

B. Rulemaking Controls and President Bush's Executive Order 13,422[163]

Executive Order 13,422, issued by the White House without press release or explanation on Thursday, January 18, appeared in the Federal Register of January 23. It significantly increased White House controls over agency rulemaking. As indicated above,[164] the amendments both added to and subtracted from preexisting provisions respecting the RPOs that President Clinton's Executive Order 12,866 had required each agency to create to assist in regulatory planning and

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161 Peter Shane, *Presidential Signing Statements and the Rule of Law as an 'Unstructured Institution,'* 16 WM. & MARY BILL RTS. J. (forthcoming 2007).

162 *Id.*

163 Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007). This Executive Order was issued long after initial submission of this article to the *Law Review*; this section draws on observations about its potential effects made in testimony before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary on February 13, 2007. This and other testimony offered that day, to this subcommittee and to the Committee on Science and Technology, Subcommittee on Investigations and Oversight of the House Committee on Science and Technology, are available online at http://judiciary.house.gov/oversight.aspx?ID=269 and http://science.house.gov/publications/hearings_markups_details.aspx?NewsID=1269.

164 *See supra* notes 22–27 and accompanying text.

analysis. Now, an RPO must be a "presidential appointee"[165]—that is, a person both appointed *and removable* by the President—whose identity would be regularly coordinated with the OMB. Also added was a striking new power for the RPO: "[u]nless specifically authorized by the head of the agency, no rulemaking shall commence nor be included on the [agency's regulatory] Plan without the approval of the agency's Regulatory Policy Office[r]."[166] Removed from the executive order was language tying both the RPO *and* the agency's annual regulatory plan to the head of the agency. No longer is it provided that an agency's RPO "shall report to the agency head"[167] or that the agency's regulatory plan "shall be approved personally by the agency head."[168] Noted almost immediately by an NGO watchdog, OMB Watch,[169] the amendments were not picked up as a story by the newspapers until Tuesday, January 30, almost two weeks later.[170]

An agency's regulatory plan or regulatory agenda reflects its overall commitments to rulemaking activity. Its priorities for regulation and projected rulemakings appear there long before the formal publication of a notice of proposed rulemaking that commences the notice-and-comment rulemaking process under the APA. It has some obvious connections to the idea of a regulatory budget, long sought by some commentators but not yet established by statute. When President Reagan first elaborated the idea in Executive Order 12,498, Christopher DeMuth, who had responsibilities for these issues in his administration, characterized it as essentially an aid to the political heads of administrative agencies—requiring career staff to reveal their priorities and plans for rulemaking to agency leadership, just as the annual dollar budget process does, and consequently injecting the agency's political leadership into the picture before matters got set in

165 Exec. Order No. 13,422 § 5(b), 72 Fed. Reg. 2763 (Jan. 18, 2007).

166 *Id.* § 4(b).

167 Exec. Order No. 12,866 § 6(a)(2), 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2000).

168 *Id.* § 4(c)(1).

169 *See* OMB Watch, President Bush Amends Federal Regulatory Process (Jan. 23, 2007), http://www.ombwatch.org/article/articleview/3688/1/132?TopicID=1. OMB Watch has been sharply critical of the Executive Order. *See, e.g.*, OMB WATCH, A FAILURE TO GOVERN: BUSH'S ATTACK ON THE REGULATORY PROCESS (2007) (report released March 15), *available at* http://www.ombwatch.org/regs/PDFs/FailuretoGovern.pdf. The analysis here does not draw on the OMB Watch report.

170 Robert Pear, *Bush Directive Increases Sway on Regulation*, N.Y. TIMES, Jan. 30, 2007, at A1; Cindy Skrzycki, *Bush Order Limits Agencies' 'Guidance,'* WASH. POST, Jan. 30, 2007, at D1.

bureaucratic concrete.[171] Seen in this way, the measure supported Congress's assignments of responsibility—it is, after all, on the agency's political leadership alone that Congress's statutes confer the power to adopt rules. To judge by its own actions in measures like the Small Business Regulatory Enforcement Fairness Act,[172] Congress, like the private community, was also attracted by the transparency and added opportunities for broad public participation that early notice of an agency's anticipated rulemaking efforts would provide.

President Clinton's Executive Order 12,866 consolidated the Reagan executive orders on regulatory analysis and regulatory planning, that had previously been separate, and in some ways strengthened these measures. It for the first time imposed a structural constraint on agencies, requiring executive agencies to designate an RPO to coordinate general issues under the Executive Order—in effect, to be the agency's designated contact person for OIRA.[173] While there were perhaps hints that the agency's regulatory plan might be used to effect presidential control over agency policy choices, in the

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171 DeMuth, formerly the Reagan Administration's Administrator for Information and Regulatory Affairs, wrote:

> The greatest benefit of OMB review . . . may result from the agency mechanisms established to respond to the kinds of questions that OMB raises. In response to Executive Order 12,291, agencies either established or enhanced their in-house capabilities to analyze their regulatory decisions. In response to Executive Order 12,498, before their options were foreclosed, agency heads established or enhanced their review of regulatory activity that was planned or underway. The regulatory planning process was in part a response to troublesome rules presented to OMB by agency heads who had themselves only recently learned that a rule of this kind was being developed. By then, there would often be some reason (such as commitments made in congressional testimony or in consent decrees) why the agency had no alternative but to issue the troublesome rule. The requirement that agency heads take a thorough look, once a year, at all significant rulemaking activity ensured for the first time that those matters were presented to agency policymaking officials while there was still time to make some policy. OMB's subsequent review of agency plans again ensures that the hard questions will be asked before an agency commits itself to a particular regulatory approach.

Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1085 (1986).

172 5 U.S.C. §§ 601–612 (2000). While requiring agencies to publish semiannual regulatory agendas, it explicitly provides that "[n]othing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda." *Id.* § 602(d).

173 Exec. Order No. 12,866, § 6(a)(2), 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2000) ("[E]ach agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.").

intervening years there has been no evidence of this happening. On specific issues of importance to him, as Elena Kagan has detailed, President Clinton would issue directives to particular agencies, but he would do so through his domestic policy office, not OIRA.[174] President Bush's first head of OIRA, John Graham, initiated a practice of occasional "prompt letters" publicly directing agency attention to matters that he concluded might warrant regulation.[175] But a general centralization of actual control over regulatory agendas was never effected—until Executive Order 13,422.

The new executive order purports to confer authority on the RPO to control the initiation of agency rulemaking and, it seems to be intended, its continued processing within the agency. This control appears to run contrary to Congress's judgment about the effect of the regulatory agendas it has required,[176] and has been conferred without statutory authorization. Almost certainly a matter for Congress, the conferral of such authority works a diffusion of political authority within the agency—authority which Congress generally entrusts to the agency head. While statutes often permit an agency head to subdelegate some of her authority to persons she trusts and will take responsibility for, the RPO is to be a "presidential appointee," whose identity is coordinated with OIRA, and who is no longer required to "report to the agency head." While the agency head may override the RPO's judgment in particular instances, it is no longer required that she sign off "personally" on the regulatory plan that now the RPO is to approve. It is at least ambiguous to whom the RPO reports. Anyone aware of the change—the agency head, for example, and the RPO himself—will know that their mandatory relationship and her mandatory responsibility for the regulatory plan have been replaced by a relationship with and responsibility to the President.

Wisely, Congress has rarely permitted agency heads to subdelegate ultimate control over rulemaking, and it certainly would be unwise to permit that to persons controlled by others outside the agency. Congress as well as the President has political relationships with the agency head, and in this political balance the agency head may be as-

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174 Kagan, *supra* note 3, at 2290–98.

175 *See Regulatory Accounting: Costs and Benefits of Fed. Regulations: Hearing Before the Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the H. Comm. on Gov't Reform*, 107th Cong. 2 (2002) (statement of John D. Graham, Administrator, Office of Info. and Regulatory Affairs, Office of Mgmt. and Budget) (describing the purpose and use of prompt letters), *available at* http://www.whitehouse.gov/omb/legislative/testimony/graham_house031202.pdf.

176 *Supra* note 172.

sured some independence of action. While the President has a formal capacity to discipline agency heads whose work displeases him, that capacity is sharply limited by the political costs of doing so—including the necessity of securing senatorial confirmation of a successor.[177] A well-connected friend of mine recently remarked that he "personally ha[d] watched two agency heads tell the President to pound sand—they wouldn't do what they were told and the President knew they had the political capital to win." Junior officers, given their responsibilities in a process under close White House supervision, knowing as "presidential appointees" that they can be dismissed by the President (but perhaps not by the agency head) at any moment, and lacking both this political capital and the prospect that their dismissal would have, in itself, political costs for the White House, are not ever going to tell the President *or* OIRA to pound sand.

Furthermore, the amended order now requires that the RPO be a "presidential appointee," but does not specify what kind of presidential appointee: one who must also be confirmed by the Senate? Or, perhaps, one the President can name without need for confirmation? If it is the latter, then the President has found his way around one constraint insisted upon by the Constitution—that those who exercise major authority in government can do so only with the Senate's blessing as well as his. Then it becomes even more apparent that the President has been able to create a divided administration within each agency, with real power vested in a shadow officer who essentially answers only to him. As my friend also remarked, this would be "disastrous":

> First[,] as a practical matter it takes regulatory power away from the head of the agency where Congress has vested it. Second, it continues the political accretion of power in the bureaucracy of the White House, away from public scrutiny. . . . [T]he worst part from my vantage point is that it treats the agency as a conquered province—the career staff is explicitly told it is distrusted and is not to make recommendations to the agency head but to the White House's political officers. That in turn destroys communication between the staff and the political level of the agency. . . . [T]he agency is quite ineffective when that happens.

It is also unclear to what extent the new controls extend to independent regulatory commissions. Section 4 of the order, including the requirement that "[u]nless specifically authorized by the head of the

177 *See supra* Part I.

agency, no rulemaking shall commence nor be included on the Plan without the approval of the agency's Regulatory Policy Office[r]," is explicitly applicable to independent regulatory commissions.[178] Section 6, defining the RPO's appointment, is not. As a legal requirement of agencies Congress has chosen to constitute as independent regulatory commissions, the new controls would be truly extraordinary.

The recent order also raises concerns about political access. Among the elements that have made the regime under Executive Order 12,866 acceptable to Congress (and to much of the academic community) are the commitments it contains to a professionalized, unusually transparent and apolitical administration. Oral contacts with outside interests are limited to OIRA's Senate-confirmed Administrator or his particular designee, agencies attend any meetings with outsiders, written communications from outsiders are also logged, and all of this information is publicly disclosed. Congress has properly insisted on these elements of transparency, as a condition of its acceptance of this generally valuable regime. The OIRA Web site, within a generally closed White House environment, has been a remarkable monument to the worth of this insistence. The professional qualities, too, of OIRA's staff, and the striking qualities of its leadership over time, have offered reassurance. None of these constraints are made applicable to the RPO or his office.

Thus with Executive Order 13,422, as with the use of signing statements, the President has again crossed the line that divides the realm of law from that of politics, that divides oversight from decision (and policymaking). Some may argue that the President is, after all, our chief executive, that our Constitution embodies the theory of a strong, unitary executive; in this light, even if the effect of presidential signing statements and Executive Order 13,422 is to convert agency judgments about rulemaking into presidential judgments, that would only be accomplishing what the Constitution commands. In my judgment, this argument is not only erroneous, but dangerous to our democracy. The Constitution's text makes the President "Commander in Chief" of the armed forces, but it omits that characterization of his role in domestic government. In domestic government, the Constitution is explicit that Congress may create duties for heads of departments—that is, it is in the heads of departments that duties lie. The President's prerogatives are to consult with them about their perform-

178 Exec. Order No. 12,866, § 4(c), 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2000).

ance of those duties, explicitly, and to replace them (with required, and thus politically expensive, senatorial confirmation of their replacement) when their performance of their duties persuades him that he must do so implicitly. Unlike army generals, who may be commanded, the heads of departments the President appoints and the Senate confirms have the responsibility to decide the issues Congress has committed to their care—after appropriate consultation, to be sure—and not simply to obey.

IV. Unitary Control of Statutory Interpretation?

Implicit in the increasing use of signing statements, and perhaps in the increased White House ambitions for control of rulemaking activities as well, is a presidential claim of right to enforce uniformity of legal interpretation within executive government. While the courts have asserted for themselves the final word on questions of statutory interpretation,[179] it is not hard to imagine the chief executive asserting that, pending any such resolution, he can command uniformity within the government whose operations he oversees. One consequence of that assertion could be that, when courts will conclude that Congress has delegated the resolution of some legal or policy issues to a particular government agency, that courts must accept if they find it "reasonable," the President can command what those resolutions must be. Yet these arguments, however plausible, reflect neither historical practice, Congress's statutes, nor the understandings implicit both in its delegations and in judicial acceptance of them. And they, too, mark an "accretion of dangerous power."

A. The Authority of the Justice Department

Perhaps one place to look for unitary controls over legal issues is in the offices responsible for the government's legal opinions, in the Department of Justice. What impact outside the Department do its

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179 *E.g.*, United States v. Am. Trucking Ass'ns, 310 U.S. 534, 544 (1940) ("The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function."). The tension the reader may sense between this bromide and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is comparable to that which may be remarked between Justice Black's confident statement for the Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), *see supra* text accompanying note 60, that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker," and administrative agency rulemaking. That a court might find certain authority statutorily delegated to an agency (and thus be fulfilling its "exclusively . . . judicial function" when it acts on that interpretation) does not entail a finding that this authority has been statutorily delegated to the President. See the discussion in the text *infra* following note 215.

opinions have? Here one instinct might be to try to distinguish between the authority to give opinions that are mandatory within the executive branch (that bind executive actors, but not the courts), and opinions that reach the outside world—that even courts would be obliged to respect. Yet the reader familiar with administrative law will quickly see the Supreme Court's iconic opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[180] looming on the horizon: if the President or his lawyer is able to state a legal view that an agency must accept, then perhaps that view (if it is a reasonable interpretation of a relevantly indeterminate statute) will also be one a court is obliged to accept. If, for example, an interpretation offered by the President in a signing statement is more than a recommendation to the responsible agency, but rather a directive it is obliged to accept, we will have found an important way in which the President is "the decider," that perhaps amplifies the concerns many have expressed about the *Chevron* limitation on the judicial role—or perhaps it rationalizes that limitation in important political terms.

Professor Cornelia Pillard has extensively and persuasively treated the practices and authority of the two departmental offices chiefly responsible for developing departmental positions: the Solicitor General's office (litigation) and the OLC (advice) in a recent article.[181] There is little reason to repeat her admirable effort here. As she amply demonstrates, strikingly limited statutory or even executive authority supports the proposition that the Attorney General's opinions on legal matters are entitled to *controlling* status.[182] Nineteenth-century Attorneys General took the view that their opinions were advisory, not legally binding—sometimes stating without much elaboration that an Attorney General's opinion could be disregarded by executive agencies,[183] and sometimes stating reasons. Consider, for example, those given by Attorneys General Black:

> The duty of the Attorney General is to advise, not to decide. A thing is not to be considered as done by the head of a department merely because the Attorney General has advised him to do it. You may disregard his opinion if you are sure it is wrong. He aids you in forming a judgment on questions of law; but still the judgment is yours, not his. You are

180 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

181 Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005).

182 *Id.* at 711 & n.108.

183 *See, e.g.*, 3 Op. Att'y Gen. 367, 369 (1838) (Butler); 5 Op. Att'y Gen. 390, 391 (1851) (Crittendon).

> not bound to see with his eyes, but only to use the light which he furnishes, in order to see the better with your own.
>
> But though opinions from this office have technically no binding effect, it is generally safer and better to adopt them. Uniformity of decision in the different departments, on similar subjects, is necessary, and cannot be secured otherwise.[184]

and Brewster:

> [W]hile it is the duty of the Attorney-General to give his opinion upon questions of law arising in the administration of any Executive Department at the request of the head thereof, such duty ends with the rendition of the opinion, which is advisory only. The Attorney-General has no control over the action of the head of Department to whom the opinion is addressed, nor could he with propriety express any judgment concerning the *disposition* of the matter to which the opinion relates, that being something wholly within the administrative sphere and direction of such head of Department.[185]

Even Attorney General Cushing,[186] while asserting that opinions of the Attorney General were "quasi judicial" in character, and "have come to constitute a body of legal precedents and exposition, having authority the same in kind, if not the same in degree, with decisions of the courts of justice,"[187] acknowledged that they were "not compulsory on the President, or even on a Head of Department. . . . A Secretary, undoubtedly, is entitled to have and to act upon his conscientious opinion of a question, even after he has taken the opinion of the Attorney General."[188] While governmental actors had almost uniformly followed Attorney General opinions, and had done so to promote uni-

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184 9 Op. Att'y Gen. 32, 36–37 (1857).

185 17 Op. Att'y Gen. 332, 333 (1882).

186 Cushing was a proponent of presidential decisional power. *See supra* note 2.

187 6 Op. Att'y Gen. 326, 334 (1854).

188 7 Op. Att'y Gen. 691, 699–700 (1856). The quasi-judicial characterization is itself problematic, suggesting a professional objectivity in the Attorney General's performance of a function that is easily overcome by his loyalty and sense of obligation to a highly political client. See Pillard, *supra* note 181, for a thoughtful development of this tension and its implications. The tension also underlies a good deal of the contemporary literature. *E.g.*, Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337 (1993); Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437 (1993); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375 (1993); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000); *see also* Samuel A. Alito, Jr., *Change in Continuity at the Office of Legal Counsel*, 15 CARDOZO L. REV. 507 (1993).

formity of rules across multiple departments (and to avoid being branded as evading their legal obligations), the Judiciary Act of 1789 did not provide that Attorney General opinions would be binding on other agencies.

Congress might establish this effect by statute, as it has empowered the Attorney General (largely acting through the Solicitor General) to control government appellate litigation. The provision respecting the Solicitor General's authority is rather straightforward; the only controversy is whether statutes creating independent litigating authority for agencies, as they often do for an independent regulatory commission, operate as an exception:

> 28 U.S.C. § 518. CONDUCT AND ARGUMENT OF CASES
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> (a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the United States Court of Federal Claims or in the United States Court of Appeals for the Federal Circuit and in the Court of International Trade in which the United States is interested.
>
> . . . .
>
> 28 U.S.C. § 519. SUPERVISION OF LITIGATION
>
> Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.[189]

Of course, the Solicitor General is an advocate. In the cases where he wields his authority, the actual decisions on points of law will be a court's. This is so even where what he has done is to deny an agency's request to petition for a writ of certiorari, or take an appeal, because in his judgment the court below reached the right result (or,

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189 28 U.S.C. §§ 518–519 (2000). Even such straightforward language as this may of course be defeated by bureaucratic realities. The size of the government's litigating docket and the political independence of U.S. Attorneys (who often enjoy the protection of powerful political patrons, their Senators) can mean, in practice, that Washington's capacity to control is sharply limited. *See, e.g.*, Peter L. Strauss, *The Internal Relations of Government: Cautionary Tales from Inside the Black Box*, 61 LAW & CONTEMP. PROBS. 155, 156–57, 167–68 (1998) (describing how an Assistant U.S. Attorney for the Southern District of New York commenced litigation on behalf of "client" Brookhaven National Laboratory, despite the contrary wishes of the two cabinet departments and independent regulatory commission also directly concerned).

less conclusively, that the taking of an appeal on these facts to this court represents too great a litigating risk for a government with a lot at stake in its courts, every day). The only authority that endures, that will be cited inside of government as well as out, is that of the court. There is no formal obstacle to seeking to have the same question reviewed on some future occasion when it again arises in a fresh case. That the Solicitor General has declined to authorize an appeal, even if known, could no more be cited for future authority than that the Supreme Court had denied certiorari.

Compare with this direct language that of the Act that created the Department of Justice in 1870. It stated that an Attorney General could delegate his opinion-writing authority to a subordinate and that, if the Attorney General approved the opinion, "such approval . . . shall give the opinion the same force and effect as belong to the opinions of the Attorney-General."[190] In 1893, noting this language, Attorney General Olney expressed the view that "[e]vidently . . . Congress contemplates that the official opinions signed or indorsed in writing by the Attorney-General shall have some actual and practical force. Congress's intention can not be doubted that administrative officers should regard them as law until withdrawn by the Attorney-General or overruled by the courts . . ."[191] His successors, while this statute was in force, expressed similar views.[192] Yet this statutory language was considerably less direct in dealing with the government's solicitor than Sections 518 and 519 are in respect of its barrister, and now even this language has disappeared from the statute books. Sections 511 to 513 of the Judiciary Code, the modern successor to the 1870 Act, do not contain the "same force and effect" language and (except for opinions rendered to the Department of Defense) characterize the Attorney General's views, whether transmitted to the President or to a cabinet secretary, only as "advice" or "opinion."[193] And the OLC obscures the issue by insisting that the agencies they advise

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190 Act to Establish the Department of Justice, ch. 150, § 4, 16 Stat. 162, 162 (1870).

191 20 Op. Att'y Gen. 654, 659 (1893).

192 *See, e.g.*, 25 Op. Att'y Gen. 301, 303–04 (1904) (Moody); 37 Op. Att'y Gen. 562, 563 (1934) (Cummings).

193 28 U.S.C. §§ 511–513. These sections place the initiative for seeking advice in the client, the department, rather than the Attorney General. Section 513 concerns the Department of Defense, and curiously suggests—in diction missing from the other sections—both that the Attorney General in some cases will not be the proper source of legal advice and that her advice, when given, may be dispositive:

> When a question of law arises in the administration of the Department of the Army, the Department of the Navy, or the Department of the Air Force, the cognizance of which is not given by statute to some other officer from whom the Secre-

must agree to accept their advice in advance; otherwise, they must act without it. In over 200 years, the issue has not had to be resolved.[194]

Perhaps the President could command agencies to accept OLC opinions by Executive Order. The likely candidate here is Executive Order 12,146, which provided for the establishment of a sizable, collegial Federal Legal Council chaired by the Attorney General to promote "the efficient and effective management of Federal legal resources that are beyond the capacity or authority of individual agencies to resolve."[195] Two sections are of particular note for their implicit limitation, even as a matter of presidential claim:

> 1-401. Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.
> 1-402. Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.[196]

No corresponding provisions address matters that are *not* in dispute between competing agencies. Unsurprisingly perhaps, in 1992, Attorney General Barr found *certainty* in these provisions only that "the Attorney General's opinions do bind the executive branch . . . with respect to interagency disputes. This highlights another change from the early days of the Office of the Attorney General. . . . [M]any of the early Attorneys General [did not think their advice was binding]."[197]

It should be evident how important would be some mechanism for resolving interagency disputes within the executive branch, short of litigation. The existence of such a dispute is, in itself, some evidence that Congress failed clearly to assign the task to a particular

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> tary of the military department concerned may require advice, the Secretary of the military department shall send it to the Attorney General for disposition.

Id. § 513.

194 Moss, *supra* note 188, at 1320.

195 Exec. Order No. 12,146 § 1-202, 3 C.F.R. 409, 410 (1980), *reprinted as amended in* 28 U.S.C. § 509 (2000).

196 *Id.* §§ 1-401 to 1-402, 3 C.F.R. at 411 (1980), *reprinted as amended in* 28 U.S.C. § 509 (2000).

197 William P. Barr, *Attorney General's Remarks, Benjamin N. Cardozo School of Law, November 15, 1992*, 15 CARDOZO L. REV. 31, 36 (1993).

agency. For disputes between agencies "whose heads serve at the pleasure of the President," the questions that might be raised about the justiciability of the dispute if aired as between them add significant force to the Executive Order's requirement and rationale.

Indeed, one can find at least inferential Supreme Court recognition of the role that presidential oversight of interagency conflicts can play.[198] Take, for example, its resolution in *Train v. Colorado Public Interest Research Group, Inc.*[199] of a dispute involving arguably conflicting EPA and Nuclear Regulatory Commission ("NRC") authority over radioactive pollution emanating from NRC-licensed facilities.[200] While principally resolving the issue as a matter of statutory interpretation, the Court carefully noted the President's characterization of the Reorganization Plan by which the EPA had acquired authority,

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198 Congress appears sometimes to have relied on the "checks and balances" inherent in potentially conflicting or overlapping assignments, in ways the Supreme Court has *not* fully appreciated. Consider two aspects of the plurality decision in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980). The decision returned a regulation controlling the carcinogenic chemical benzene in the workplace to the Occupational Safety and Health Administration ("OSHA") because, the plurality thought, OSHA had failed to make a necessary judgment about the importance of giving this chemical priority over all the others it might have regulated. *Id.* at 640, 662. (This, one might note, was an asserted failure of executive action, selecting among priorities; if the choice of benzene as target was acceptable, the Court seemed to have no difficulty with the justification for the regulation.) First Congress had provided that another agency—its scientific integrity insulated within the Department of Health, Education, and Welfare's National Institutes of Health—should advise OSHA (an administration of the Department of Labor) about its priorities; and the National Institute of Occupational Safety and Health had repeatedly called on OSHA to take action very like that which it ultimately proposed and decided upon. *See id.* at 618–23 & n.10. The plurality, in its concerns about the rationality of prioritization, paid no attention to this careful bureaucratic arrangement. Second, while OSHA has responsibilities for carcinogens in workplace air, the EPA has that responsibility for the air citizens breathe. Citizens and workers co-occupy gas stations, where benzene is frequently in the air; what standards should govern there? OSHA had excepted gas stations from its regulation, awaiting resolution of this issue with EPA through intra-governmental mechanisms—the Federal Legal Council or perhaps the OMB. The plurality, however, appears to have taken this accommodation to the realities of possibly conflicting mandates as a sign of OSHA's irrationality, questioning how such a large body of workers could be excepted from the reach of the rule. *Id.* at 628.

199 Train v. Colo. Pub. Interest Research Group, Inc., 426 U.S. 1 (1976).

200 Strikingly, in doing so the Court *unanimously* insisted on the necessity of consulting legislative history, an approach that could hardly be imagined today:

> To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" In this case, as we shall see, the legislative history sheds considerable light on the question before the Court.

Id. at 9–10 (internal citations omitted).

and an Atomic Energy Commission-EPA[201] memorandum of understanding subsequently published in the Federal Register; both strongly supported its outcome.[202] Interagency disputes can be distinguished, in this regard, from disputes between White House and agency. If Congress has given apparently conflicting statutory instructions to differing agencies, it will not clearly have established where authority lies. Given arguable issues about justiciability, and the "necessity of the case," the President as "the decider"—or at least as the preliminary, and often enough in practice, the final decider—is a readily understandable outcome.[203] The same cannot be said of disagreements between White House and agency, where a statute empowers only the agency.

Here one may recall the first two elements of Justice Robert Jackson's justly admired tripartite analysis of the relationship between presidential authority and congressional command in *Youngstown Sheet & Tube*:[204]

> Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. . . .
>
> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or

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201 The NRC succeeded to the regulatory responsibilities of the Atomic Energy Commission ("AEC") in 1975, turning what had previously been an AEC-EPA problem into an NRC-EPA problem.

202 *Train*, 426 U.S. at 24 n.20.

203 *See* Percival, *supra* note 87, at 998–99.

204 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) (footnotes omitted).

> in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.

Should the interagency dispute ever reach the courts, it would likely be decided—as in *Train* it *was* decided—as a matter of statutory interpretation, with the presidential view to be taken as indicative but *not* authoritative. Under the Constitution, it is Congress that constructs and instructs the agencies of government under the Necessary and Proper Clause.

One might pause to note that, at least as it is currently articulated and in the absence of direct congressional authorization, the *Chevron* doctrine would have no application to such a presidential judgment. Where "no single agency with enforcement power has been charged with administration of [a statute, it is universally agreed] that *Chevron* does not apply."[205] The central premise of *Chevron* is that deference is warranted precisely because a statute has explicitly or implicitly delegated to a particular agency a unique and specialized authority to render interpretations with the force and effect of law.[206] It was the EPA that unambiguously held the authority to use (or not) the "bubble" concept in administering the Clean Air Act. It shared this authority with no other agency. When the President is allocating responsibilities as between the EPA and the Atomic Energy Commission, in the face of statutes unclear as to their precise reach, he is acting outside this defined realm. As was done in *Train*,[207] we anticipate that the courts will resolve such allocational issues for themselves when they are presented to them—perhaps according some deference to an accommodation reached by an actor (the President) better able to understand the full range of considerations entailed, but not imagining this as a matter entrusted to his judgment.

Consistent congressional practice in relation to executive branch reorganization strengthens one's sense of its reluctance to confer definitive law-determining authority on the President. When Congress conferred reorganization authority on the President, as it often did in

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205 Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 893 (2001) (citing Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997), and similar circuit court cases).

206 *Cf.* Gonzales v. Oregon, 126 S. Ct. 904, 920–22 (2006) (if an act confers limited interpretive authority on more than one agency, that counsels against finding that one agency's view has the force of law); United States v. Mead Corp., 533 U.S. 218, 229 (2001) (*Chevron* deference warranted only if Congress delegated, and agency exercised, authority to act with legal force).

207 *Supra* notes 199–200.

the years before the Supreme Court sweepingly disapproved the legislative veto in *INS v. Chadha*,[208] it was willing to do so only under conditions that assured it veto-proof control over the President's exercise of that authority.[209] Reorganization acts conferring broad power on the President to reshape executive government, subject to legislative approval, came to an end with *Chadha*. Congress promptly created a "fast-track" bill procedure for two-house approvals of presidential submissions of reorganization proposals; the proposals would not otherwise take effect.[210] This is, in effect, the same regime. Congress remains in control of agency reorganizations—a proposition that one would suppose includes empowering (or not) junior officers within an agency to exercise default control over its rulemaking activities.

Professor Pillard's essay develops at length the arguable differences between the roles of advocate (Solicitor General) and counselor (OLC).[211] She concludes that politics and law may be somewhat intermixed for *both* offices (perhaps more so for OLC); for each office, moreover, she finds that the influence it enjoys as an objective legal analyst inside government basically depends on its analysis of judicial doctrine.[212] The acceptability of a role for OLC in *fixing* legal meaning independent of judicial doctrine is compromised, she argues, both by the difficulties the public would often experience in learning of its judgments[213] and by the absence of the important constraint that operates on the Solicitor General—his need to maintain credibility in his long-term relationship with the Court before which he so often appears.[214] And if such disinterested expertise as OLC may have within government is fundamentally derivative of judicial doctrine, that gives the proposition that its judgments might be entitled to special deference by the courts a certain circularity. Or, one might say, to the extent courts would concede that, inevitably, OLC would be engaging in statutory interpretation, they would find no reason other than politics to accord it deference.

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208 INS v. Chadha, 462 U.S. 919 (1983).

209 *See* Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 805–06.

210 5 U.S.C. §§ 901–912 (2000).

211 Pillard, *supra* note 181, at 704–17.

212 *Id.* at 723–28.

213 *Id.* at 713–14, 750.

214 *See id.* at 730.

B. Chevron *Deference for Presidential Interpretations?*

Now suppose an interpretive problem arising under an agency statute, a problem that lies outside Executive Order 12,146's concern with "which [of contending agencies] has jurisdiction to administer a particular program or to regulate a particular activity,"[215] and that is also one respecting which the relevant statute confers no participatory right on the President. (If the statute is one of those in which Congress has provided for a presidential role—if it has in terms delegated decisional authority to him—the difficulties discussed here do not arise.) In such a case, the issue is simply whether, as the person vested with "the executive power," and responsible to "take care that the laws be faithfully administered," the President may displace the designated agency's judgment with his own. Of course the agency's designation as the body with decisional authority is a part of at least the *statutory* law. If one understands Congress's designation of, say, the EPA to represent its statutory decision who should exercise the power it is creating, then the third element of Justice Jackson's triad now comes into play:

> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[216]

Two questions arise in this context—first, whether one should nonetheless treat Presidential directorial authority as compatible with the *implied* will of Congress; and second, whether even if not, the Constitution requires the conclusion that he must possess that authority.

Dean Kagan's influential analysis, supported by analyses such as Lessig and Sunstein's,[217] essays an affirmative answer to the first of these questions. Thus, it works to remove a presidential claim of deci-

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215 *See supra* note 195.

216 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring) (footnotes omitted).

217 *See* Kagan, *supra* note 3; Lessig & Sunstein, *supra* note 3; *see also* Goldsmith & Manning, *supra* note 137.

sional authority from Justice Jackson's third category to his second—or perhaps even his first. Acknowledging the weakness of the proposition that "his own constitutional powers minus any constitutional powers of Congress over the matter" in themselves make him "the decider," she urges us to imply a congressional delegation of decisional authority to him from congressional silence, from the absence of an express provision denying him that authority.[218]

Professor Kevin Stack, a younger scholar, has published his second analysis of the "statutory president," largely consistent with the positions taken here.[219] One of its striking contributions to the literature is his careful cataloguing of the numerous occasions on which Congress has been explicit in making administrative action subject to presidential review or control—drawing the strong implication that in other cases it would be inappropriate to infer a congressional wish for that outcome.[220] With remarkable thoroughness, this shows a technical difficulty with Dean Kagan's argument: Congress has known how to empower the President as "decider" throughout our national history—and most clearly so in that period, just after the Constitution's adoption, when one can regard the Congress's work as the influential deposit of "contemporaneous construction . . . by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."[221] This often-quoted phrase[222] was an early explanation of a reason for judges to assign some "weight" on their own "scales" (one meaning of "deference," if not *Chevron*'s) to *agency* interpretations of *statutes*—and to do so even though, as the Court also said in one prominent decision relying on the phrase, "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function."[223] The proposition seems hardly less apt for early congressional interpretations of the Constitution, even granted a court might also affirm that the interpretation of the meaning of the Constitution, as applied to justiciable controversies, is exclusively a judicial function.[224] Congress has made agency decision subject to presidential override when it has wished to; and it has omitted doing

218 Kagan, *supra* note 3, at 2319–31.

219 Stack, *supra* note 3.

220 *Id.* at 278–91.

221 Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).

222 *E.g.*, United States v. Am. Trucking Ass'ns, 310 U.S. 534, 549 (1940).

223 *Id.* at 544; *cf. supra* note 179.

224 *Cf.* Printz v. United States, 521 U.S. 898, 907–08 (1997) (finding that the *absence* of early statutes attempting to co-opt state executives in enforcement of federal law suggested that Con-

so in other statutes passed in the same period, and in circumstances in which one can readily infer the basis for a different judgment. Dean Kagan's suggested implication is thus unwarranted as a factual proposition.

As Professor Stack also shows, the argument for implication of delegation to the President has normative risks to "the equilibrium established by our constitutional system" as well. These are given point by the signing statement controversy, Executive Order 13,422, and last Term's Supreme Court decisions in *Gonzales*[225] and *Hamdan*.[226] *Gonzales* and *Hamdan*, in particular, suggest that the present Court is within a vote of recognizing broad executive authority to create law without even the bother of such public processes as attend APA adjudication and rulemaking. If the President is entitled to be "the decider" on matters ostensibly committed to *agency* discretion, does that enhance or undercut the Supreme Court's iconic decision in *Chevron*? Are views the President may express about statutory meaning in signing statements "law" for the officers of the executive branch? If so, may they claim *Chevron* obedience from the courts, the lesser (but arguably significant) respect suggested by the Court's subsequent decision, troublesome to some, in *United States v. Mead Corp.*;[227] or are they just elements of legislative history as appropriately discarded from consideration as any other, given current fashions in statutory interpretation?

Scholars arguing for presidential decisional authority as a normatively desirable element of the contemporary administrative state rather than as constitutional command have asserted that such authority would give greater legitimacy to the Court's *Chevron* analysis by adding the weight of centralized political judgment to what may be implicit in congressional delegation.[228] They note the opinion's concluding passages, relying on the President's political oversight role as one of the opinion's rationales:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In

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gress lacked such power, particularly in comparison with numerous early statutes imposing such an obligation on state courts).

225 *See supra* note 13 and accompanying text.

226 *See supra* note 10 and accompanying text.

227 United States v. Mead Corp., 533 U.S. 218 (2001).

228 *See, e.g.*, Goldsmith & Manning, *supra* note 137, at 2298–302; Kagan, *supra* note 3, at 2372–80.

> contrast, **an agency** to which Congress has delegated policymaking responsibilities **may**, within the limits of that delegation, **properly rely upon** the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and *it is entirely appropriate for this political branch of the Government to make such policy choices*—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left **to be resolved by the agency charged with the administration of the statute** in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. *The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones:* "Our Constitution vests such responsibilities in the political branches."[229]

Yet note that although these passages do celebrate the President's political controls, the emphasized portions also suggest, at the least, that the Court was unaware of the possible implication for presidential authority now sought to be drawn. The bolded phrases assume the location of decision *in the agency*; the italicized phrase suggests but does not define the nature of presidential involvement; the underscored phrase comes closest to placing decision with the President, faintly echoing the emphatic terms of Chief Justice Marshall's disclaimer in *Marbury*.[230] But the echo *is* faint. In the world as imagined by Chief Justice Marshall, an executive officer might be "the mere organ by whom [the will of the President] is communicated," acting under circumstances which "can never be examinable by the courts."[231] In the ordinary world of administrative law, courts have extensive review authority over decisions such as the EPA made in *Chevron*—review authority extending to their reasonableness in terms of the agency's

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229 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978) (emphases added)).

230 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166–70 (1803); *see supra* note 62.

231 *Id.* at 166.

mandate.[232] To make *Chevron* turn entirely on presidential politics is to omit consideration of the role of "reasonableness" in relation to those matters found to fall within the area of discretion constituting "step two" of its analysis.

While *Chevron* sensibly accepts the President's political role as mediating the difficulties of focused bureaucratic expertise, it does not purport to displace reliance on the latter. Indeed, the structure of judicial review of administrative action depends, top to bottom, on the presumption that the matter being reviewed is in some respects the product of an expert, not merely a political judgment. Not a word in *Chevron* suggests tolerance for the proposition that decision could be made by anyone but the administrator of the EPA, following the procedures and within the parameters of consideration set for that official by the Clean Air Act and the APA. Were it otherwise, it would be impossible to understand the Court's insistence, in the subsequently decided *Whitman v. American Trucking Ass'ns*,[233] that she would *not* be authorized to consider costs, as such, in pursuing her mandate, when the President's own commitment to the centrality of cost considerations to administrative rulemaking is so clearly established.[234]

It is worth recalling, in this connection, that agencies adopt roughly ten times as many rules each year as Congress adopts statutes. The proposition, then, that the President, but not Congress, might directly control these outcomes would transform congressional delegations into an even more remarkable transfer of authority than is usually addressed. Indeed, one could find in it the mirror image of the concern that underlay the Court's rejection of the legislative veto in *Chadha*. There, the flaw lay in the defeat of presidential controls; here, we would discover the defeat of congressional control. Should Congress disagree with any rule, it would have to transcend its own veto-gates and the President's veto to overcome it.[235] Imagining the

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232 *See* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997).

233 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

234 "I once asked Jay Plager what he worried about legally when he headed OIRA, and he said: 'the 3 sisters concern, that political pressure would detach administrators from statutory grounds.'" E-mail from Harold Bruff, Charles Inglis Thomson Professor of Law, Univ. of Colo. Law Sch., to Peter Strauss (Jan. 15, 2007, 10:45 EST) (on file with the author). "The 3 sisters" refers to *D.C. Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), in which the D.C. Circuit vacated a decision of the Secretary of Transportation on finding that political pressure, in this case from a Member of Congress, may have influenced the Secretary to decide on the basis of factors not provided by statute. *See supra* note 78.

235 In the Congressional Review Act, 5 U.S.C. §§ 801–808 (2000), Congress created an elaborate mechanism for generating and potentially enacting fast-track legislation disapproving

rulemaking agency as merely the "organ by whom [the will of the President] is communicated" is a far cry from seeing it embedded in oversight relations with President *and* Congress *and* courts.

We can also have no illusions that the decision will be made by "the" President (that one individual who has been elected by the public and vested with "the executive power") rather than an appointed official. It will, rather, be made within an apparatus of a few thousand White House employees working within the properly protected opacity of that institution, out of the reach of the APA and the Freedom of Information Act ("FOIA")[236], in contrast to a decision reached by a politically accountable agency administrator[237] with the help of a more extensive and expert staff operating under those conditions of enhanced transparency and procedural regularity. Professors Bressman and Vandenbergh document for us how varied and often conflicting

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any agency rule, while delaying rule effectiveness for a time to permit congressional review to occur. The one example of Congress's successfully exercising this elaborate authority occurred in the transition between the Clinton and Bush administrations, when a Republican Congress and President agreed to block an OSHA rule on ergonomic injuries that a Democratic President would probably have supported and could have protected with his veto. S.J. Res. 6, 107th Cong, 115 Stat. 7 (2001); *see also* Statement on Signing Legislation to Repeal Federal Ergonomics Regulations, 37 WEEKLY COMP. PRES. DOC. 477 (Mar. 20, 2001).

236 Absent express statement, the Court has held, the APA does not apply to presidential decision making. Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992). While FOIA is in terms applicable to "the Executive Office of the President," 5 U.S.C. § 552(f)(1) (2000), the relevant web page for FOIA access within the White House advises:

> The President's immediate personal staff and units within the EOP whose sole function is to advise and assist the President are not subject to FOIA.
>
> Please contact the separate EOP entities, that are subject to FOIA, individually, if you would like to make a FOIA request for their records.
>
> The EOP entities subject to the FOIA are: Council on Environmental Quality; Office of Administration; Office of Management and Budget; Office of National Drug Control Policy; Office of Science and Technology Policy; Office of the United States Trade Representative
>
> The EOP entities exempt from the provisions of the FOIA are: White House Office; Office of the Vice President; Council of Economic Advisers; National Security Council; Office of Policy Development; Domestic Policy Council; Office of National AIDS Policy; National Economic Council; President's Foreign Intelligence Advisory Board

FOIA Within the EOP, http://www.whitehouse.gov/government/eop-foia.html (last visited May 6, 2007). Dean Kagan's article makes clear that policy directives emerge from the Domestic Policy Council and the like, not OMB. Kagan, *supra* note 3, at 2297, 2316. In any event, relevant OMB/OIRA documents would likely fall within the government's "predecisional" privilege under 5 U.S.C. § 552(b)(5).

237 Or by a five-member independent regulatory commission. There are, in my judgment, few important differences in this regard. *See* Strauss, *The Place of Agencies in Government*, *supra* note 35, at 583–96.

were the voices that the EPA officials they interviewed heard—whether in the first President Bush's administration or in President Clinton's—and how much more impaired was public access to the circumstances of that advice than to agency action.[238] Given the overwhelming complexity and activity level of modern government, White House officials can attend to no more than a fraction of issues having to be decided. One should doubt, rather than presume, that in delegating lawmaking authority that it imagined would be exercised at some remove from raw politics, pursuant to the APA and subject to FOIA, Congress authorized any such outcome. In all but the most extraordinary cases, invocation of "the President's will" in relation to ordinary administration will be the product of a politically driven accident making this one issue salient, out of the thousands that remain unattended. It will be a bolt of lightning hurled by one unelected operative—whose political valence is high, whose expertise is stretched, whose staff support is limited, and whose exposure to public view and obligations of procedural regularity are low—against another unelected operative enjoying significant virtues from a rule-of-law perspective: that she is somewhat more removed from electoral political concerns, that she is supported by more extensive and expert staff, and that she operates under conditions of enhanced transparency and procedural regularity.

If judgment on the issues left open to *Chevron*'s second step is the agency's, it will have been taken in light of an administrative record and explained in terms of the agency's own mandate. That *Chevron* deference is owing only to judgments about statutes uniquely committed to the administration of the agency claiming it, in itself implies an understanding that it will be the agency itself making this determination, in light of its particular responsibilities and expertise. If, on the other hand, we say this may be decided outside the agency, we have disconnected decision from the particular limits of that statute, from the uniqueness of its delegation, from the intricate understanding a given agency may have of the interconnections of its regulatory mission, from the administrative record—we have made politics not only *an* element, but the dominating element. Recognizing presidential decisional authority, in this perspective, is precisely a conversion of discretion controlled by law into the DISCRETION! Chief Justice Marshall evoked.[239]

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238 *See generally* Bressman & Vandenbergh, *supra* note 5.

239 *See supra* note 62.

Even the political argument from the fact of the President's election is troublesome, to the extent it could be seen as making a differential case for presidential political control. It is not easy to construct a credible political mandate for such authority from the simple fact of the President's national election. A recent article by Professor Jide Nzelibe rather persuasively challenges the proposition that the President is a more reliable spokesperson for national politics than the Congress, taken as a collective; or that agencies responding only to the President would be more reflective of contemporary political judgment than those subject to the oversight of both political branches.[240] Voters cannot reasonably be credited with either the information or the will that might vest such authority in a single official (and his immediate aides).

One might note that the Justices who are most enthusiastic about executive authority, and nearly prevailed on those questions in the 2005 Term, are the same ones who insist most strenuously that legislative history is inappropriate for judges to consider when interpreting statutory text, and who are most likely to question the line the Court has drawn between formal and informal agency action, between *Chevron* and *Mead.* Consider what the implications of the dissents in *Gonzales* and *Hamdan* might be for the status of presidential "interpretations" such as appear in signing statements (or OLC opinions) if they were challenged in court. *If* the President is the decider—*if* he is empowered to decide matters ostensibly committed to administrative agencies, *if* his views, as theirs, are entitled to *Chevron* deference, and *if* the dissents of the 2005 Term were to prevail, so that courts would defer to presidential interpretations even when not the product of any direct congressional empowerment—what would be the political consequences? Again, should Congress disagree with those views, it would have to transcend its own veto-gates and the President's veto to overcome them.

And the courts, thanks to *Chevron*, would regard these views as the President's business, not theirs. The EPA's understanding of the APA does not get *Chevron* deference. But if the President gets to decide what the Clean Air Act means—that is, if the President is entitled to control what the administrator says the statute means, if that is not an issue committed to the discretion of the administrator, exercised with reasons—now we have a single, and infinitely political, generalist actor handcuffing the courts in their oversight of the admin-

240 Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006).

istrative state. When the President announces in a signing statement how he understands a statute, we can know and accept that this is a political message to his government about what he would prefer. But can we accept that it creates a legal obligation on them and then, in effect, on the courts?

One argument that might be made in support of the strong unitary executive proposition[241] is that it constitutes an understandable and ultimately persuasive political response to the situation in which President Ronald Reagan and his Republican successors found themselves in relation to the career civil service—notoriously Democratic still, even after a quarter century of largely Republican presidencies.[242] Enhancing the claims of the "unitary executive," enforced by a White House staff whose politics it could largely control, was an obvious tactic against these entrenched actors holding different views. Memoranda of the time make plain the deliberateness with which a campaign to enhance the presidency was being undertaken.[243] The campaign may have had its roots as importantly in the wish to repair the institutional damage done to the presidency by Watergate and Vietnam, and arguably weak presidencies following, as in this pointed political agenda. And a number of elements of change that can be identified to the period—the creation of a Senior Civil Service more amenable to incentive and political control[244]; the institution of regulatory review for economic and other impacts[245]—offer enhanced coordination and influence without necessarily entailing substituted judgment.

The other side of this argument, again suggesting the place of knowledge and expertise (as well as politics) in ordinary administration, is that the professional civil service within any particular agency serves as an anchor against the influence of raw politics in the exercise of delegated responsibilities. This potential as a further check on the executive has been persuasively imagined by Professor Neal Kumar Katyal.[246] And the civil service would lie defenseless before an agency

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241 *See supra* note 8.

242 President Clinton, the exception, nonetheless built on the "strong presidency" line he inherited from Presidents Reagan and George H.W. Bush. *See generally* Kagan, *supra* note 3.

243 *See supra* note 9 and accompanying text.

244 Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

245 Executive Order 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2000), is the most prominent such requirement.

246 Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

head's understanding that she was obliged to accept a President's interpretation, and that it could be expected to prevail before the courts. Where would their advice have purchase? Central direction extending to the commanding of decisions congressionally placed within an agency and reflecting its unique responsibilities and expertise seems more than the simple rebalancing of an equation that had been permitted to decay into an inappropriately weak chief executive.[247] Given the extent to which the authority to create law has in fact been placed in executive agency hands, it appears rather as a threat to the engine of practical checks and balances that, for more than two centuries, has helped keep American government on a democratic track.

C. *The President as Decider on Issues of Priority*

Perhaps a stronger case for the President as "the decider" in ordinary administration arises in contexts where we do not expect judicial review, a developed record for administrative action, relatively formal administrative process, or FOIA transparency. Developing the agenda for regulation—deciding what rulemakings will be given effort during the coming year—is readily associated with programmatic considerations that do seem closely linked to a President's election. It can reflect a centralized perspective on how government effort should best be allocated, overall, that no one regulatory agency can be expected to attain, and for which the President, as a general matter, can expect to be held responsible. The presumptive ordinary unreviewability of agency decisions whether to act, on analogy to prosecutorial functions that are explicitly characterized as executive matters,[248] similarly suggests presidential control. So there is a good deal to be said for a "regulatory plan" approach—whether or not it embodies the particular elements of Executive Order 13,422.[249] Given the absence of distinguishing procedures, the connection of agency priorities as a general matter to the President's program, and the ordinary opacity even of agency judgments about such matters, here one might find considerably greater room for the presumption of directorial authority for which Dean Kagan and others argue.

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247 *See* John Yoo, Op-Ed., *How the Presidency Regained Its Balance*, N.Y. TIMES, Sept. 17, 2006, § 4 (Week in Review) at 15.

248 Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'").

249 *See supra* notes 22–27 and accompanying text.

That order, as noted, was adopted well after this essay entered the editorial process. Full analysis of these issues would require many pages, and one can imagine one's reader's patience already taxed. But it seems possible at least to suggest that this case, if stronger, is not conclusive. Its predecessor orders invoked a rhetoric of coordination and persuasion—discussions of the regulatory plan were to be held centrally, after interagency coordination, and the orders were indirect about claims of command power both in their language and in what can be known about their implementation. OIRA's attention, and the attention of other elements in the White House, has predominantly been retrospective.[250] As remarked above, their principal benefit may well have been enhancement of agency heads' control of their staff, by creating an annual need to discuss and rationalize regulatory work planned for future effort.[251] In putting together a draft regulatory agenda, as in developing an annual budget, the agency head would be required to confront at an early stage competing views about priorities for her agency and to rationalize them.[252] President Bush's Executive Order 13,422, as described in detail above,[253] directly asserts command control, inside the agency, but in a "presidential appointee" who is no longer required to "report to [an] agency head" who no longer must "personally" sign the plan. This no longer seems a coordinating enterprise. One can conceive few benefits flowing to agency heads from their effective removal from hierarchical control, or the power conferred on the RPO to block rulemaking efforts. It is also striking that the order asserts an authority in respect of the regulatory plan—that agencies may not lawfully engage in rulemaking not approved for inclusion on the plan—that Congress has withheld. Opinions generally favoring executive authority have been quite careful to differentiate between case-by-case prioritization, and an enforcement judgment so strong as to amount to general refusal to execute a valid statute.[254]

Moreover, even when one moves to case-by-case prioritization, the very fact of the granular nature of such decisionmaking, in a government of immense breadth and scope, argues for subordination of direct control from the very top. Such, recall, was Attorney General

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250 *See* Bressman & Vandenbergh, *supra* note 5, at 55–59, 95–96.

251 *See supra* note 249 and accompanying text.

252 *See* Christopher DeMuth, *Memorandum to the Cabinet Council on Domestic Affairs*, *reprinted in* 3 INSIDE THE ADMINISTRATION, No. 3, at 7 (Feb. 10, 1984).

253 *Supra* Part III.B.

254 *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 832–33 & n.4 (1985); Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 & n.* (1983) (Rehnquist, J., concurring in part and dissenting in part).

Taney's judgment in much less complicated times.[255] One remembers Richard Nixon's "enemies list" of tax audit subjects, which became prominent in considering his impeachment; in most developed legal systems, prosecution is a professional calling, and—as President Bush appears to be learning as we edit this essay—its political control is a scandal, not a central pillar of constitutional arrangements. When Congress places the award of research contracts deep inside a government department, to be made under standards suggesting appropriate concerns with scientific worth and integrity, it is easy to understand the President's role in assuring the "faithful execution" of the laws as being to see to it that they are made following rigorous analyses of prospective scientific worth. It follows that the President's role excludes any interference by him or his immediate assistants to secure favorable consideration of friends, or disapproval of projects he finds politically unattractive. So too for the award of contracts, and the myriad of other judgments daily made by government bureaucrats operating under laws that presume that all is *not* politics, that there is a positive role for law.

Conclusion

Our Constitution explicitly gives us a unitary head of state, but it leaves the framework of government almost completely to congressional design. If its text chooses between President as overseer of the resulting assemblage, and President as necessarily entitled "decider," the implicit message is that of oversight, not decision. Congress's arrangements of government are a part of the law that the President is to assure will "be faithfully executed," and the Constitution's text anticipates that those arrangements will place "duties" elsewhere in the executive branch, which Congress is given wide scope to define. The size and ambition of contemporary government, in a country dedicated to the rule of law and resolute to defend itself against unchecked individual power, point in the same direction. Congress can, to be sure, give the President decisional authority, and it has sometimes done so. In limited contexts—foreign relations, military affairs, coordination of arguably conflicting mandates—the argument for inherent presidential decisional authority is stronger. But in the ordinary world of domestic administration, where Congress has delegated responsibilities to a particular governmental actor it has created, that

255 *See supra* note 47 and accompanying text.

delegation is a part of the law whose faithful execution the President is to assure.[256] Oversight, and not decision, is his responsibility.

256 Compare the following from President Bush's signing statement on the Postal Accountability and Enhancement Act of 2006, Pub. L. No. 109-435, 120 Stat. 3198, reacting to a statutory provision explicitly requiring a search warrant to open domestic first class mail:

> The executive branch shall construe subsection 404(c) of title 39, as enacted by subsection 1010(e) of the Act, which provides for opening of an item of a class of mail otherwise sealed against inspection, in a manner consistent, to the maximum extent permissible, with the need to conduct searches in exigent circumstances, such as to protect human life and safety against hazardous materials, and the need for physical searches specifically authorized by law for foreign intelligence collection.

Statement on Signing the Postal Accountability and Enhancement Act, 42 WEEKLY COMP. PRES. DOC. 2196, 2196 (Dec. 20, 2006).