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OVERSEER, OR 'THE DECIDER'? THE PRESIDENT IN ADMINISTRATIVE LAW

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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.”

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 that work. But is it the same for the President? When Congress confers authority on the Environmental Protection Agency to regulate various forms of pollution, on the Occupational Safety and Health Administration to regulate workplace safety, on the Food & Drug Administration to regulate the safety of food, drugs and medical devices, etc., etc., is it in legal contemplation giving the President the authority to decide these matters, or only to oversee them? One might think this a fairly elementary question, yet it is one that has divided Attorneys General from the beginning of the Republic and that divides scholars still. Conversations with many scholars over the years, and in the course of writing this

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1 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 Profs. Trevor Morrison and Kevin Stack for their helpful comments.

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

3 Compare Attorney General Wirt’s advice to President Monroe (his 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 not be taking care that the laws were faithfully executed, but he would be violating them himself,” 1 Op. A.G. 624-625 (1823)), with Attorney General Cushing’s advice to President Buchanan (“no Head of Department can lawfully perform an official act against the will of the President,” since 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 Departments, not the President, and “may be performed by its Head, without the special direction or appearance of the President.” 7 Op. A.G. 453, 469-70 (1855)). The opinions, with helpful commentary, may be found in H. Jefferson Powell, THE CONSTITUTION AND THE ATTORNEYS GENERAL(1999); the story is also told in Harold H. Bruff, BALANCE OF FORCES: SEPARATION OF POWERS IN THE ADMINISTRATIVE STATE 456-59 (2006).

4 Constitution confers this authority: e.g., Steven Calabresi & Saikrishna Prakash, The President’s Power to Execute the Laws, 104 Yale L. J. 541 (1994); Christopher S. Yoo, Steven G. Calabresi, and Anthony Colangelo, The (continued...)
essay, have been marked with confusion over the difference between oversight and performance. In a recent, encyclopedic study of separation of powers, Harold Bruff, long a leading scholar of the field, reveals the debates without seeking clearly to resolve them; Lisa Bressman and Michael Vandenbergh, in a ground-breaking account of the EPA-White House interface from the perspective of EPA political appointees (both Republican and Democrat), refer repeatedly to “presidential control” without being explicit whether their EPA correspondents viewed what they heard as political guidance (however emphatic) or binding instructions. Does it deny the unitary characteristic 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 whom that authority is statutorily conferred?

Madison and Hamilton, writing about federalism and the judiciary respectively in the Federalist Papers, remarked in striking similar terms on their expectations that the course of events would shape answers to questions a brief text could not determine.

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

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4 (...continued)

Unitary Executive in the Modern Era, 1945-2004, 90 Iowa L. Rev. 601 (2005); Constitution does not confer this authority, but it should be presumed Congress intends it, given the realities of modern administration: e.g., Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245 (2001); Laurence Lessig & Cass Sunstein, the President and the Administration, 94 Colum. L. Rev. 1 (1994); the President, unless directly authorized, is only an overseer: e.g., Kevin M. Stack, The President’s Statutory Powers to Administer the Laws, 106 Colum. L. Rev. 263 (2006); Peter L. Strauss, Presidential Rulemaking, 72 Chi.-Kent L. Rev. 965 (1997); Cynthia R. Farina, The Consent of the Governed: Against Simple Rules for a Complex World, 72 Chi-Kent L. Rev. 987 (1997).

5 N. 3 above.


adjudications.⁸

‘Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE.⁹

One could have said with confidence that the course of history over our nation’s first two centuries had produced an understanding of the President’s role, in relation to ordinary administration, as overseer and not decider. The last quarter century has seen an unmistakable trend, however, to a stronger White House role – corresponding in part to intellectual trends highlighting the roles of politics over those of “law” or “expertise” in relation to administrative work, in part to the challenges of an increasingly large and important administrative rulemaking apparatus, and in part to a self-conscious political agenda to “return” strength to a presidency weakened by Watergate and political reactions to the war in Viet Nam.¹⁰

The trend would be enough to warrant making this question the subject of this first Foreword to the planned annual Administrative Law number of this law review. Recent developments give it added force. Two Supreme Court decisions essentially bracketing the Term just ended address the legality of presidential decision, one directly and one by strong implication. In Hamdan v. Rumsfeld,¹¹ decided on the final day of 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 non-citizen detainees, operating procedurally and substantively outside the frameworks established by the Uniform Code of Military Justice 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 it was required to assess 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

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⁸ The Federalist No. 37 (Madison)[6th (long) para].

⁹ The Federalist No. 82 (Hamilton) [1st para.]

¹⁰ 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, [cite]


¹³ 126 S. Ct. 904 (2006). The reader is entitled to know that I appeared as an amicus curiae supporting Oregon in this case.
President – interpreting the Controlled Substances Act 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. 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.

Like Hamdan, the current debates often turn around presidential initiatives associated with the “war on terror,” or, more narrowly, the use of military forces in, and treatment of detainees from, Afghanistan and Iraq. Evoking the President’s authority as Commander in Chief and the unusual breadth of his authority over the nation’s foreign affairs, these issues are not my concern here. But the debates also include the recent contretemps in the newspapers, the blogosphere, and even the American Bar Association, over presidential use of signing statements rather than vetoes to express concerns and understandings about legislation Congress had presented for approval. 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,” departs from the marvelous system of checks and balances that has so long kept American government on the rails. Our last 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; and their cabinet officials sometimes speak as if they were following binding presidential orders, rather than exercising their own statutory powers. 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

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16 In the foreign relations and military command, settings we are not accustomed to thinking that the exercise of executive authority results in actions subject to judicial review; rather, it constitutes the exercise of discretion in its largest sense, essentially political questions and uncheckd by law. See TAN 35 below.


18 News stories quoting Sec. Thompson of HHS, early in the first Bush administration.
contemporary circumstances of government support them in the absence of explicit congressional instructions to the contrary; Professors Jerry Mashaw and Kevin Stack, exploring Congress’s early practice and subsequent patterns, raise considerable doubts whether any 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 power in the President, and the Philadelphia convention famously and emphatically rejected any idea of a collegial executive. From the strongest perspective on what it means to have a unitary chief executive, when Congress assigns a matter for decision to a constituent element of the executive branch, it does so only for convenience – as a matter of constitutional power, the President has the right to decide it. On the other hand, the Constitution twice refers to “duties” or “power” assigned to other officers; 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 those assigned duties); and it concludes that he is responsible to see to it that the laws “be faithfully executed” – i.e. as if by others. From this perspective, as some (but not all) Attorneys General have concluded, Congress’s creation of duties in others creates in the President a constitutional obligation to oversee and respect the independent exercise of those duties. On this view, 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, he must act within a statutory framework that assigns actual decision-making about particular issues affecting air quality to the EPA – subject to his (inevitably political) oversight.

19 Op. cit. n. 4 above.


22 “The Executive power shall be vested in a President of the United States ...,” U.S. Const. Art. II, §1, cl. 1.


24 “... [H]e 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,” U. S. Const. Art. II., § 2, cl. 1 (emphasis added).

25 Id., § 3, cl. 3 (emphasis added).

26 E.g., Attorney General Wirt, n. 3 above.
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 the others 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; and the subordinate’s understanding which of these is owed, and what is her personal responsibility, has implications for one’s hopes for a government under laws, that motivate this writing. I cannot improve on the characterization of the problem given half a century ago by Prof. 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 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."27

As in earlier scholarship,28 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 President’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, the President; and they avoid the executive tyranny horn of Corwin’s dilemma.

As, first, 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. The Princess of Orange wanted the return to her of


jewels stolen from her, that the United States was seeking to forfeit to itself in a customs action. As Attorney General, Taney advised President Andrew Jackson that he could lawfully direct a United States Attorney to discontinue an existing forfeiture action, but acknowledged as well that “The district attorney might refuse the President’s order; and if he did refuse, the prosecution, while he remained in office, would go on.”29 That is, the President would assure the faithful execution of the laws through removal of one who failed to follow his directions, rather than substitution of his own decision.

Shortly the issue recurred in more dramatic form. Jackson had successfully vetoed a bill that would have reauthorized the Bank of the United States; subsequently elected to his second term 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. 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.”30 When Secretary McLane decided against removing the funds, Jackson removed him and appointed William Duane as his successor. Duane also proved resistant, responding to Jackson’s persistent arguments that “In this particular case, congress confers a discretionary power, and requires reasons if I exercise it. Surely this contemplates responsibility on my part.”31 In September of 1833, when after lengthy and fervent correspondence between them Duane declined to remove the funds, Jackson removed him and appointed Taney Acting Secretary; almost immediately, Taney made the requested order.32 The result was a political

29 The Jewels of the Princess of Orange, 2 Op. A.G. 482, 489 (1831). See also n. 31 infra.

30 3 Stat. 266, §16 (April 10, 1816).


32 White’s account reveals in detail Jackson’s acceptance of the proposition that his control lay over the office-holder and was not a power of decision. Id. at 35-39. The same passages refer to the near-contemporaneous decision of the Supreme Court in Kendall v. United States ex rel. Stokes, 37 U.S. 524 (1838), in which the Court would remark

The 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.

(continued...)
furore: the Senate passed a Resolution of Censure and subsequently rejected Taney’s nomination as Secretary — the first time in American history it had rejected a presidential nomination to the cabinet. When in 1835 President Jackson nominated Taney to a seat as Associate Justice of the Supreme Court, that nomination, too, failed. Changes in Senate membership permitted his renomination and confirmation as Chief Justice months later, in 1836, and the eventual expungement of the Resolution of Censure.\textsuperscript{33} The President thus did prevail, but not without cost.

The main point to note here is how recognition that the discretion involved lay with the Secretary of the Treasury, not the President, gave the events high political visibility and animated the machinery of checks and balances.\textsuperscript{34} In more recent times, 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 it is in the detritus of this event, it appears, that a campaign to restrengthen the presidency has taken root.

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 \textit{Youngstown Sheet & Tube v. Sawyer} (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.”\textsuperscript{35} Chief Justice Marshall’s famous \textit{Marbury v. Madison} distinction between discretionary and non-discretionary acts of government — characterizing an official who performed

\textsuperscript{32} (...continued)

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. As Attorney General, he had issued 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. 2 Opinions of the Attorney General 507, 509 (April 5, 1832). And see White at 167-69.

\textsuperscript{33} White at 44, 110.

\textsuperscript{34} In their vigorous account of the same events, in the first installment of their four-part series, see n. 101 infra, Christopher Yoo and Steven Calabresi, The Unitary Executive During the First Half Century, 47 Case W. Res. L. Rev. 1451, 1537 ff. (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. Compare White, n. 30 above.

\textsuperscript{35} 343 U.S. 579, 587 (1952).
the former as “the mere organ by whom [the will of the President] is communicated”\textsuperscript{36} – made clear that he meant discretion in its largest sense, as those cases in which there is no law to apply and which “can never be examinable by the courts”; he was not addressing the mixed questions of law and politics that are the everyday focus of administrative law and of judicial review for “abuse of discretion” under the APA. Chief Justice (and former President) Taft, writing for a narrow majority in \textit{Myers v. United States}, included this in his lengthy opinion:

\begin{quote}

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.\textsuperscript{37}

\end{quote}

Although this 5-4 decision, written by a former President, is often taken as a particularly strong evocation of the unitary presidency, note that both the context and this language, as it may properly be read,\textsuperscript{38} 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 would be inappropriate. It would soon enough retreat in confusion from the apparent breadth of that

\textsuperscript{36}Marbury v. Madison, 5 U.S. 137, 166 (1803). The full passage makes the limited target of Marshall’s invocation of “discretion” the more evident:

\begin{quote}

[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 act 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 rights of others.

... [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. ...

The province of the courts is, solely, to decide on the rights of individuals, not to inquire 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.

\end{quote}

Id. At 166-170.

\textsuperscript{37}272 U.S. 52, 135 (1926).

\textsuperscript{38}[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.
holding,\textsuperscript{39} and the opinion today is understood to turn on Congress’s effort to reserve participation in an act of executive oversight, the removal, rather than on any proposition about the scope of presidential authority simpliciter.\textsuperscript{40}

The issue was more directly presented to the Ninth Circuit in Portland Audubon Soc. v. Endangered Species Committee,\textsuperscript{41} in which the court confronted allegations of presidential effort covertly to instruct a body consisting of three cabinet secretaries, two administrators of important federal agencies (one free-standing and one intra-departmental), the Chair of his Council of Economic Advisors and state representatives he had appointed how they should vote on a desired exemption from the Endangered Species Act. Virtually all these officials served him at will – and hence could have been removed from office at any time, for any reason – but the particular decision they were taking was one Congress had said should be taken “on the record.” That was enough in the court’s view to preclude his \textit{ex parte} intervention. 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 \textit{sub rosa} intervention.\textsuperscript{42}

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 \textit{Portland Audubon}) the cases do not require that those complaining of presidential intervention have \textit{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 \textit{here} and specified that decision should be taken by \textit{this} official following \textit{these} procedures, within \textit{these} legal constraints. It is this committee Congress has authorized to act, not the Department of Agriculture that otherwise controls 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.\textsuperscript{43}

\textsuperscript{39} Humphreys’ Executor v. United States, 295 U.S. 602 (1935).

\textsuperscript{40} Morrison v. Olson, 487 U.S. 654 (1988).

\textsuperscript{41} 984 F.2d 1534 (1993).

\textsuperscript{42} To similar effect, United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). 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 Thomas Merrill, The Accardi Principle, 74 Geo. Wash. L. Rev. 569 (2006).

\textsuperscript{43} E.g., "Congress has been willing to delegate its legislative powers broadly - and courts have upheld such (continued..."
Why aren’t these placements, procedures, and substantive standards for decision always part of the laws the President is charged to see will “be faithfully executed”? Since 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 the agency actors are the “mere organ by whom [the will of the President] is communicated”?

That politics alone does not suffice to support decisions subject to judicial review is the lesson of cases involving documented congressional, rather than presidential, interference in agency decisionmaking. Thus, in *Hazardous Waste Treatment Council v. EPA*, the EPA had explained a rulemaking choice, that was concededly within EPA’s authority to have chosen, as the choice that “best responds” to congressional comments it had received. 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’ ... ... 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.’ *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.” 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 the most prominent DC Circuit discussion of presidential “prodding.”

To raise this question is to doubt neither that procedural requirements will sometimes permit

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43 (...)continued

degregation - because there is court review to assure that the agency exercises the delegated power within statutory limits." *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C.Cir.1976) (Leventhal, J., concurring), cert. denied, 426 U.S. 941 (1976).

44 886 F. 2d 355 (D.C. Cir. 1989).

45 At 365.

46 At 375. To similar effect, see *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971).

private presidential consultations (as they don’t in on-the-record proceedings), nor that in such cases “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.”

Rather, the question is where legal responsibility for 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 – “In this particular case, congress confers a discretionary power, and requires reasons if I exercise it. Surely this contemplates responsibility on my part”? 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, and in the difference one may find an ineffable but 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. At issue is finding the constraint of law operating on politics; and in the argument for a decisional presidency one finds a strong move in the “political” direction. The congressionally appointed 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, 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

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49 See text at n. 30 above.

50 In the age-old metaphor; “a government of laws and not of men and women” today.

51 See, e.g. n. 33 above.
perverted to political ends for the advantage of the administration in power.\footnote{Corwin, n. 26 above.}

Professor Todd Rakoff reinforces these doubts by connecting them to the residual force of the delegation doctrine. He reminds us of the important political differences between delegations to an agency in oversight relationships with President and Congress and courts, and delegations to the President himself. Although generally authorized to act in a variety of modes (quasi-legislative, quasi-executive, 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; it is too hazardous to render him also omni-powered. “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.”\footnote{The Shape of Law in the American Administrative State, 11 Tel Aviv U. Studies in Law 9, 23 (1992).}

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 what bluffs are worthy of being called – with an error in that estimation producing a sudden loss of position and income. And yet Secretary Duane’s case was hardly the last to be noted in the literature;\footnote{E.g., the following from Robert V. Percival, Presidential Management of the Administrative State: the Not-so-unitary Executive, 51 Duke L.J. 963, 994 (2001): “President George H. W. Bush became directly involved in a few regulatory decisions, including a dispute over Food and Drug Administration (FDA) regulations to implement the (continued...)} and knowledge of the relative position and stakes – as compared 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.” Knowing who is actually speaking “for the President,” if indeed anyone is, can be challenging indeed.

I. What is not at issue here – President as Overseer

It may be appropriate to begin with a brief review of presidential authority that is not at issue here, that readily fits the “oversight” mold and/or that may have been explicitly conferred by Congress. Extended discussion’s can be found elsewhere in the literature, as in Bruff’s fine recent book.

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

Removals: In the absence of 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. 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; all these 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,“\textsuperscript{58} one cannot say that Congress is unable to limit the removal of Heads of Departments to “cause,”\textsuperscript{59} but Congress perhaps fortunately has not tested the limits of this authority in respect of cabinet officials like the Secretary of State, who frequently must serve as the “mere organ” by which presidential will is expressed, outside the dimensions of the administrative state.\textsuperscript{60} Its closest approach came in the setting of the Independent Counsel,\textsuperscript{61} where a decent historical case could be made for the legitimacy of vesting appointment authority and disciplinary controls in the courts\textsuperscript{62} and prior precedent reached a similar result respecting a Department of Justice regulation.\textsuperscript{63} If the President or a cabinet official can create law constraining the executive branch at its highest levels while it remains effective, it is hard to imagine why the body that constitutionally must delegate such authority to the executive branch cannot. What might constitute “cause” remains unsettled, perhaps fortunately so,\textsuperscript{64} but is clearly linked to the constitutional necessity of effective presidential oversight.\textsuperscript{65}

\textit{Coordination:} The Constitution in terms recognizes the President’s right to consult with those

\textsuperscript{58} Ibid.

\textsuperscript{59} Humphrey’s Executor v. United States, 295 U.S. 602 (1935).

\textsuperscript{60} See Bowsher v. Synar, 478 U.S. 714, 762 (1986)(Justice White 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.”)

\textsuperscript{61} Morrison, n. 39 above; see also Charles Tiefer, The Constitutionality of Independent Officers as Checks on Abuses of Executive Power, 63 B.U. L. Rev. 59 (1983).


\textsuperscript{64} Strauss, n.72 below.

\textsuperscript{65} Morrison, n. 39 above. That history might have persuaded one that proper application of this test should have produced a different result in \textit{Morrison}, as Justice Scalia argued so forcefully in his dissent from that decision, should not obscure its holding that the possibility of effective oversight is the proper constitutional test.
who exercise the legal authority Congress delegates in establishing government agencies, although its terms (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”\textsuperscript{66}) do not state a right to command them. 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. And it has regularly appropriated significant sums for White House offices as well as the government agencies directly responsible for actions affecting the public.

The President, additionally, has by executive order or directives issued through his Office of Management and Budget (OMB) – the principal though hardly the only instrument of his coordinating activities\textsuperscript{67} – created 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. 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.

\textit{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 depend 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 itself creates space for agency heads to pursue their own responsibilities. For those who appointments are confirmed by the Senate – those most responsible for an agency’s conduct of business – political obligations to the Senate, even promises made, may in themselves 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

\textsuperscript{66} Art. II, Sec. 2, cl. 1.

\textsuperscript{67} Bressman & Vandenberg, n. above.
politics? When is the President entitled to decide? What is he entitled not merely to supervise and seek to reason about, but to control?

II. Staking out the President’s Position – Signing Statements and Other Presidential Initiatives

Presidential assertions of controlling authority come in a variety of forms – Executive Orders such as established the Federal Legal Council or the obligation of economic impact analysis under OIRA supervision, OMB circulars requiring pre-clearance 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. The increasing reach of all these assertions marks the trend underlying the present paper. At the present moment, the most hotly disputed forum for such claims are 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.

Professors Curtis Bradley and Eric Posner [will] have published a careful empirical study of these signing statements in the Winter issue of Constitutional Commentary, that makes clear both that they 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

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69 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, _Fed. Reg._ (__, 198) to replace President Carter’s more limited Executive Order 12044, _Fed. Reg._ (__, 197); it was subsequently strengthened by President Clinton in _Executive Order 12, 866, 58 Fed. Reg. 51,735_ (Sept. 30, 1993), and slightly amended by President George W. Bush, _Executive Order 13258, 67 Fed. Reg. 9385_ (Sept. 26, 2002).


71 Presidential Signing Statements and Executive Power (draft of September 28, 2006, on file with the author).

72 On October 9, 2006, Christopher S. Kelley – a political scientist they cite who has given much of his career to observing the use of signing statements, see, e.g., id. at nn. 15, 54, 59 – reported that President Bush had passed the 1000 mark in statutory sections challenged with his signing statement concerning the “Department of Homeland Security Appropriations Act, 2007,” H.R. 4451, released Oct. 4, 2006. See (continued...)

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claims about the breadth of executive authority under the Constitution ("the unitary presidency"). The principal argument of their analysis, hard to disagree with in general, is that in and of themselves signing statements are unexceptionable. The statements offer political and even legal advantages in making known presidential views that he could readily express by other, perhaps less transparent means. The legitimate questions about them largely concern not their existence, but their legal force, if any, and the 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.  

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.”

Appointments and removals 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:

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.77

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,78 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, Sec. 2, cl. 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,79 the Supreme Court has firmly rejected on constitutional grounds congressional efforts to participate in the nomination of persons holding executive office—whether directly80 or by statutory designation that sharply constrains the President’s choices to those whom members might influence.81 They have rejected congressional participation in removals.82 They

76 (...continued) 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 are the expansive views of presidential authority discussed in text.

77 Art. I, §8, cl. 18.

78 E.g., Bruff, n. 3 above, Lessig & Sunstein, n. 30 above; Mashaw, n. 19 above, Stack, n. 20 above.

79 Art. I, §6, cl. 2; its implications and relation to the Court’s jurisprudence is well developed in Bruff, n. 3 above, at 393 ff.


have worried about constraints on the President’s seeking advice about appointments, 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. 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 be a licensed physician, the Solicitor General a person “learned in the law,” members of independent regulatory commissions balanced in their political party affiliations – 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.

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 lighthouses in Maine must be persons recommended or designated by certain Maine officials or organizations, and another 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” – “a broad group of the most knowledgeable and experienced practitioners in the field of international trade,” as a subsequent OLC memo characterized the matter. With these objections,


84 Freytag v. Commissioner, 501 U.S. 868 (1991); the apparent implications of the Court’s reasoning are withdrawn without explanation in n. ___ of Justice Blackmun’s opinion for the Court, 501 U.S. at ___.

85 See Myers v. United States, 272 U.S. 52, 128-29 (majority) and 265-74 (Brandeis, J., dissenting) (1926).


Presidents Reagan and George H.W. Bush also used signing statements to defend perceived infringements on their Appointments Clause authority. See, e.g., Statement by President George Bush upon Signing S. 2184, 28 Weekly Comp. (continued...)

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compare President Bush’s objection to a statutory provision, enacted in the wake of the Hurricane Katrina scandals, limiting appointments to the head of the Federal Emergency Management Administration to persons “who have—

(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.”

as unconstitutionally “rul[ing] out a large portion of those persons best qualified by experience and knowledge to fill the office.” Perhaps, as they speculate, this is merely a symptom of an inclination in the present Justice Department to thoughtless bureaucratic routine, but it suggests a view of the President’s illimitable authority that has currency in scholarly circles today.  

Recommendating legislation and providing Congress with requested information

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 consideration 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; 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

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89 (...continued)

of Pres. Doc. 507 (Mar. 23, 1992) (stating that provision that required that no more than three trustees to scholarship board be member of same party and that appointees have shown leadership and interest in environment and Native American affairs raises constitutional concerns and will be interpreted as precatory); Statement by President Reagan upon Signing H.R. 558, 23 Weekly Comp. of Pres. Doc. 842 (July 27, 1987) (stating that provision that could be read to require FEMA director to appoint individual nominated by one of six private organizations raises constitutional concerns and that President will interpret provision to mean that private organizations’ nominations are advisory).


93 Art. II, §3, cl. 1.
recommendations that might be made by the National Association of Manufacturers or the Sierra Club. None becomes legislative business without a congressional sponsor, and 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 – with its creation of a Bureau of Budget as a White House office, balanced by the simultaneous creation of Congress’s General Accounting Office (GAO)\(^\text{94}\) – that appropriations became a subject of coordinated presidential recommendation; previously, all those communications occurred between Congress and relevant departments. Recall too that since that time, as part of this general arrangement, GAO (i.e., at least arguably\(^\text{95}\) congressional) bureaucrats have continuously resided in government agencies, soliciting as well as investigating information from them.

Presidents have long used the Bureau of the Budget and its modern successor, the Office of Management and Budget, as coordinating bodies for all legislative proposals, not merely budgetary ones, 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 pre-clearance of testimony at congressional hearings and submissions in response to requests for information as well as legislative matters. 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 a legal right to resist statutory provisions seeking proposals and/or information he might not independently wish to generate – much less, 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 on that subject 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,”\(^\text{96}\) 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,


\(^{95}\) The matter was one of the confusions underlying Bowsher v. Synar, 478 U.S. 714 (1986).

\(^{96}\) Art. II, §2, cl. 1 (emphasis added).
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 assertion that the Constitution requires that he have exclusive authority – that only presidentially approved statements or recommendations may be made, in the face of statutes providing otherwise – is rather hard to find in the modest descriptions of presidential role to be found in Article II.

Note the limited nature of the argument. It assumes a statute calling upon an agency to submit information or proposals, as in the Homeland Security Act Appropriations legislation discussed in the following paragraphs. In the budget context, the Budget and Accounting Act\(^\text{97}\) gives the President a general claim to be the exclusive spokesperson to Congress (subject to the exceptions Congress occasionally makes for independent regulatory commissions; and even here the President is clearly entitled to be informed in advance of the agency’s submission, U.S. Const. Art. II Sec. 2, cl. 1). Absent congressional instruction, where the issue may be resolving policy questions of broad scope, the President’s claim to control as well as consultation is considerably stronger; one is no longer talking about “the Duties of their respective offices.”\(^\text{98}\) But 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. Still it may be useful to observe their spreading reach. In 1988, President Reagan wrote that “[T]he President enjoys plenary and exclusive authority to determine whether and when he should propose legislation to the Congress.”\(^\text{99}\) Three years later the first President Bush made a stronger and broader claim: “Article II, section 3 of the Constitution vests the President with exclusive authority to decide whether and when the executive branch should propose legislation.”\(^\text{100}\) Next, consider the example Profs. Bradley and Posner use from President Clinton’s signing statements:

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

\(^{97}\) N. 91 above.

\(^{98}\) Ibid. Cf. TAN 134 below.


\(^{100}\) Statement by President Bush upon Signing H.R. 3370, 27 Weekly Comp. of Pres. Doc. 1795 (Dec. 16, 1991). Thanks to Prof. 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.
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.\textsuperscript{101} 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.”\textsuperscript{102} Finally, compare with this a characteristic recent such statement from President Bush:

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.\textsuperscript{103}

Now a claim of right of approval is explicitly made, and a “unitary executive branch” explicitly referred to. As Professors Bradley and Posner remark, quoting leading exponents, “[t]he central tenets of the unitary executive theory 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 official’s exercises of discretionary power.’”\textsuperscript{104}

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\textsuperscript{102} Cf. Sullivan v. United States, 395 U.S. 169 (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 L & C P 107, 120 (2000).
\textsuperscript{103} Signing statement of October 4, 2006 (emphasis added).
\textsuperscript{104} At ___, quoting Christopher S. Yoo, Steven G. Calabresi & Anthony Colangelo, \textit{The Unitary Executive in the Modern Era, 1945-2001}, 90 IOWA L. REV. 601, 607 (2005)(emphasis added). They go on to explain 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.” ___ at n. 75. The most prominent academic treatment of President Clinton’s practice and understanding, Kagan, n. 67 above, grounds it in policy considerations that Congress (continued...)
\end{flushright}
**Directing outcomes, not merely effort**

The italicized language makes clear the breadth of the current claims to presidential authority. In directing officials what he wished them to do, even with the specificity Professor Kagan’s account\(^\text{105}\) revealed, 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. Professors Bradley and Posner hypothesize that because so strong a unitary executive “theory itself is quite controversial in academia, ... it is probably no coincidence that Clinton did not use the term itself.”\(^\text{106}\) In her analysis, Dean Kagan grounds President Clinton’s practice and understanding in policy considerations that Congress could alter if it chose, while arguing that Congress should be understood *presumptively* to have accepted presidential command.\(^\text{107}\) Consider, for example, two passages from his statement on signing H.R. 4635, the Fiscal Year 2001 Appropriations Legislation.\(^\text{108}\)

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.

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. 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.”\footnote{Ibid.} 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\footnote{That is, this is an official at least some of whose important duties might fall within the strong-discretion ambit evoked by Justice Marshall in Marbury v. Madison, n. 35 above. Compare Justice White’s dissent in Bowsher v. Synar, 478 U.S. 714, 760-62 (1986), 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, Art. I, § 8, 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. See, e.g., Humphrey's Executor v. United States, 295 U.S. 602 (1935 ... [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. ... [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.} 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.”\footnote{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.}

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.
III. Unitary Control of Statutory Interpretation?

A. The Authority of the Justice Department

Perhaps one place one could 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 opinions have? Here one instinct might be to try to distinguish between the authority to give opinions that are mandatory within the executive branch—those 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, Inc. v. Natural Resources Defense Council, Inc.*, 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 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 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 Office of Legal Counsel (advice) in a recent article, that there is little reason to repeat 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. Early Attorneys General disagreed as to whether their opinions were legally binding in any way on executive agencies. Many simply stated without much elaboration that an Attorney General’s opinion either may be disregarded by executive agencies or, conversely, must be accepted by them. The contrasting views of Attorneys General Wirt and Cushing, frequently the pair isolated in the literature, have already been referred to. Consider as well the views of Attorneys General Black:

The duty of the Attorney General is to advise, not to decide. A thing is not to be considered

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114 Id. at 711 ff.
117 Text at n. 3 above.
done 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 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 the 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.118

and Brewster:

[While 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 discretion of such Head of Department.119

Even Attorney General Cushing, 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,” acknowledged that they were advisory only.120 While governmental actors had almost uniformly followed Attorney General opinions, and had done so to promote uniformity 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.122

Congress might establish this effect by statute, as it has empowered the Attorney General (largely

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122 The quasi-judicial characterization is itself problematic, suggesting a professional objectivity in the Attorney General’s performance of function that is easily overcome by his loyalty and sense of obligation to a highly political client. See Pillard, n. 110 above 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; Nelson Lund, Rational Choice at the Office of Legal Counsel, 5 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).
acting through the Solicitor General) to control government appellate litigation. The provision respecting the Solicitor General’s authority is rather straightforward – the only controversy being whether statutes creating independent litigating authority for agencies, as for the typical independent regulatory commission, operate as an exception:

28 U.S.C. § 518. Conduct and argument of cases

(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. ...

§ 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. 123

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, less conclusively, that the taking of an appeal on these facts to this court represents a 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 arises again in a fresh case. That the SG 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, which stated that an Attorney General could delegate his opinion writing authority to a subordinate and that, if the AG approved the opinion, “such approval . . . shall give the opinion the same force and effect as belong to the opinions of the Attorney General.” 124 In 1893, noting this language,

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123 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 United States 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, for example, Peter L. Strauss, The Internal Relations of Government: Cautionary Tales from Inside the Black Box, 61 L & CP 155, 156-57, 167-68 (1998)(Assistant USA for the Southern District of New York commences litigation on behalf of “client” Brookhaven National Laboratory, despite the contrary wishes of the two cabinet departments and independent regulatory commission also directly concerned.)

124 Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870).
Attorney General Olney expressed the view that

Evidently ... 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 cannot be doubted that the administrative officers should regard them as law until withdrawn by the Attorney General or overruled by the courts ... 125

Yet this statutory language is considerably less direct, in dealing with the government’s solicitor, than one finds in respect of its barrister. And even this language has now disappeared. The modern successor to the 1870 Act does not contain the “same force and effect” language and (except for opinions rendered to the Department of Defense) characterizes the Attorney General’s views, whether transmitted to the President or to a cabinet secretary, only as “advice” or “opinion.” 126 And the Office of Legal Counsel obscures the issue by insisting up front that agencies they advise agree to accept their advice; otherwise they must act without it. In 200 years, Professor Pillard observes, the issue had not had to be resolved. 127

Perhaps the President could command agencies to accept OLC opinions by Executive Order. The likely candidate here is Executive Order 12,146, 128 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.” 129 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

126  28 U.S.C. §§ 509, 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 dictation 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 Secretary of the military department concerned may require advice, the Secretary of the military department shall send it to the Attorney General for disposition.

127 Pillard, n. 110 above, at 711 n. 108.
129 Id. §1-202.
to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere. No corresponding provisions address matters that are not in dispute between competing agencies. Unsurprisingly, perhaps, Attorney General Barr found certainty in these provisions only that … [T]he Attorney General’s opinions do bind the executive branch ...with respect to interagency disputes. This highlights another change from the early days of the Attorney General . . . many of the early Attorneys General [did not think their advice was binding].

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 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 accommodations can play in such circumstances. Take, for example, its resolution of a dispute involving arguably conflicting EPA and NRC authority over radioactive pollution emanating from NRC-licensed facilities. While principally resolving the issue as a matter of statutory interpretation – unanimously insisting in doing so on the necessity of consulting legislative

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131 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), returning 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. (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 it ultimately proposed and decided upon. 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 Environmental Protection Agency (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.

history, an approach that could hardly be imagined today – the Court carefully noted the President’s characterization of the Reorganization Plan by which the EPA had acquired authority, and an AEC-EPA memorandum of understanding subsequently published in the Federal Register, both strongly supporting its outcome. The President as “the Decider” – or at least as the preliminary and often enough in practice the final decider – seems an inevitable outcome. Congress will not clearly have established where authority lies; here one may recall the first two elements of Justice Robert Jackson’s justly admired tri-partite analysis of the relationship between presidential authority and congressional command in Youngstown Sheet & Tube:

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 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.

133 “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.”’ United States v. American Trucking Assns., 310 U.S. 534, 543-544 (1940) (footnotes omitted). See Cass v. United States, 417 U.S. 72, 77-79 (1974). See generally Murphy, Old Maxims Never Die: The ‘Plain-Meaning Rule’ and Statutory Interpretation in the ‘Modern’ Federal Courts, 75 Col. L. Rev. 1299 (1975). In this case, as we shall see, the legislative history sheds considerable light on the question before the Court.” 426 U.S. at .

134 The Nuclear Regulatory Commission succeeded to the regulatory responsibilities of the Atomic Energy Commission in 1975, turning what had previously been an AEC-EPA problem into an NRC-EPA problem.

135 Id. at 24 n. 20.

136 See Percival, n. 53 above, 51 Duke L. J. at 998-99.

137 343 U.S. at 634-38 (Jackson, J., concurring)(footnotes omitted).
Should the issue ever reach the courts, it would likely be decided – as in the cited case – as a matter of statutory interpretation, in which the presidential view would 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.” The central premise of *Chevron* is that deference is warranted precisely because a statute has explicitly or implicitly delegated to an agency a unique and specialized authority to render interpretations with force and effect of law. It was the EPA that unambiguously held the authority to use (or not) the “bubble” concept in administering the Clean Air Act, an authority that – at least in terms of statutory language – it shared with no other agency. When the President is allocating responsibilities as between the EPA and the AEC, in the face of statutes unclear as to their precise reach, he is acting outside this defined realm. As has in fact been their practice, 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 actors better able to understand the full range of considerations entailed, but not imagining this as a matter entrusted to those actors’ judgment.

Consistent congressional practice in relation to executive branch reorganization strengthens this sense. When Congress conferred reorganization authority on the President, as it often did in the year’s preceding the Supreme Court’s decision in *Chadha v. INS*, sweepingly disapproving the legislative veto, it was willing to do so only under conditions that assured it veto-proof control over the President’s exercise of that authority. Reorganization acts conferring broad power on the President to reshape executive government, subject to legislative approval, came to an end with the Supreme Court’s disapproval of the legislative veto. Congress promptly created a “fast-track” bill procedure for two-house approvals of presidential submissions of reorganization proposals, that

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139 Cf. United States v. Mead Corp., 533 U.S. 218, 229 (2001); Gonzales v. Oregon, 126 S. Ct. 904, 918-21 (2006) (noting that, when it is ambiguous whether act has given agency authority to render interpretations with force of law, the fact that an act conferred limited interpretive authority on more than one agency counsels against finding that one agency had such authority).

140 Train, n. 129 above.

141 Cite.

could not otherwise take effect. This is, in effect, the same regime.

Professor Pillard, in her extended discussion, develops at length the arguable differences between the roles of advocate (SG) and counsellor (OLC), while observing that politics and law may be somewhat intermixed for both offices -- perhaps more so for OLC -- and that such purchase as either office enjoys inside government as an objective legal analyst is basically dependent on its analysis of judicial doctrine. The acceptability of a role for OLC in fixing legal meaning is further compromised, she argues, by the often impaired transparency of its judgments and the absence of the kinds of external check supplied, for example, by the SG’s need to maintain a long-term relationship with the Court before which he so often appears. 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 conclude interpretive authority had been placed in executive hands, no reason other than politics to accord it deference.

B. Chevron deference for presidential interpretations?

Now suppose a case raising no question “which [agency] has jurisdiction to administer a particular program or to regulate a particular activity,” and one in which the 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.) Then 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 that designation is a part of at least the statutory law. If one takes Congress’s designation of, say, the EPA as its statutory decision about who should exercise the power it is creating, 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

\[143\] 5 U.S.C. §901 ff.
\[144\] See n. 110 above.
\[145\] At 704 ff., 730.
\[146\] At 713, 750.
\[147\] At 730.
at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Two questions then – 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 Sunstein and Lessig’s, 148 essays an affirmative answer to the first of these questions. Thus, it works to remove a presidential claim of decisional authority from Justice Jackson’s third category to his second – or perhaps even first. Acknowledging the weakness of the proposition that “his own constitutional powers minus any constitutional powers of Congress over the matter” in itself make him “the decider,” she urges us to imply a congressional delegation to him of decision authority from congressional silence, from the absence of an express provision.

Professor Kevin Stack, a younger scholar, has published his second analysis of the "statutory president," largely consistent with the positions taken here. 149 One striking contribution of this contribution to the literature is its 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 wish for that outcome on its part. This shows a technical difficulty with Dean Kagan’s argument with remarkable thoroughness: 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.” 150 This often-quoted phrase, 151 was an early explanation of a reason for judges to assign some weight in the balancing scales (one meaning of “deference,” if not Chevron’s) to agency interpretations of statutes even though, as the Court also said in one prominent decision relying on it, “The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function.” 152 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

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148 N. 4 above; see also Jack Goldsmith and John Manning, The President’s Completion Power, 115 Yale L. J. 2282 (2006).
149 Stack, n. 20 above.
150 Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315 (1933).
152 At 544.

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controversies, is exclusively a judicial function.\footnote{153} Congress has made agency decision subject to presidential override when it has wished to; and omitted that in other statutes passed in the same period, and in circumstances in which one can readily infer the basis for differential judgment. Dean Kagan’s suggested implication is thus wholly 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”\footnote{154} as well. These are given point by the signing statement controversy and last Term’s Supreme Court decisions in \textit{Gonzales}\footnote{155} and \textit{Hamdan},\footnote{156} that suggest that the present Court is within a vote of recognizing broad executive authority to create law without even the bother of public processes such 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 \textit{Chevron USA, Inc. v. Natural Resources Defense Council, Inc.}? Are views the President may express about statutory meaning in signing statements “law” for the officers of the executive branch; and, if so, may they claim \textit{Chevron} obedience from the courts, the lesser (but arguably significant) respect suggested by the Court’s subsequent decision, troublesome to some, in \textit{United States v. Mead Corp.}; 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 normally 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 \textit{Chevron} analysis by adding the weight of centralized political judgment to what may be implicit in congressional delegation. They note the opinion’s concluding passages indicating a reliance on the President’s political oversight role as one of the opinion’s rationales. The central passages of \textit{Chevron} for these purposes, occurring in the opinion’s peroration, are the following:

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 contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, \textbf{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 \textit{it is entirely appropriate for this political branch of the Government to make such policy choices} - resolving the competing interests which Congress itself either


\footnotetext{154}{Youngstown Sheet & Tube, 343 U.S. at 638 (Jackson, J. concurring).}

\footnotetext{155}{TAN n. 12 above.}

\footnotetext{156}{TAN n. 10 above.}
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." TVA v. Hill, 437 U.S. 153, 195 (1978).157

While, to be sure, these passages celebrate the political controls of the President, note how the emphasized portions 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 v. Madison.158 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,”159 acting under circumstances which “can never be examinable by the courts.” 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 mandate.160 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 Administrative Procedure Act. Were it otherwise, it would be hard indeed to understand the Court’s insistence, in the subsequently

158 N. 35 above.
159 Marbury v. Madison, 5 U.S. 137, 166 (1803); see n. 9 above.
decided *Whitman v. American Trucking Assns.*, 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.

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 make of congressional delegations 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 *INS v. 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. Imagine the 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 a single 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), in relation to a decision reached with the help

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163 In the Congressional Review Act, 5 U.S.C. §801 ff., Congress created an elaborate mechanism for generating and potentially enacting fast-track legislation disapproving any agency rule, 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 Democrat President would probably have supported and could have protected with his veto.
164 Or a five-member independent regulatory commission. There are, in my judgment, few important differences in this regard. See Strauss, n. 72 above.
165 Absent express statement, the Court has held, the APA does not apply to presidential decisionmaking. Franklin v. Massachusetts, 505 U.S. 788, 800-801 (1992); Dalton v. Specter, 511 U.S. 462 (1994). While the Freedom of Information Act is in terms applicable to “the Executive Office of the President,” 5 U.S.C. 552(f)(1), the relevant web page for FOIA access within the White House, [http://www.whitehouse.gov/government/eop-foia.html](http://www.whitehouse.gov/government/eop-foia.html), advises that

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 (continued...)

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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 were the voices 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 agency action. Given the overwhelming complexity and activity level of modern government, White House officials can attend 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 — a bolt of lightning hurled by one unelected operative, whose political valence is high, whose expertise is stretched and staff support limited, and whose exposure to public view and obligations of procedural regularity are low, against another somewhat more removed from electoral political concerns, supported by more extensive and expert staff, and operating 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.

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Note: (...continued)

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

Dean Kagan’s article, n. 67 above, makes clear that policy directives emerge from the Domestic Policy Council and the like, not OMB. In any event, relevant OMB (OIRA) documents would likely fall within the government’s “predecisional” privilege under 5 U.S.C. 552(b)(5).

Note: 166 Above.
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 Prof. 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.\footnote{The Fable of the Nationalist President and the Parochial Congress, 53 UCLA L. Rev. 1217 (2006).} Voters cannot credibly 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 last 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 \textit{Chevron} and \textit{Mead}. Consider what the implications of the dissents in \textit{Gonzales} and \textit{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 \textit{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 \textit{Chevron}, will regard these views as the President’s business not theirs. The EPA’s understanding of the APA does not get \textit{Chevron} deference. But if the President gets to decide what the statute 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 handcuffing the courts in their oversight of the administrative 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 what he would prefer. But can we accept that it creates a legal obligation on them and then, in effect, on the courts?\footnote{With thanks to my colleague Avery Katz for suggesting it.}

One argument that might be made in support of the strong “unitary executive” proposition is that it constitutes an understandable and ultimately persuasive political response to the situation in which Ronald Reagan and his Republican successors found themselves in relation to the career civil service – notoriously Democrat still, even after a quarter century of largely Republican
presidencies.\textsuperscript{169} 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.\textsuperscript{170} 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; the institution of regulatory review for economic and other impacts\textsuperscript{171} – 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.\textsuperscript{172} And the civil service would lie defenseless before an agency 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 expending 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.\textsuperscript{172} 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.

\textit{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,

\textsuperscript{\red{169}} President Clinton, the exception, nonetheless built on the “strong presidency” line he inherited from Presidents Reagan and George Herbert Walker Bush. E.g., Kagan, n. 67 above.

\textsuperscript{\red{170}} N. 9 above.

\textsuperscript{\red{171}} Executive Order 12,866, above,, 51 Fed. Reg. 51735 (Oct. 4, 1993), is the most prominent such requirement.

\textsuperscript{\red{172}} Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within, 115 Yale L. J. 2\textsuperscript{____} (2006).

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; and here one may note that the last two Presidents have been more emphatic about their authority, requiring the independent regulatory commissions to participate in the processes of Executive Order 12,866 for coordinating regulatory agendas although not requiring their participation in later stages of the economic impact analysis process. The presumptive ordinary unreviewability of agency decisions whether or not to act, on analogy to prosecutorial functions that are explicitly characterized as executive matters, similarly suggests presidential control. 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.

Remarkably in my judgment, the “regulatory agenda” aspect of Executive Order 12866, derived from an earlier order of President Reagan, appears to have received little attention from OIRA and has attracted few comments in the literature. Its 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. 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. While both Executive Orders suggest the possibility that elements of proposed agendas might be centrally disapproved (and hence never undertaken), one has encountered little indication that OIRA in facts so administers the order. Its attention, and the attention of other elements in the White House, has predominantly been retrospective.

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. Even here, however, it remains a question whether Congress has given instructions constrain that authority. 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.

176 E.O. 12498, __ Fed. Reg. ___.
177 See Christopher DeMuth, Memorandum to the Cabinet Council on Domestic Affairs, reprinted in 3 Inside the Administration, No. 3, p. 7 (Feb. 10, 1984).
178 Bressman & Vandenbergh, n. 7 above.
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 at the least for readiness to accept the subordination of direct control from the very top. Such, recall, was Attorney General Taney’s judgment in much less complicated times. One remembers Richard Nixon’s “enemies list” of tax audit subjects, that became prominent in considering his impeachment; in most developed legal systems, prosecution is a professional calling, and 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 that is how they are made – following rigorous analyses of prospective scientific worth – and as excluding 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 text anticipates that those arrangements will place “duties” elsewhere in the executive branch it defines. 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 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 responsibilities that Congress has delegated to a particular governmental actor it has created, that delegation is a part of the law whose faithful execution the President is to assure. Oversight, and not decision, is his responsibility.

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179 (...continued)


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