

ARTICLE
PRESIDENTIAL ADMINISTRATION

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PRESIDENTIAL ADMINISTRATION

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This Article examines a recent and dramatic transformation in the relationship between the President (and his staff) and the administrative state. Professor Kagan argues that President Clinton, building on a foundation President Reagan laid, increasingly made the regulatory activity of the executive branch agencies into an extension of his own policy and political agenda. He did so, primarily, by exercising directive authority over these agencies and asserting personal ownership of their regulatory activity — demonstrating in the process, against conventional wisdom, that enhanced presidential control over administration can serve pro-regulatory objectives. Professor Kagan offers a broad though not unlimited defense of the resulting system of “presidential administration” against legal and policy objections. This form of controlling agency action, she argues, comports with law because, contrary to the prevailing view, Congress generally should be understood to have left authority in the President to direct executive branch officials in the exercise of their delegated discretion. In addition, and relatedly, this form of controlling agency action advances core values of accountability and effectiveness, given notable features of the contemporary administrative and political systems. In comparison with other forms of control over administration, which continue to operate, presidential administration renders the bureaucratic sphere more transparent and responsive to the public and more capable of injecting energy as well as competence into the regulatory process. Professor Kagan concludes this Article by considering ways in which courts might promote presidential administration in its most beneficial form and scope, discussing in particular potential modifications to the nondelegation doctrine and two judicial review doctrines.

The history of the American administrative state is the history of competition among different entities for control of its policies. All three branches of government — the President, Congress, and Judiciary — have participated in this competition; so too have the external constituencies and internal staff of the agencies. Because of the stakes of the contest and the strength of the claims and weapons possessed by the contestants, no single entity has emerged finally triumphant, or is ever likely to do so. But at different times, one or another has come to the fore and asserted at least a comparative primacy in setting the direction and influencing the outcome of administrative process. In this time, that institution is the Presidency. We live today in an era of presidential administration.

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This assertion may seem jarring to those who have immersed themselves in the recent work of constitutional law scholars on the relationship between the Presidency and the administration. In this work, scholars have debated the constitutional basis for a fully “unitary executive” — otherwise put, a system in which all of what now counts as administrative activity is controllable by the President.¹ Because Congress has deprived (or, in the view of the “unitarians,” unconstitutionally purported to deprive) the President of such plenary authority in one obvious respect — by creating the so-called independent agencies, whose heads the President may not remove at will — the common ground of this debate is that the current system of administration is not strongly unitary. And because this much is common ground, the participants in the debate largely have failed to register, much less to comment on, the recent trend toward presidential control over administration generally.

For administrative law scholars, the claim of presidential administration may seem puzzling for a different reason. These scholars — concerned as they are with the actual practices of administrative control, as carried out in executive branch as well as independent agencies — may well have viewed the claim as arguable, though perhaps premature, if made ten or fifteen years ago, when President Reagan or Bush was in office. In the first month of his tenure, Reagan issued an executive order creating a mechanism by which the Office of Management and Budget (OMB), an entity within the Executive Office of the President (EOP), would review all major regulations of executive branch agencies. As Reagan’s and then Bush’s terms proceeded, and the antiregulatory effects of this system of review became increasingly evident, administrative law scholars took part in a sharp debate about its propriety.² With the advent of the Clinton Administration, however, this debate receded. Although President Clinton issued his own executive order providing for OMB review of regulations, the terms of this order struck most observers as moderating the aggressive approach to oversight of administration taken in the Reagan and Bush

¹ See generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41.

² See generally Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443 (1987); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way To Write a Regulation*, 99 HARV. L. REV. 1059 (1986); Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127 (1991); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986).

Presidencies.³ Perhaps as important, the Clinton OMB chose to implement the order in a way generally sympathetic to regulatory efforts. Because objections to OMB review in the Reagan and Bush era arose in large part from its deregulatory tendencies,⁴ this reversal of substantive direction contributed to the waning of interest in, and even recognition of, the involvement of the President and his EOP staff in administration.⁵

In fact, as this Article will show, presidential control of administration, in critical respects, expanded dramatically during the Clinton years, making the regulatory activity of the executive branch agencies more and more an extension of the President's own policy and political agenda. Faced for most of his time in office with a hostile Congress but eager to show progress on domestic issues, Clinton and his White House staff turned to the bureaucracy to achieve, to the extent it could, the full panoply of his domestic policy goals. Whether the subject was health care, welfare reform, tobacco, or guns, a self-conscious and central object of the White House was to devise, direct, and/or finally announce administrative actions — regulations, guidance, enforcement strategies, and reports — to showcase and advance presidential policies. In executing this strategy, the White House in large measure set the administrative agenda for key agencies, heavily influencing what they would (or would not) spend time on and what they would (or would not) generate as regulatory product.

The resulting policy orientation diverged substantially from that of the Reagan and Bush years, disproving the assumption some scholars

³ See, e.g., Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 17, 27 (1995) (stating that the Clinton order “insists, more than its predecessors, on agency autonomy” and “is significant mostly for the constraints it imposes on presidential oversight”); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 174 (1995) (stating that the regulatory review process established by the Clinton order is “more consultative, more accessible, and more deferential to policy making by individual agencies”).

⁴ See, e.g., Morrison, *supra* note 2, at 1065 (“The Administration has principally used the system of OMB review . . . to implement a myopic vision of the regulatory process which places the elimination of cost to industry above all other considerations.”); Percival, *supra* note 2, at 161 (“Regulatory review has made it more difficult for EPA to issue regulations . . . and Executive Office reviewers have consistently sought to make the regulations EPA does issue less stringent.”); *infra* pp. 2259–61.

⁵ A few influential scholars have bucked this trend and asserted the continuing significance of presidential involvement in administrative action. Peter Strauss, in a penetrating (and sharply critical) essay, has noted some of the ways, discussed in Part III, in which President Clinton asserted himself in the rulemaking process. See Peter L. Strauss, *Presidential Rulemaking*, 72 CHI-KENT L. REV. 965 (1997). And Richard Pildes and Cass Sunstein, although viewing the Clinton order on regulatory review as limiting the role of the President and EOP in administration, have concluded as well that “presidential oversight of the regulatory process [through OMB], though relatively new, has become a permanent part of the institutional design of American government.” Pildes & Sunstein, *supra* note 3, at 15.

have made, primarily on the basis of that earlier experience, that presidential supervision of administration inherently cuts in a deregulatory direction.⁶ Where once presidential supervision had worked to dilute or delay regulatory initiatives, it served in the Clinton years as part of a distinctly activist and pro-regulatory governing agenda. Where once presidential supervision had tended to favor politically conservative positions, it generally operated during the Clinton Presidency as a mechanism to achieve progressive goals. Or expressed in the terms most sympathetic to all these Presidents (and therefore most contestable), if Reagan and Bush showed that presidential supervision could thwart regulators intent on regulating no matter what the cost, Clinton showed that presidential supervision could jolt into action bureaucrats suffering from bureaucratic inertia in the face of unmet needs and challenges.

The methods of presidential supervision used in the Clinton years also differed substantially from what had come before, enabling the President to use more numerous and direct means of controlling administrative activity. The Clinton OMB continued to manage a regulatory review process, but with certain variations from the Reagan and Bush model: although the process provoked fewer confrontations with agencies, it in fact articulated a broader understanding of the President's appropriate authority to direct administrative actions. More important, the Clinton White House sandwiched regulatory review between two other methods for guiding and asserting ownership over administrative activity, used episodically by prior Presidents but elevated by Clinton to something near a governing philosophy. At the front end of the regulatory process, Clinton regularly issued formal directives to the heads of executive agencies to set the terms of administrative action and prevent deviation from his proposed course. And at the back end of the process (which could not but affect prior stages as well), Clinton personally appropriated significant regulatory action through communicative strategies that presented regulations and other agency work product, to both the public and other governmental actors, as his own, in a way new to the annals of administrative process.

⁶ Both defenders and critics of regulatory review, as practiced in the Reagan and Bush Administrations, have indulged this notion. See, e.g., DeMuth & Ginsburg, *supra* note 2, at 1082 (suggesting that presidential oversight "[i]n any administration" probably will tend toward checking regulation); McGarity, *supra* note 2, at 455 (positing that "over time and across presidential administrations, presidential intervention probably benefits regulatees more than the regulations' intended beneficiaries"). Cynthia Farina, in a more broad-based response to the unitarian position in constitutional law, also has made the claim. See Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 227 (1998) (arguing that the unitary executive thesis "is, at least potentially, a profoundly anti-regulatory phenomenon," which "threatens the legacy of the New Deal").

By the close of the Clinton Presidency, a distinctive form of administration and administrative control — call it “presidential administration” — had emerged, at the least augmenting, and in significant respects subordinating, other modes of bureaucratic governance. Triggered mainly by the re-emergence of divided government and built on the foundation of President Reagan’s regulatory review process, President Clinton’s articulation and use of directive authority over regulatory agencies, as well as his assertion of personal ownership over regulatory product, pervaded crucial areas of administration. Of course, presidential control did not show itself in all, or even all important, regulation; no President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity. And of course, presidential control co-existed and competed with other forms of influence and control over administration, exerted by other actors within and outside the government. At times, indeed, presidential administration surely seemed to Clinton and his staff, as it surely also had to their pioneering predecessors, more an aspiration than an achievement. Still, these officials put in place a set of mechanisms and practices, likely to survive into the future, that greatly enhanced presidential supervision of agency action, thus changing the very nature of administration (and, perhaps too, of the Presidency).

A key aspect of this system of administrative control raises serious legal questions. Accepted constitutional doctrine holds that Congress possesses broad, although not unlimited, power to structure the relationship between the President and the administration, even to the extent of creating independent agencies, whose heads have substantial protection from presidential removal.⁷ The conventional view further posits, although no court has ever decided the matter, that by virtue of this power, Congress can insulate discretionary decisions of even removable (that is, executive branch) officials from presidential dictation — and, indeed, that Congress has done so whenever (as is usual) it has delegated power not to the President, but to a specified agency official.⁸ Clinton’s use of what I call directive authority — his commands to executive branch officials to take specified actions within their

⁷ See *Morrison v. Olson*, 487 U.S. 654, 685–96 (1988); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 626–32 (1935).

⁸ See, e.g., Pildes & Sunstein, *supra* note 3, at 25 (noting that the generally accepted view is that “the President has no authority to make the decision himself, at least if Congress has conferred the relevant authority on an agency head”); Thomas O. Sargentich, *The Administrative Process in Crisis — The Example of Presidential Oversight of Agency Rulemaking*, 6 ADMIN. L.J. 710, 716 (1993) (stating that “the power to regulate remains where the statute places it: the agency head ultimately is to decide what to do”); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 649–50 (1984) (stating that “the agencies to which rulemaking is assigned,” rather than the President, possess “ultimate decisional authority”).

statutorily delegated discretion — ill-comports with this view. The unitarians would defend the practice simply by insisting, against the weight of precedent, that the Constitution provides the President with plenary authority over administration, so that Congress can no more interfere with the President's directive authority than with his removal power.⁹ I too defend the practice, but not on this basis. I accept Congress's broad power to insulate administrative activity from the President, but argue here that Congress has left more power in presidential hands than generally is recognized. More particularly, I argue that a statutory delegation to an executive agency official — although not to an independent agency head — usually should be read as allowing the President to assert directive authority, as Clinton did, over the exercise of the delegated discretion.

This rule of statutory construction is based in part (though only in part) on policy considerations relating to the desirability of presidential control over administration. Those considerations also should govern the questions how Congress and the President should act within the legal framework I posit: whether and when Congress should override the interpretive rule, and whether and when the President should exercise the power conferred under this rule in the absence of such congressional action. Policy arguments for presidential control over administration are surprisingly undeveloped in the legal literature, in large part because most of the unitarians, the strongest proponents of presidential power in public law scholarship, believe that all important questions surrounding this subject are settled by resort to originalist inquiry.¹⁰ My analysis focuses on the values of accountability and ef-

⁹ See, e.g., Calabresi & Prakash, *supra* note 1, at 599 (“[T]he President must be able to control subordinate executive officers through the mechanisms of removal, nullification, and execution of the discretion ‘assigned’ to them himself.”).

¹⁰ Articles that rely exclusively or principally on originalist claims to advance the unitarian position are legion. See, e.g., Calabresi & Prakash, *supra* note 1, at 570–99; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–68 (1992); David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 31–36; Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 314–17 (1989). Two notable pieces of scholarship, however, have argued for the unitary executive position by invoking broader constitutional values, in ways that partly overlap my policy discussion. See CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION — A FIRSTHAND ACCOUNT* 170 (1991) (asserting that the “structure,” “logic,” and “vision” of the Constitution support a strongly unitary executive); Lesig & Sunstein, *supra* note 1 (attacking the originalist argument for the unitary executive, but also offering an argument for that claim based on the translation of founding values to current conditions). In addition, a few defenses of the Reagan order on regulatory review — the initial incarnation of presidential administration — make policy arguments bearing on my discussion. See, e.g., Strauss & Sunstein, *supra* note 2, at 189–90. The more common policy position in the legal literature, advanced by those who attack the constitutional unitarian position or criticize the Reagan order, is anti-presidentialist in nature. See Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 993–1007 (1997); Farina,

fectiveness — the principal values that all models of administration must attempt to further. I aver that in comparison with other forms of control, the new presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism. I make these claims against the backdrop of notable features of contemporary American government, including the emergent relationship between the President and public, the rise of divided government, and the increased ossification of federal bureaucracies. I also consider objections to a system of presidential administration and note appropriate limitations on it.

These arguments, if valid, should play a role in the development of certain doctrines of administrative law. For the most part, administrative law has taken little notice of the President's increased participation in administrative process. Several lower courts have considered claims relating directly to the involvement of the President or his staff in regulatory proceedings.¹¹ And a few important Supreme Court opinions have suggested or appeared to assume views about the President's role in administrative decisionmaking.¹² But even as the courts self-consciously have addressed and tried to shape the participation of other institutions and groups in the regulatory process, they have given no sustained attention to the burgeoning participation of the President. Both proponents and opponents of presidential administration have reason to challenge this attitude of studied (or perhaps oblivious) neglect. I accordingly close this Article by considering how courts attuned to the benefits of presidential administration could adjust important doctrines of administrative law — the nondelegation doctrine and two judicial review doctrines — to promote this mechanism of bureaucratic control in its most beneficial form and appropriate scope.

The Article proceeds in five parts. Part I lays the groundwork by briefly describing non-presidential methods of control over the administrative state. Proceeding in part chronologically and in part topically, it addresses efforts to rely on Congress, substantive experts, interest

supra note 6, at 231–38; Flaherty, *supra* note 1, at 1816–28; McGarity, *supra* note 2, at 454–62; Percival, *supra* note 2, at 156–72; Shane, *supra* note 3, at 192–212.

¹¹ See, e.g., *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1539–48 (9th Cir. 1993); *New York v. Reilly*, 969 F.2d 1147, 1152 (D.C. Cir. 1992); *Sierra Club v. Costle*, 657 F.2d 298, 404–08 (D.C. Cir. 1981); *Env'tl. Def. Fund v. Thomas*, 627 F. Supp. 566, 568–72 (D.D.C. 1986).

¹² See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 58–59 (1983) (Rehnquist, J., concurring in part and dissenting in part). The Court, of course, also has addressed the extent of the President's constitutional power to appoint and remove administrative officers. See, e.g., *Morrison*, 487 U.S. at 685–96; *Bowsher v. Synar*, 478 U.S. 714, 721–34 (1986); *Humphrey's Executor*, 295 U.S. at 626–32; *Myers v. United States*, 272 U.S. 52, 135 (1926).

groups, and courts to produce appropriate administrative decisions. Part II recounts the emergence of increased presidential control over administration, focusing on the initiation of OMB oversight under President Reagan. Part III is the centerpiece of the Article in more than a numeric sense. It describes presidential administration in its most current — and I believe its near-term future — incarnation, considering the panoply of contexts in which and strategies by which President Clinton shaped both the content and the perception of administrative action. Part IV provides a mostly sympathetic view of both the legality and the wisdom of this emergent system of presidential control, especially in light of the current administrative and political context and in comparison with the alternatives described in Part I. Part V focuses on how courts should respond to these developments, suggesting ways in which legal doctrine can promote and improve the new practices of presidential administration.

I. NON-PRESIDENTIAL MECHANISMS OF ADMINISTRATIVE CONTROL

A by now standard history of the practice and theory of administrative process goes something as follows.¹³ At the dawn of the regulatory state, Congress controlled administrative action by legislating precisely and clearly; agencies, far from exercising any worrisome discretion, functioned as mere “transmission belt[s]” to carry out legislative directives.¹⁴ But as the administrative state grew and then the New Deal emerged, Congress routinely resorted to broad delegations, giving substantial, unfettered discretion to agency officials. With this change came a justifying theory, which stressed the need for professional administrators, applying a neutral and impartial expertise, to set themselves the direction and terms of regulation. As the years passed, however, faith in the objectivity of these administrators eroded, and in consequence, an array of interest groups received enhanced opportunities to influence agency conduct. Under the theory accompanying this new development, culminating in the 1960s and 1970s, the full and fair participation of these interests in agency processes would serve as the principal check on administrative discretion.

This narrative ends sometime around 1980, conveniently enough when mine begins. At that time, confidence in the interest group control model had declined in its turn, as the difficulty and costs of effec-

¹³ Variations on this account are found in MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 213–46 (1992); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); and Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

¹⁴ Stewart, *supra* note 13, at 1675.

tive interest representation became more clear and the very ideal of interest-dominated administration came into question.¹⁵ Yet again, then, administrative law faced its perennial question of how to ensure appropriate control of agency discretion — of who could be trusted to set the direction and influence the outcomes of administration. One understanding of the new presidential administration is that it represents simply the next stage in this chronology, filling neatly the vacuum created by the failure of the most recent claimant to rightful possession of administrative authority.

The real story, however, is more complicated. The three supposedly discrete chapters in the standard account in fact bleed into each other, as some of its authors readily acknowledge.¹⁶ Each kind of administrative control that this account highlights — congressional control, self-control (through bureaucratic experts), and interest group control — achieved its heyday at roughly the appointed time, but each also survives in some form today, well past its purported demise. Even though Congress, for example, abandoned its initial precise delegations, it attempted to control administrative action through alternative means; as bureaucratic experts and interest groups later asserted a similar role, they supplemented, perhaps subordinated, but never supplanted this congressional function. Similarly, presidential administration arose against the backdrop of, and now inevitably competes with, modern incarnations or vestiges of congressional, expert, and interest group control. To understand, much less evaluate, the former, it is therefore necessary to consider the latter, from both a descriptive and a normative standpoint. The review I offer here is necessarily cursory; I will revisit many of the issues it raises in Part IV, where I discuss whether presidential administration too greatly displaces these other, competing mechanisms to influence the exercise of administrative discretion.¹⁷

A final element in this preliminary discussion concerns the role of the courts in controlling administrative action. Although substantial, this role is now mostly indirect: the courts today do not so much exercise an independent check on agency action as they protect or promote (in various ways and to varying degrees) the ability of the other entities discussed here to perform that function. The last section of this Part reviews these judicial efforts — given constraints of space, in an

¹⁵ See MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 74–75 (1988). Stewart's seminal article criticizing the interest representation model signaled the decline, although ironically he viewed the model as not yet fully mature, see Stewart, *supra* note 13, at 1813.

¹⁶ See, e.g., Frug, *supra* note 13, at 1284 (stating that "the idea of historical development" he lays out should be taken "only as a rough guide").

¹⁷ See *infra* section IV.C, pp. 2346–64.

essentially ahistorical manner. This discussion forms the backdrop to Part V, where I consider the so far little used ways in which courts similarly might promote presidential control over administrative power.

A. Congressional Control

The rationale for strong congressional supervision of administrative action is straightforward. Congress is a democratically elected and accountable decisionmaking body, charged by the Constitution to make law for the nation. Congress, of course, must delegate certain tasks relating to the implementation of these laws to the administration. But administrative officials may exercise coercive powers only as authorized by and in conformity with legislative directives. In establishing mechanisms to secure agencies' compliance with legislative will, Congress does no more than assert its unquestioned constitutional primacy over the lawmaking function.

To the extent that Congress delegates specifically and clearly to administrative agencies, it performs this control function effectively. The agencies, as noted above, then function as little more than transmission belts for implementing legislative directives. The first generation of the nation's regulatory statutes — including preeminently the Interstate Commerce Act — largely followed this model (especially as these statutes were construed by the courts), containing detailed and limited grants of authority to administrative bodies.¹⁸

Congress, however, proved over time either unable or unwilling to legislate consistently in this manner. From the beginning of the twentieth century onward, many statutes authorizing agency action included open-ended grants of power, leaving to the relevant agency's discretion major questions of public policy.¹⁹ The reasons for these broad delegations varied. Sometimes Congress legislated in this way because it recognized limits to its own knowledge or capacity to respond to changing circumstances; sometimes because it could not reach agreement on specifics, given limited time and diverse interests; and

¹⁸ See Interstate Commerce Act, 24 Stat. 379 (1887), *repealed by* Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(b), 92 Stat. 1337, 1466-67; *ICC v. Cincinnati, New Orleans & Tex. Pac. Ry.*, 167 U.S. 479, 505-06 (1897).

¹⁹ A recent empirical study found that broad delegations are more common in some substantive areas than in others — for example, they are more common in education, environmental, and public health policy than in tax and fiscal policy. See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 198-99 (1999). This Article concerns primarily the policy areas in which Epstein and O'Halloran found that broad delegations most often occur. Epstein and O'Halloran's study also showed a trend toward decreased delegation of discretionary authority in all areas. See *id.* at 115-17. But even given this trend, agencies continue to hold and exercise, under already enacted statutes, large amounts of discretion.

sometimes because it wished to pass on to another body politically difficult decisions. But whatever the reasons — good, bad, or indifferent — sweeping delegations, of a kind utterly inconsistent with the classical “transmission belt” theory of administrative action, became many decades ago a simple, even if not an inevitable, fact of regulatory legislation.²⁰

For many years, political scientists and other observers of government agreed that once Congress made these delegations, it could not, or at the least did not, exercise any effective control over administrative policymaking.²¹ Adherents to this view pointed to the rarity of any visible use by Congress of its remaining levers of control — its ability to revise statutory mandates, reverse administrative decisions, cut agency budgets, block presidential nominees, or even conduct serious oversight hearings. These scholars noted as well the widespread lack of knowledge and interest among members of Congress, evident in repeated surveys and actual cases, regarding obviously important administrative decisions.

²⁰ The ubiquity of broad delegations forms the cornerstone of the claim that the administrative state, as presently constituted, violates the Constitution. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–41 (1994). The question whether to revive the now practically defunct nondelegation doctrine, in response to this perceived constitutional crisis, lies beyond the scope of this Article, except as it relates, in the ways discussed in section V.A, pp. 2364–72, below, to the extent of presidential involvement in administrative action. My assumption here is that the Supreme Court will continue to permit exercises of agency discretion under broad delegations, as indicated in the Court’s most recent statements on the issue. See, e.g., *Whitman v. Am. Trucking Ass’ns*, 121 S. Ct. 903, 913 (2001) (“[E]ven in sweeping regulatory schemes we have never demanded . . . that statutes provide a ‘determinate criterion’ for saying ‘how much [of the regulated harm] is too much.’”); *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

²¹ See, e.g., LAWRENCE C. DODD & RICHARD L. SCHOTT, *CONGRESS AND THE ADMINISTRATIVE STATE* 2 (1979) (“Although born of congressional intent, [the administrative state] has taken on a life of its own and has matured to a point where its muscle and brawn can be turned against its creator.”); James Q. Wilson, *The Politics of Regulation, in THE POLITICS OF REGULATION* 357, 391 (James Q. Wilson ed., 1980) (“Whoever first wished to see regulation carried on by quasi-independent agencies and commissions has had his boldest dreams come true. The organizations studied for this book operate with substantial autonomy, at least with respect to congressional . . . direction.”). Administrative law scholars, to the limited extent they have addressed this question, generally have echoed the findings of these political scientists. See, e.g., JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 160 (4th ed. 1998) (noting “doubt whether existing connections between Congress and administrative bodies are effective means for accomplishing any of several plausible objectives, including assuring fidelity to congressional intent, preserving the political responsiveness of administration, or dispassionately assessing the strengths and weaknesses of regulatory programs”); Stewart, *supra* note 13, at 1696 n.128 (questioning whether “Congress can responsibly accomplish through other means what it cannot achieve through legislation”).

Even when Congress adopted mechanisms to facilitate administrative control, it declined, in apparent accordance with this conventional view of legislative-agency relations, to make any real use of them. Prior to the Supreme Court's invalidation of the technique in *INS v. Chadha*,²² Congress placed "legislative veto" provisions in nearly 300 statutes, allowing one or both houses or their relevant committees to overturn, without the President's approval, an agency's exercise of delegated authority.²³ Congress, however, invoked this power on only 230 occasions (an average of less than one use per statutory provision), of which 111 concerned suspensions of deportation for illegal aliens.²⁴ In partial compensation for the loss of the legislative veto, Congress passed in 1996 the Congressional Review Act (CRA),²⁵ which requires agencies to submit certain regulations to Congress sixty days prior to their effective date and prescribes expedited procedures for their disapproval (subject to presidential signature). Yet Congress has passed only a single resolution of disapproval under this statute in its five years of operation.²⁶

A recent body of political science literature, however, argues, contrary to the conventional view, that Congress does effectively influence agency decisionmaking — even that the current system is one of "congressional dominance."²⁷ Two different arguments, in some tension with each other, have emerged to support this claim. One noted study by Joel Aberbach shows a large increase in formal methods of legislative oversight, such as committee hearings and investigations, in the 1970s and 1980s.²⁸ Although current statistics are hard to find, many observers believe such oversight has accelerated still further since that time.²⁹ By contrast, a mass of public choice scholarship assumes that Congress rarely takes overt measures to monitor or sanction agencies, but avers that this behavior is fully consistent with real control over

²² 462 U.S. 919 (1983).

²³ *Id.* at 944.

²⁴ See Richard B. Smith & Guy M. Struve, *Aftershocks of the Fall of the Legislative Veto*, 69 A.B.A. J. 1258, 1258 (1983); see also Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 483 (1985) ("[T]he putatively systematic congressional review that the legislative veto power implies was chimerical; any such review inevitably was sporadic and haphazard.").

²⁵ Pub. L. No. 104-121, tit. II, subtit. E, 110 Stat. 847, 868-74 (1996) (codified at 5 U.S.C. §§ 801-808 (Supp. II 1996)).

²⁶ See Ergonomics Rule Disapproval, Pub. L. No. 107-5, 115 Stat. 7 (2001) (disapproving Ergonomics Program, 65 Fed. Reg. 68,261 (Nov. 14, 2000)); Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1052 (1999) (noting prior history of the CRA).

²⁷ Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 767 (1983).

²⁸ See JOEL D. ABERBACH, KEEPING A WATCHFUL EYE 14, 34-37 (1990).

²⁹ See, e.g., Alexis Simendinger, *The Paper Wars*, 30 NAT'L J. 1732, 1735-36 (1998).

administration.³⁰ This work notes that perfect control of an institution is likely to be invisible: if the agencies always did what Congress wanted, Congress would have no need to hold oversight hearings, express disapproval, or impose sanctions. Several of these political scientists further claim, based principally on studies of the Federal Trade Commission, that the available empirical evidence supports the hypothesis of covert but effective legislative control of administrative policymaking.³¹

A primary mechanism of control, on either theory of congressional power, is a "fire alarm" system, backed by powerful legislative sanctions.³² The fire alarm system is a set of procedures and practices that enable citizens and interest groups to monitor an agency and report any perceived errors to the relevant congressional committees. Such a system allows Congress to pass on many of the costs of monitoring administrative action to non-governmental entities. The legislative sanctions backing up the system include new legislation, budget cuts, and embarrassing oversight hearings. If a fire alarm goes off, the committee can threaten and, if necessary, use one of these sanctions to bring the agency into submission. Through this mechanism, declares one political scientist, "the Congress controls the bureaucracy, and the Congress gives us the kind of bureaucracy it wants."³³

This claim of congressional dominance, however, likely errs as much in one direction as the conventional view of legislative impotence erred in the other.³⁴ The new scholarship indeed suggests that Congress possesses sufficient weapons, and sufficient will to use them, to make agencies sensitive to its preferences. The work of legal scholars on the legislative veto supports this view, finding that although Congress rarely used the veto, agencies negotiated and compromised

³⁰ See Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 274 (1987); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 176 (1984); Weingast & Moran, *supra* note 27, at 768-69, 792-93.

³¹ See Weingast & Moran, *supra* note 27, at 791-92.

³² The public choice theorists claim that the fire alarm system "predominate[s]" in congressional oversight of administrative action. McCubbins & Schwartz, *supra* note 30, at 171; see McCubbins, Noll & Weingast, *supra* note 30, at 250. Joel Aberbach claims that Congress also increasingly engages in more direct oversight of administrative action, often called "police patrol" oversight, but agrees that the fire alarm mechanism is "important." See ABERBACH, *supra* note 28, at 101.

³³ Morris P. Fiorina, *Congressional Control of the Bureaucracy: A Mismatch of Incentives and Capabilities*, in CONGRESS RECONSIDERED 332, 333 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2d ed. 1981); see *id.* at 339-40 (arguing that in response to constituency pressure, members of Congress use the threat of sanctions to control agency decisions).

³⁴ For a similar conclusion, see EPSTEIN & O'HALLORAN, *supra* note 19, at 29. As Epstein and O'Halloran note, Congress's stepped-up efforts to limit statutory delegations betray a lack of confidence in its ability to control the recipients of delegated authority in the way the congressional dominance theorists posit. See *id.* at 74.

with congressional committees in the shadow of that sanction.³⁵ But the evidence of dominance is doubtful at best. The empirical work of the public choice theorists, purporting to show that agencies routinely comply with legislative agendas, has come under sharp fire.³⁶ And although Aberbach showed increased use of hearings and other public oversight tools, he did not try to assess the real significance of this development. Indeed, if the public choice theorists are correct, an increase in formal oversight may suggest the decline rather than the rise of congressional power. Most important, all the claims of legislative control inadequately acknowledge the limits on Congress's ability to impose harsh sanctions.³⁷ Statutory (including most budgetary) punishments require the action of the full Congress — action which is costly and difficult to accomplish. And since the demise of the legislative veto, even majority support is not enough: to impose its most effective sanctions, Congress must gain the approval of either the President or two-thirds of both houses.³⁸ For these reasons, although agencies do not and cannot ignore Congress, they often can get their way regardless.

Further, to the extent that Congress influences agency behavior, two related features of the way it does so give cause for concern about this result. The first relates to the identity — more particularly, the factional characteristics — of the parties most engaged in Congress's oversight system. As the congressional dominance theorists point out, the fire alarms triggering congressional review of agency action go off in the committee and subcommittee rooms of Congress, not on the floor of the House or Senate.³⁹ Each of these committees dispropor-

³⁵ Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1410-12 (1977).

³⁶ See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 254-56 (1989); Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance'*, 12 LEGIS. STUD. Q. 475, 513 (1987).

³⁷ See Moe, *supra* note 36, at 486-90 (noting the significant difficulties involved in using legislative powers to influence agency action).

³⁸ Congress may hold its strongest hand in the appropriations process, if for no other reason than that passage of a budget is an annual requirement. But as Terry Moe notes, "It is easy to exaggerate the power of the purse." *Id.* at 488. Exercising this power requires the authorizing and appropriations committees of both houses to discover and agree on an effective budgetary sanction. Furthermore, as a Republican Congress often found during the Clinton Presidency, the President's veto power may be capable of forcing the deletion of riders and the return of monies. See David Baumann, *The Art of the Deal*, 39 NAT'L J. 2700, 2701 (1999) (noting that "[t]he conventional wisdom around town is that Clinton always wins these budgetary showdowns" and stating that he "has extraordinary leverage during . . . end-of-year negotiations"); David E. Rosenbaum, *Bush Rules! It's Good To Be the President*, N.Y. TIMES, Jan. 28, 2001, § 4, at 16 (noting findings by the National Resources Defense Council that Clinton had succeeded in blocking more than seventy appropriations riders that aimed to relax regulatory requirements).

³⁹ See, e.g., Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal-Agent Perspective (with Applications to the SEC)*, 44 PUB. CHOICE 147, 150 (1984) ("For any particular

tionately includes legislators whose constituents have a special interest in its jurisdiction: so, for example, agriculture committees attract representatives of farming districts, banking committees representatives of urban districts, and public lands committees representatives from western states.⁴⁰ And these legislators tend to develop strong ties to the set of organized interests that sound the fire alarms in the first instance. Even if the proliferation of both interest groups and committees has lessened the force of classic "iron triangle" relationships,⁴¹ the administrative policy set by this confluence of players rarely will mirror the preferences of Congress as a whole or the general public.

The second notable aspect of congressional control, as described by this theory, lies in its reactive nature. Recall that the theory posits that congressional committees focus on administration primarily in response to complaints by outside parties. These complaints likely will arise more often when an agency changes than when it maintains existing policy. The resulting congressional oversight thus will tend to have a conservative (in the sense of status quo-preserving) quality. Moreover, these complaints often will present themselves as discrete problems even when they are aspects of broader regulatory issues. The complaint-driven nature of congressional oversight, especially in combination with its reliance on committees, thus pushes toward the ad hoc rather than the systematic consideration of administrative policy.

B. Self-Control

In the wake of Congress's shift toward broad delegations — or metaphorically, of the breakdown in the transmission belt connecting Congress to the administration — bureaucratic officials necessarily gained enhanced power over regulatory policy. Operating under stan-

agency . . . it is not the Congress as a whole that is relevant . . . but rather the committee(s) with jurisdiction . . ."); see also Bruff & Gellhorn, *supra* note 35, at 1410 (finding that all of the bargaining done in the shadow of the legislative veto occurred in committees and subcommittees).

⁴⁰ See KENNETH A. SHEPSON, *THE GIANT JIGSAW PUZZLE: DEMOCRATIC COMMITTEE ASSIGNMENTS IN THE MODERN HOUSE* 231-34 (1978); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 145-46, 150-52 (1988). But see Keith Krehbiel, *Are Congressional Committees Composed of Preference Outliers?*, 84 AM. POL. SCI. REV. 149, 149, 158-59 (1990) (challenging the "dominant view" of committee membership).

⁴¹ DOUGLASS CATER, *POWER IN WASHINGTON* 17-48 (1964), and J. LEIPER FREEMAN, *THE POLITICAL PROCESS* 22-31, 66-129 (rev. ed. 1965), discuss "iron triangles" (or "subgovernments"), which bind an agency tightly to a single congressional committee and organized interest. More recent scholarship expresses skepticism about the strength and stability of these relationships. See, e.g., Jeffrey M. Berry, *Subgovernments, Issue Networks, and Political Conflict, in REMAKING AMERICAN POLITICS* 239, 239-40 (Richard A. Harris & Sidney M. Milkis eds., 1989); Hugh Hecl, *Issue Networks and the Executive Establishment, in THE NEW AMERICAN POLITICAL SYSTEM* 87, 102-05 (Anthony King ed., 1978).

dards as diffuse as “just and reasonable,”⁴² “fair and equitable,”⁴³ and in the “public convenience, interest, or necessity,”⁴⁴ administrators acquired wide latitude to make rules and define priorities in their areas of substantive responsibility. At the same time, administrators saw these areas widen, as Congress created additional agencies and expanded the jurisdiction of existing agencies to deal with aspects of economic and social life newly thought appropriate for regulation.⁴⁵

The need for expertise emerged as the dominant justification for this enhanced bureaucratic power. James Landis became the principal spokesman for the idea on his return from the New Deal Securities and Exchange Commission to the legal academy. “With the rise of regulation, the need for expertness became dominant[,]” Landis wrote, “for the art of regulating an industry requires knowledge of the details of its operation”⁴⁶ Political control — legal control, for that matter — posed the risk of unduly stifling this needed “expertness.” Landis spoke admiringly of “[o]ne of the ablest administrators” he knew, who never read the statutes he administered, but simply “assumed that they gave him power to deal with the broad problems of an industry and, upon that understanding . . . sought his own solutions.”⁴⁷ Fear not this official, Landis implied, for “expertness” imposed its own guideposts, effectively solving the problem of administrative discretion. Expert professionals could ascertain and implement an objective public interest; administration could become a science.

Expressed in this form, the idea today seems almost quaint, and even then it provoked strong opposition.⁴⁸ At the heart of the critique lay a growing skepticism about the possibility of neutral or objective judgment in public administration. Whereas the questions of what and how to regulate seemed to Landis matters of fact and science, they appeared to his detractors, ever more numerous as time passed, to involve value choices and political judgment, thus throwing into question the legitimacy of bureaucratic power. The critique did not deny

⁴² Natural Gas Act of 1938, 15 U.S.C. §§ 717–717z (1994).

⁴³ Emergency Price Control Act of 1942 § 2(a), 56 Stat. 23, 24 (1942).

⁴⁴ Communications Act of 1934, 47 U.S.C. § 309(a) (1994) (lapsed 1947).

⁴⁵ Robert Rabin provides an illuminating history of what he terms a “century of regulatory expansion” in *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1193 (1986).

⁴⁶ JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23 (1938).

⁴⁷ *Id.* at 75.

⁴⁸ Roscoe Pound, for one, attacked the expertise theory, as well as the reach of the administrative state it had helped to create. In a report written for the American Bar Association, Pound warned of “administrative absolutism” and wrote of the National Labor Relations Board: “The postulate of a scientific body of experts pursuing objective scientific inquiries is as far as possible from what the facts are or are likely to be.” Comm. on Admin. Law, Am. Bar. Ass’n, *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 344 (1938). Morton Horwitz provides a lively account of the dispute between Landis and Pound. See HORWITZ, *supra* note 13, at 217–22.

the importance of expert knowledge in helping to shape public policy decisions, by providing information or analyses relating to available regulatory strategies. But opponents of Landis's theory did insist that much besides expertise necessarily permeated administrative choice and that assignment of these value-laden decisions to unelected administrative officials — possessing, along with expertise, political views, interest group affiliations, and bureaucratic interests — needed at the least to be subject to external control.

This new skepticism toward expertise resulted in dramatic changes in administrative process. Bureaucratic officials, to be sure, continued in some strong sense to determine bureaucratic policy. They remained, after all, the delegates of congressional authority, the managers of the administrative apparatus, and the proprietors of vast stores of information relevant to regulatory decisions. The passage of the Administrative Procedure Act (APA) of 1946,⁴⁹ however, curtailed the sway of administrative officials by subjecting their most important lawmaking mechanisms — rulemakings and (especially) adjudications — to stringent procedural requirements. And a subsequent generation's enhancement of these procedures to provide still greater public participatory rights, detailed in the next section of this Article,⁵⁰ further cut into the flexibility, latitude, and power of professional administrators.⁵¹

In recent years, however, influential observers of administrative process, most prominent among them law-professor-turned-Justice Stephen Breyer, have urged that professional administrators again take center stage in regulatory policymaking, this time with support from a more sophisticated variant of Landis's defense of technocratic values.⁵² Focusing on health risk regulation, but in a way that intimates wider application, Breyer proposes the creation of an elite cadre of administrators charged with bringing order and rationality to regulatory policy. Breyer's case for this proposal stresses two points: first, the failure of the current regulatory system to set sensible priorities, and second, the potential of bureaucracy itself to ameliorate this failure. Breyer emphasizes, with respect to the latter point, what he views as the "inherent" bureaucratic virtues of expertise, rationalization, and insula-

⁴⁹ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1994 & Supp. IV 1998)).

⁵⁰ See *infra* pp. 2265-67.

⁵¹ See Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 404-05 (noting that the augmentation of procedural requirements limits agencies' power).

⁵² See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993). Bruce Ackerman is another prominent member of the new expertise movement. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 697-715 (2000).

tion.⁵³ Knowledge of administration and its subject matter, combined with the habit and practice of developing systems, further combined with distance from politics and public opinion, Breyer posits, will produce the most coherent regulatory policy. To the objection that this proposal is undemocratic, Breyer responds that the operation of his new administrative entity, by “reduc[ing] a mass of individual decisions to a smaller number” and “publiciz[ing] the criteria used” to make them, would clarify policy choices and thus “empower” Congress and the public.⁵⁴

Several commentators on Breyer’s work have criticized it on grounds reminiscent of the attack on Landis’s original version of the expertise theory.⁵⁵ Focusing as Breyer does on health risk regulation, these critics again have emphasized the “centrality of questions of value”⁵⁶ and the “political dimension of science.”⁵⁷ They have noted, for example, the diversity of ways to conceive risk and thus to specify the goals of regulation.⁵⁸ And they have questioned the propriety of giving unelected administrators, potentially acting on the basis of personal views, interests, and relationships, the task of making these contestable choices. All these criticisms should sound familiar.

But another point, routinely neglected in the legal literature on administration, is equally important: bureaucracy also has inherent vices (even pathologies), foremost among which are inertia and torpor. The standard rhetoric of administrative law, which talks of the need to control agency action, obscures this danger. If the perceived solution is control of administration, then surely the problem must be “out of con-

⁵³ BREYER, *supra* note 52, at 61.

⁵⁴ *Id.* at 73–74. A different response, deriving from an argument made by Jerry Mashaw in favor of broad delegations, see Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985), and more consistent with the arguments made in this Article, see *infra* pp. 2332–39, would focus on the twin connections between (1) administrative officials and the President and (2) the President and the public. But although Breyer places his proposed administrative corps someplace in the executive branch, he is anxious to emphasize the separation rather than the link between that entity and the White House, stressing the importance of insulation from politics and noting with sympathy suggestions that the current OMB’s Office of Information and Regulatory Affairs (OIRA) “wields undue political influence” because of its ties to the White House. BREYER, *supra* note 52, at 69.

⁵⁵ See David A. Dana, *Setting Environmental Priorities: The Promise of a Bureaucratic Solution*, 74 B.U. L. REV. 365, 379–85 (1994); Lisa Heinzerling, *Political Science*, 62 U. CHI. L. REV. 449, 470–73 (1995); Pildes & Sunstein, *supra* note 3, at 87–89.

⁵⁶ Pildes & Sunstein, *supra* note 3, at 87.

⁵⁷ Heinzerling, *supra* note 55, at 473.

⁵⁸ Pildes and Sunstein, for example, make a strong case for the rationality of evaluating risk by looking not only to mortality and morbidity rates, as Breyer would, but also to contextual factors such as the nature, distribution, and familiarity of the risk. See Pildes & Sunstein, *supra* note 3, at 57–58, 87–89.

trol" agencies or "runaway" bureaucracy.⁵⁹ But the need to control bureaucracy may be more a matter of providing direction and energy than of imposing constraints. Louis Jaffe saw as early as 1954 that governmental agencies inevitably develop "arteriosclerosis."⁶⁰ Students of all kinds of bureaucracies have identified what one calls a "rigidity cycle" or "ossification syndrome":⁶¹ Bureaus "become[] . . . gigantic machine[s] that slowly and inflexibly grind[] along in the direction in which . . . initially aimed," incapable of acting speedily or making necessary innovations.⁶² As a result, officials set up new and smaller organizations (like Breyer's proposed administrative corps), but these too degenerate after a few years of operation.⁶³ According to the classic view, the best hope of arresting or at least moderating this downward cycle lies in subjecting bureaucracies to an outside "sovereign" positioned both to receive feedback about the administration and to exert pressure on it.⁶⁴ Some more recent scholarship, responding to the same problems of administrative performance, has urged instead greater decentralization of decisionmaking.⁶⁵ For now, the remedial question is premature. The key point is that models of administration, like those of Landis or Breyer, relying on internal expertise provoke serious questions about the quality, no less than the legitimacy, of agency action.

C. Interest Group Control

One purpose, even if unfulfilled, of efforts to place institutional controls on agency action relates to the prospect that, in the absence of these safeguards, regulated entities and other organized interests themselves will grasp the reins of regulatory authority. The view that firms subject to regulation had "captured" the agencies gained wide currency

⁵⁹ See, e.g., Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 796 (1984) (noting the argument that agencies are "out of control"); Jerry L. Mashaw, *Organizing Adjudication: Reflections on the Prospect for Artisans in the Age of Robots*, 39 UCLA L. REV. 1055, 1056 (1992) (noting the fear of "runaway" adjudicators); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 511 (1997) (arguing for a check on "runaway" agencies).

⁶⁰ See Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1109 (1954).

⁶¹ ANTHONY DOWNS, *INSIDE BUREAUCRACY* 158 (1967) (emphasis omitted).

⁶² *Id.* at 160.

⁶³ See *id.* at 161. As even a noted defender of expert-dominated administration recently conceded, "[b]ureaucracies are intellectually conservative creatures — full of old-timers who have invested heavily in obsolete conventional wisdom." Ackerman, *supra* note 52, at 701.

⁶⁴ See DOWNS, *supra* note 61, at 163–64.

⁶⁵ See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 314–23 (1998). The two proposed remedies do not necessarily conflict with each other, given that the "sovereign" itself can order decentralization. Indeed, decentralization may be more difficult without such an authoritative command from outside the bureaucracy. See *infra* p. 2345.

beginning in the 1960s.⁶⁶ Although the thesis often was stated too crudely, few could argue with its basic insight — that well-organized groups had the potential to exercise disproportionate influence over agency policymaking by virtue of the resources they commanded, the information they possessed, and the long-term relations they maintained with agency officials.⁶⁷

The response of both the courts and Congress to “capture theory” was to open still wider the doors of the agencies to groups affected by regulatory action.⁶⁸ If the administrative state had become tainted by the participation in agency processes of the most powerful interest groups, particularly regulated businesses, then it could become pure again through the inclusion of additional, traditionally unrepresented interests. Going beyond what the APA seemed to require, the federal courts in the 1970s imposed on agencies new rules designed to ensure the meaningful participation in agency process of all potentially affected interests.⁶⁹ Congress likewise passed a set of statutes providing, in select areas of regulation, enhanced participatory opportunities.⁷⁰ The goal was to put in place procedures that would create a broadly pluralist system of agency decisionmaking, thus replicating the process of interest group representation and bargaining thought responsible for legislation.⁷¹ In effect, political control of agency action would come from the interaction and conflict, within the administrative process, of the full range of affected constituencies.

⁶⁶ See, e.g., ROBERT C. FELLMETH, *THE INTERSTATE COMMERCE COMMISSION* 15–22 (1970); GABRIEL KOLKO, *RAILROADS AND REGULATION, 1877–1916*, at 233–35 (1965).

⁶⁷ See Stewart, *supra* note 13, at 1684–87 (providing a fuller statement of the causes, scope, and limits of this phenomenon).

⁶⁸ See *id.* at 1711–60 (providing the classic account of the judiciary’s part in this development); *infra* p. 2271 (offering further discussion of the judicial role).

⁶⁹ See, e.g., *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 251–52 (2d Cir. 1977) (requiring an agency to disclose the data on which it relied to interested parties so they could make meaningful comments); *Calvert Cliffs’ Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1117–19 (D.C. Cir. 1971) (requiring an agency to provide a public hearing before taking action); *Env’tl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 594–95 (D.C. Cir. 1971) (requiring an agency to consider all relevant interests affected by agency policy).

⁷⁰ See, e.g., Consumer Product Safety Act of 1972, Pub. L. No. 92-573, 86 Stat. 1207 (codified as amended at 15 U.S.C. §§ 2051–2084 (1994)); Toxic Substances Control Act of 1976, Pub. L. No. 94-469, 90 Stat. 2003 (codified as amended at 15 U.S.C. §§ 2601–2692 (1994)); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1592 (codified as amended at 29 U.S.C. §§ 651–678 (1994)).

⁷¹ For classic accounts of pluralist political theory, see ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* (1967) and DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* (1971). Accounts of pluralism written from an economic perspective include WILLIAM NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971) and ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

But even as this system of interest representation went into effect, doubts emerged about its consequences.⁷² At the deepest level, and in keeping with a broad intellectual attack on pluralist theory, some critics of the interest representation system assailed its substitution of unmediated bargaining among interest groups for the disinterested efforts of administrative decisionmakers to promote a distinctive public interest. The roots of this critique reach back to Madison's explanation of constitutional structure: although Madison believed that faction was inevitable and often beneficial, he also insisted on the need to create space between factional interests and governmental officials so as to moderate faction's impact.⁷³ It was exactly this space that the interest representation system narrowed. The more interest groups flourished and the more they came to pervade the administrative process, the less the prospect, on this view, for an attractive, public-regarding form of administrative government.

Other critics focused on equity issues, contending that the efforts made to ensure broad representation had left in place, or perhaps even aggravated, substantial disparities in interest group influence. Some interests of a diffuse nature continued to lack any adequate representation. Others crossed this threshold only to find that traditionally powerful interests could take comparatively greater advantage of the new panoply of participatory rights. On one conception of pluralism, none of this made a difference: the unrestrained competition of interest groups, even assuming inequalities of power, would work better than any alternative system to promote socially optimal policy outcomes.⁷⁴ But the interest representation model had arisen precisely to counteract the ability of certain factions to dominate agency process through resource and organizational advantages. In this context, the apparent "imperfections" of group politics simultaneously sparked yet further efforts to equalize interest groups' influence and fostered a growing sense of disillusion that this goal ever could be accomplished.

As this debate occurred, the interest representation system silently operated to increase the costs of administrative, and particularly informal rulemaking, processes. The "ossification" of rulemaking, as

⁷² See SHAPIRO, *supra* note 15, at 9-35, 49-54 (providing a fuller discussion of the critiques of interest representation discussed in this and the next paragraph).

⁷³ See THE FEDERALIST NO. 10, at 122 (James Madison) (Isaac Kramnick ed., 1987). According to Madison, representation would "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." *Id.* at 126.

⁷⁴ See, e.g., Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 396 (1983).

administrative law scholars now have tagged the problem,⁷⁵ had many causes, not the least of which was the “hard look” method of judicial review discussed in the next section of this Article.⁷⁶ But one principal culprit (itself related to hard look review) was the elaborate set of interactive procedures agencies had to adopt to ensure that all affected interests could participate meaningfully in the rulemaking process. At a minimum (when no statute other than the APA is involved), these procedures require a formal “paper hearing” that includes extensive and often repeated notice to affected groups of a proposed rule, provision to them of the factual and analytical material supporting it, and detailed responses to any group’s adverse comment or alternative proposal.⁷⁷ These interest-group-oriented procedures, which depart markedly from any the drafters of the APA contemplated, impose significant burdens and delay on agencies and thus make them reluctant to issue new rules, revisit old rules, or experiment with temporary rules even when the circumstances warrant.⁷⁸

This formalization of rulemaking also, if ironically, undercut the very purposes of interest representation. The more courts required agencies to give detailed notice to interest groups of proposed regulatory action, the more pressure agencies felt to complete the bulk of their work prior to the onset of the rulemaking process. And the more work agencies put into their proposals at this preliminary stage, the less flexibility they showed during rulemaking to respond to the concerns and preferences of affected parties. True interaction with interest groups now took place elsewhere and earlier⁷⁹ — in all the informal and nontransparent ways that initially had raised concerns about inequalities of interest group access and resulting agency capture.

In part because of the difficulties afflicting informal rulemaking, a new form of interest group representation, called negotiated rulemaking, recently has emerged — taking its place, as another mechanism to

⁷⁵ E.g., Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

⁷⁶ See *infra* pp. 2270–71.

⁷⁷ See, e.g., *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1267–69 (D.C. Cir. 1994); *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973).

⁷⁸ See CARNEGIE COMM’N, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 107–09 (1993); McGarity, *supra* note 75, at 1387–92.

⁷⁹ As one legal scholar, a former General Counsel of the Environmental Protection Agency, has written:

No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions — a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.

E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

control administrative action, beside the new incarnations (actual and proposed) of congressional oversight and bureaucratic management. In this process, governed by federal statute,⁸⁰ the agency establishes a negotiating committee thought to represent all affected interests and charges it with reaching consensus on the terms of a rule.⁸¹ The agency must invite public comment on any consensus proposal, but because relatively few parties remain to respond, the agency usually issues the rule much as it emerged from the committee. For the same reason, the chance of judicial challenge is slight; indeed, not a single court has reviewed the outcome of a negotiated rulemaking. Proponents of the process argue that it leads to constructive solutions to regulatory issues, while greatly reducing the uncertainties and costs to agencies associated with standard rulemaking.⁸² The underlying notion is essentially of a perfect interest representation process, with all affected interests having an equal vote and public officials ratifying their deal precisely as written.

Conceived in this way, negotiated rulemaking becomes subject — except more so — to the most fundamental criticism of the interest representation system: that it equates the aggregation of private preferences with the determination of the public interest. Expressing disgust that an agency, in issuing a rule, would do no more than certify a private deal, Judge Richard Posner, in a rare opinion involving the Negotiated Rulemaking Act, wrote: “It sounds like an abdication of regulatory authority to the regulated, the full burgeoning of the interest group state, and the final confirmation of the ‘capture’ theory of administrative regulation.”⁸³ Stated another way, the practice excludes the application of all governmental — whether expert or political — judgment.

It is, in any event, unlikely that negotiated rulemaking ever could become a principal technique of administrative government, given the difficulty of reaching consensus across a wide range of interests on regulatory issues. For this reason, agencies have attempted negotiated rulemakings rarely (especially on significant or contentious issues) and

⁸⁰ See Negotiated Rulemaking Act, 5 U.S.C. §§ 561–570 (1994).

⁸¹ The Negotiated Rulemaking Act defines consensus as unanimity unless the negotiating committee agrees otherwise. See *Id.* § 562(2). As a practical matter, the committee’s ability to depart from the default definition — like the agency’s ability to exclude potentially dissenting groups from the negotiation — is limited by the desire to avoid objections at the comment stage of a rulemaking or in a later lawsuit.

⁸² See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 33–66 (1997); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 28–31 (1982).

⁸³ USA Group Loan Servs. v. Riley, 82 F.3d 708, 714 (7th Cir. 1996).

have completed these rulemakings on even fewer occasions.⁸⁴ Most administrative action necessarily entails serious conflict about both the selection of values and the allocation of gains and losses. Administrative process cannot change this fact. Administrative law therefore must confront the issue this Article has begun to address: the appropriate allocation of influence among institutions or groups over the resolution of these conflicts. The courts, as the next section will show, inevitably have had much to say about this question.

D. Judicial Control

The judiciary can play a role in controlling administrative government in either of two ways: directly, by engaging in substantive review of agency decisions, or indirectly, by supporting, through various rules of procedure and process, other institutions and groups that can influence agency policymaking. The history of administrative law doubtless provides many examples of the former approach.⁸⁵ The current law, however, leans far in the latter direction. Courts, to be sure, sometimes say that an agency decision (especially of fact, less often of policy) reflects a simple misreading of the evidence or error of judgment.⁸⁶ But they usually shy away from such substantive review of agency outcomes, perhaps in recognition of their own inability to claim either a democratic pedigree or expert knowledge. The courts incline instead toward enforcing structures and methods of decisionmaking designed to enable or assist other actors discussed in this Part to influence administrative actions and policies. For this reason, most administrative law today amounts to an allocation of power to and among the different parties (internal and external) interested in controlling agency product.

The pattern of this law is by no means neat. Some of the current rules empower, encourage, or legitimate one mechanism of control (say, interest groups), some another (say, bureaucratic experts). The rules arose at diverse times and in diverse contexts, with judges often giving little attention to the similarly motivated but differently oriented rules that already littered the landscape. The choice of each rule — effectively, a choice among groups and institutions — created a progressively more complex, multivariate system for controlling administra-

⁸⁴ See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1273–76 & tbls.1–2 (1997) (reporting that between 1983 and 1996, agencies announced sixty-seven negotiated rulemakings and completed thirty-five — about one-tenth of one percent of all regulations adopted in this period).

⁸⁵ See, e.g., Rabin, *supra* note 45, at 1210–15 (detailing de novo review of agency ratemaking at the turn of the twentieth century).

⁸⁶ See, e.g., *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 367–68 (1998) (overturning a factual finding for lack of substantial evidence); *Cnty. Nutrition Inst. v. Bergland*, 493 F. Supp. 488, 494 (D.D.C. 1980) (remanding a regulation for irrationality of policy judgment).

tive decisions. A historical treatment of this doctrine's elaboration lies beyond the scope of this Article. What matters, to complete the backdrop against which presidential control of administration operates (and to pave the way for my later discussion of how legal doctrine could support it), is to indicate some of the ways in which administrative law today reinforces (or declines to reinforce) rival forms of control.

In this scheme, the courts have assigned Congress an odd and paradoxical role, by at once enforcing legislative primacy and countenancing legislative inferiority in relation to administrative action. Congress's power here proceeds from the first premise of judicial review of agency conduct — when Congress has spoken clearly as to what an agency should do or what factors it should consider in making a decision, the agency must adhere to that directive. Congress's frailty results, initially, from the courts' accession to broad delegations of discretion, which largely cede this directive authority.⁸⁷ But more, this frailty derives from the courts' refusal, in the face of broad delegations, to ratify alternative mechanisms of legislative control over agency decisionmaking. In invalidating not only the legislative veto, but also various schemes giving Congress a role in the appointment or removal of administrative officials,⁸⁸ the courts have suppressed political control of administration by the legislature.

The courts, by contrast, have promoted vigorously the control of administrative policy by bureaucratic experts, not only by enabling them to fill the space that Congress might have occupied but also by requiring that agency action bear the indicia of essentially apolitical, "expert" process and judgment. The sharpest judicial spur to this expert authority comes from "hard look" review, which requires an agency (on pain of judicial reversal of its action) to address all significant issues, take into account all relevant data, consider all feasible alternatives, develop an extensive evidentiary record, and provide a detailed explanation of its conclusions.⁸⁹ These requirements both express a vision of an expert-driven, technocratic administration and attempt to force that vision on the agencies. They in effect assign to experts a dominant role in the agency's process by insisting that the agency's decisions reflect and proceed from the distinctive kind of knowledge, skills, and evaluative capacity that experts possess. Cor-

⁸⁷ The Supreme Court used the nondelegation doctrine for both the first and the last time sixty-six years ago in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

⁸⁸ See *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 274-77 (1991); *Bowsher v. Synar*, 478 U.S. 714, 736 (1986); *Buckley v. Valeo*, 424 U.S. 1, 135-36 (1976).

⁸⁹ See, e.g., *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

relatively, these requirements aim to subject other, more political influences on administration to the disciplining effect of expert judgment.⁹⁰

Yet the courts also have promoted the control of administrative policy by interest groups — a form of surrogate political control — by articulating rules that require agencies to heed these groups' views in the decisionmaking process. Recall that the judicial demand for an extensive paper hearing in informal rulemaking sought to enhance the ability of the full range of an agency's external constituencies to shape its decisions.⁹¹ So too did doctrine that expanded the rights of affected interests to intervene in agency adjudications.⁹² These requirements, essentially compelling administrators to consider the views and proposals of affected interests, render external constituencies always visible and potentially important players in agency decisionmaking.

And how have courts treated the President? Parts IV and V will address this question fully; for now, a few words will suffice. One possible view is that the cases barring Congress from exercising new forms of supervisory authority over the agencies in effect affirm the power of the President by suggesting that once a delegation has occurred, political control over administration passes from one end of Pennsylvania Avenue to the other. But this understanding of the law fails to take account of several indications to the contrary. First, as the proponents of a unitary executive lament, the courts sometimes have allowed Congress to insulate the administrative state from the President through limitations on his power to remove officeholders.⁹³ Next, and critically important given current methods of presidential control, the courts never have recognized the legal power of the President to direct even removable officials as to the exercise of their delegated authority. Finally and most broadly, the courts usually have ignored the very existence of the President in their articulation of administrative law, again

⁹⁰ Although hard look review thus affirms control of administration by experts at the possible expense of interest groups, this technique of judicial review in some sense depends on, and in turn provides additional impetus to, the paper hearing process that has become the hallmark of the interest representation model of administrative control. This dynamic results because an extensive record of public comments and responses helps a court to review the adequacy of an agency's decisionmaking process.

⁹¹ See *supra* pp. 2265, 2267.

⁹² See *Nat'l Welfare Rights Org. v. Finch*, 429 F.2d 725, 736 (D.C. Cir. 1970); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1005 (D.C. Cir. 1966).

⁹³ See *Morrison v. Olson*, 487 U.S. 654 (1988); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). As a practical matter, successful insulation of administration from the President — even if accomplished in the name of "independence" — will tend to enhance Congress's own authority over the insulated activities. See Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1341 (1994). The cases approving independent agencies thus count as something of an exception to the general reluctance of courts, noted at p. 2270, above, to countenance legislative control over administration in any way other than by delegating precisely.

even in cases involving executive branch officials. The courts seemingly have assumed in this doctrine the absence of strong presidential involvement in agency decisionmaking; at the least, they have declined, with one possible important exception,⁹⁴ to create doctrinal rules that acknowledge, much less support, this form of administrative supervision. To explore in the last Part whether this approach is in error, I now begin to examine and assess the newly emergent system of presidential administration.

II. PRESIDENTIAL ADMINISTRATION — SOME BACKGROUND AND HISTORY

Harry Truman, preparing to leave the Presidency, famously remarked of his soon-to-be successor: "He will sit here and he'll say, 'Do this! Do that!' *And nothing will happen.* Poor Ike — it won't be a bit like the Army."⁹⁵ Truman's comment may have applied to more than the administrative sphere, but his relationship with the federal bureaucracy doubtless took pride of place as a source of his frustration. Since the dawn of the modern administrative state, Presidents have tried to control the bureaucracy only to discover the difficulty of the endeavor.⁹⁶ On another occasion, Truman complained, "I thought I was the president, but when it comes to these bureaucrats, I can't do a damn thing."⁹⁷ John Kennedy reportedly once told a petitioner, "I agree with you, but I don't know if the government will."⁹⁸ Richard Nixon notoriously viewed himself as surrounded by a hostile administration, complaining on one occasion to his chief domestic policy ad-

⁹⁴ The possible exception derives from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in which the Court held that an agency's interpretation of an ambiguous statute is entitled to deference. One rationale for this rule, mentioned in the Court's opinion, focuses on the agency's relationship to a publicly accountable "Chief Executive." *Id.* at 865. Other rationales for the rule, however, derive from congressional intent, bureaucratic expertise, and even interest representation. Part V will address this issue further. *See infra* pp. 2373-76.

⁹⁵ RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 10 (1990) (internal quotation marks omitted).

⁹⁶ *See, e.g.*, FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 329 (1994) ("From the point of view of administration, the history of the Presidency in the twentieth century has been the history of presidents' attempts to gain control of the sprawling federal bureaucracy."); *see also* THOMAS E. CRONIN, *THE STATE OF THE PRESIDENCY* 224 (2d ed. 1980) ("It is difficult to overestimate the degree of frustration and resentment that White House aides develop about the seeming indifference of the permanent government toward presidential policy.")

⁹⁷ RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* 2 (Macmillan Publ'g Co. 1986) (1983) (internal quotation marks omitted).

⁹⁸ *Id.* at 1 (internal quotation marks omitted).

visor that "we have no discipline in this bureaucracy."⁹⁹ Jimmy Carter commented in a press conference during the last year of his Presidency that although he knew from the beginning that "dealing with the federal bureaucracy would be one of the worst problems [he] would have to face," the reality had been even "worse than [he] had anticipated."¹⁰⁰

The reasons for this difficulty and attendant frustration come in two kinds. The President, as an initial matter, confronts a typical principal-agent dilemma: how to ensure against slippage between the behavior the principal desires from the agent and the behavior the principal actually receives, given the agent's own norms, interests, and informational advantages. In a world of extraordinary administrative complexity and near-incalculable presidential responsibilities, no President can hope (even with the assistance of close aides) to monitor the agencies so closely as to substitute all his preferences for those of the bureaucracy. And superimposed on this constraint lies another: the President, even in theory and even as to executive branch agencies, is not the single, indisputable principal. Given both the structure of American government and the requirements of administrative law, the President must compete for that preeminent position with the other institutions and groups discussed in Part I. The agents themselves, or at least those possessing substantive expertise, have a claim to control of the administrative sector; so too does Congress (or its many parts) and even special interest organizations. This multiprincipal structure — creating a welter of cross-pressures, forcing all manner of trade-offs and compromises, and offering a wealth of opportunities for strategic machination — forms the context in which a President tries to control administration.¹⁰¹ Little wonder that Presidents often have felt powerless to achieve this objective.

Viewed from this perspective, the debate in legal doctrine and scholarship between strong and weak presidentialists emerges as far too narrow in focus, relating to only one small part of a much larger whole. That debate almost exclusively concerns the constitutionality (and, to a lesser extent, the desirability) of Congress's creation of independent agencies — that is, agencies whose heads the President may not remove at will.¹⁰² This question has some practical importance:

⁹⁹ CRONIN, *supra* note 96, at 223 (internal quotation marks omitted). To his credit, Nixon took some measure of personal responsibility for this situation: "We always promote the sons-of-bitches that kick us in the ass." *Id.* (internal quotation marks omitted).

¹⁰⁰ NATHAN, *supra* note 97, at 2 (internal quotation marks omitted).

¹⁰¹ For related discussions of this point in the political science literature, see Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 121-26 (1996); and Moe, *supra* note 36, at 481-82.

¹⁰² See *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926);

although the President often cannot make effective use of his removal power given the political costs of doing so, and although conversely, in the absence of this power, he retains other methods of exerting influence over administrative officials, the existence of independent agencies can pose a particularly stark challenge to the aspiration of Presidents to control administration. Indeed, later Parts will return to the distinction between executive and independent agencies, and suggest some consequences that should follow from it.¹⁰³ But when Truman and other Presidents spoke of the difficulties of controlling administration, they did not mean primarily the Federal Trade Commission and like agencies, nor did they usually follow their laments with appeals for greater removal power. They understood that these difficulties pervade the administrative state and that successful strategies for asserting presidential control would involve more than structural changes to independent agencies (even were such changes remotely plausible).¹⁰⁴ Their incipient efforts to implement these strategies, followed by Ronald Reagan's more aggressive and successful plan, form the subject of this Part.

A. *Early Efforts*

In 1937, the Brownlow Committee, a study group set up by Franklin Roosevelt, explained its call for fundamental reforms in administration with the simple conclusion: "The President needs help."¹⁰⁵ Earlier twentieth-century Presidents had made forays into this territory. A commission established by Theodore Roosevelt had proposed measures to standardize and centralize administrative practices; one formed by President Taft had advanced similar measures, including the preparation of a unified executive budget for submission to Congress.¹⁰⁶ In

Calabresi & Prakash, *supra* note 1; Flaherty, *supra* note 1; Lessig & Sunstein, *supra* note 1; Miller, *supra* note 1.

¹⁰³ See *infra* pp. 2326–28, 2377.

¹⁰⁴ The focus of legal scholars on independent agencies has become all the more misdirected in light of the gradual transfer of power from independent to executive branch agencies. This shift has resulted from the elimination of some independent agencies (the Interstate Commerce Commission and Civil Aeronautics Board) and the assignment of emerging regulatory functions to new executive branch agencies (the EPA) or new divisions of existing executive branch agencies (the Occupational Safety and Health Administration in the Department of Labor). The single, albeit significant, change in the opposite direction resulted from the recent detachment of the Social Security Administration from the Department of Health and Human Services. I am grateful to David Shapiro for this point.

¹⁰⁵ PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF THE ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 5 (1937).

¹⁰⁶ See PERI E. ARNOLD, MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING, 1905–1996, at 22–51 (2d ed. 1998); McDONALD, *supra* note 96, at 330–31.

each case, however, Congress had rebuffed the President's proposals, noting pointedly in response to Roosevelt that the power he sought to manage the incipient administrative state was "an authority previously the exclusive and unchallenged domain of Congress."¹⁰⁷ As a result of wartime deficits, Congress gave to President Harding what Taft had wanted: the Budget and Accounting Act of 1921 provided that the President, assisted by a new Bureau of the Budget (placed in the Treasury Department but understood to have a direct connection to the President), would oversee and coordinate all agencies' budget requests.¹⁰⁸ This was landmark legislation, endowing the President for the first time with a fiscal lever over administrative policy. Still, as the Brownlow Committee surveyed the landscape immediately after the spate of New Deal reforms, it found a President who although "now ha[ving] popular responsibility" for the "direction and control of all departments and agencies of the Executive Branch . . . is not equipped with adequate legal authority or administrative machinery to enable him to exercise it."¹⁰⁹

The proposals of the Brownlow Committee, most of which Congress accepted, established the infrastructure underlying all subsequent attempts by the White House to supervise administrative policy. These reforms created the Executive Office of the President (EOP) and placed within it a greatly enlarged Bureau of the Budget and an expanded personal staff for the President.¹¹⁰ A decade later, this time in response to proposals by the Hoover Commission, Congress enacted further reforms to create a more coordinated administration under a more managerial President. The intent of the proposals, in the language of the Commission's report, was to "cut[] through the barriers that have in many cases made bureaus and agencies practically independent of the Chief Executive,"¹¹¹ and to create "a clear line of command from the top to the bottom, and a return line of responsibility and accountability from the bottom to the top."¹¹²

With little else done in ensuing years to achieve this goal, even as the size and responsibilities of the federal government continued to grow, Richard Nixon entered office to discover a bureaucracy he

¹⁰⁷ MCDONALD, *supra* note 96, at 330-31 (internal quotation marks omitted).

¹⁰⁸ See ARNOLD, *supra* note 106, at 53-55.

¹⁰⁹ *Id.* at 103 (quoting Memorandum from Louis Brownlow, President's Committee on Administrative Management, to President Franklin Delano Roosevelt (Nov. 5, 1936) (A-II-33 Roosevelt Library)) (internal quotation marks omitted).

¹¹⁰ See *id.* at 103-06.

¹¹¹ COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, GENERAL MANAGEMENT OF THE EXECUTIVE BRANCH 7 (1949).

¹¹² *Id.* at 1.

deemed both hostile to his policies and impervious to his control.¹¹³ Nixon responded by creating a “counter-bureaucracy” within the EOP, with a White House staff more than double the size of Lyndon Johnson’s, a new White House-centered Domestic Council to formulate policy positions on domestic issues, and an expansive OMB, remade from the Bureau of the Budget in ways designed to bring certain non-budgetary matters under its aegis.¹¹⁴ Many of these reforms served more to supplement than to supervise — much less to co-opt — the permanent administration: while the White House focused on formulating legislative proposals, it left strictly administrative decisions, including the development of important rules, in the hands of the agencies.¹¹⁵ But as part of his re-creation of OMB, Nixon instituted a “Quality of Life” review of proposed regulations relating to environmental quality, consumer protection, and other matters of public health. Under the program, OMB circulated proposed rules of one agency to other agencies for comment, integrated the criticisms received, and sent them on to the initiating agency. Although OMB rarely played a substantive role, the review process set a precedent for an enhanced EOP role in agency decisionmaking.¹¹⁶

Presidents Ford and Carter built incrementally on this precedent by using inter-agency review processes to encourage greater analytical rigor by agencies, particularly regarding the costs of regulations. Faced with the threat of rising inflation, Ford directed agencies to consider the inflationary impact of all major rules and to submit their analyses to a new office in the EOP named the Council on Wage-Price Stability. But because all parties viewed the Council’s role as purely consultative, agencies tended to treat the process as more a paperwork obligation than a substantive constraint.¹¹⁷ Carter followed by requiring agencies to submit analyses of major proposed rules — including a description of alternatives and a comparative evaluation of their economic consequences — to the Regulatory Analysis Review Group, a new body consisting of EOP and agency representatives. But again, all parties understood final decisionmaking authority to rest with the

¹¹³ See NATHAN, *supra* note 97, at 8–9. An empirical study conducted as the Nixon administration came to a close suggested that the federal bureaucracy indeed was “dominated by administrators ideologically hostile to many of the directions pursued by the Nixon administration in the realm of social policy.” Joel D. Aberbach & Bert A. Rockman, *Clashing Beliefs Within the Executive Branch: The Nixon Administration Bureaucracy*, 70 AM. POL. SCI. REV. 456, 467 (1976).

¹¹⁴ NATHAN, *supra* note 97, at 34; see Peri E. Arnold, *The Managerial Presidency’s Changing Focus, Theodore Roosevelt to Bill Clinton*, in *THE MANAGERIAL PRESIDENCY* 217, 222–23 (James P. Pfiffner ed., 2d ed. 1999).

¹¹⁵ See NATHAN, *supra* note 97, at 8.

¹¹⁶ See Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 546–47 (1989); Pildes & Sunstein, *supra* note 3, at 13–14.

¹¹⁷ See THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* 18–19 (1991).

initiating agency, and in any event, the Review Group evaluated only a smattering of rules during its brief operation.¹¹⁸ As a result, the Congressional Research Service could report to a Senate committee at the close of the Carter administration that “more, not fewer . . . agencies and programs [were] considered outside of direct accountability to the president,” thus “further undermin[ing] the president’s managerial authority and influence over the administrati[on].”¹¹⁹

B. The Reagan Era

The sea change began with Ronald Reagan’s inauguration. Just a year earlier, an influential report by the American Bar Association had noted that Presidents historically “ha[d] shunned direct intervention”¹²⁰ in rulemaking and that they “ha[d] been loath to let it appear that they were influencing regulatory agencies, even those within the executive branch, to write their regulations one way rather than another.”¹²¹ Reagan, by contrast, self-consciously and openly adopted strategies to exert this influence. He began by using his appointment power, perhaps more successfully than any other modern President, to staff the agencies with officials remarkable for their personal loyalty and ideological commitment, who would subscribe to his (obligingly clear) policy agenda even in the face of competing bureaucratic pressures.¹²² But in the event these officials strayed, or proved unable to control their departments, Reagan also instituted, through two executive orders, a centralized mechanism for review of agency rulemakings unprecedented in its scale and ambition — and soon shown to be unprecedented in its efficacy as well, though perhaps still not to the degree its advocates desired.¹²³

Executive Order 12,291, issued during Reagan’s first month in office, established the system: the order required executive — but not independent — agencies to submit to OMB’s Office of Information

¹¹⁸ See Pildes & Sunstein, *supra* note 3, at 14.

¹¹⁹ HAROLD SEIDMAN & ROBERT GILMOUR, *POLITICS, POSITION, AND POWER: FROM THE POSITIVE TO THE REGULATORY STATE* 118 (4th ed. 1986) (quoting SENATE COMM. ON GOVERNMENTAL AFFAIRS, 96TH CONG., *THE FEDERAL EXECUTIVE ESTABLISHMENT: EVOLUTION AND TRENDS* 20 (Comm. Print 1980)).

¹²⁰ COMM’N ON LAW & THE ECON., AM. BAR ASS’N, *FEDERAL REGULATION: ROADS TO REFORM* 73 (1979) [hereinafter *ROADS TO REFORM*].

¹²¹ *Id.* at 70.

¹²² See NATHAN, *supra* note 97, at 74; Terry M. Moe, *The Politicized Presidency, in THE MANAGERIAL PRESIDENCY*, *supra* note 114, at 144, 158.

¹²³ Political scientists have noted the contrasting presidential strategies of “centralization” and “politicization” — meaning, respectively, a shift in the locus of decisionmaking to the White House and other offices of the EOP and an attempt to infiltrate the agencies through aggressive use of the appointment power. See Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 *LAW & CONTEMP. PROBS.* 1, 17–19 (1994). Perhaps unique among modern Presidents, Ronald Reagan accomplished both.

and Regulatory Affairs (OIRA) for pre-publication review any proposed major rule, accompanied by a "regulatory impact analysis" of the rule, including a cost-benefit comparison.¹²⁴ The order also outlined substantive criteria to govern agency rulemaking: "to the extent permitted by law," an agency could regulate only if the benefits of doing so exceeded the costs and the choice among alternatives "involv[ed] the least net cost to society."¹²⁵ Although the order and the legal opinion supporting it explicitly disclaimed any right on the part of OMB, or the President himself, to dictate or displace agency decisions,¹²⁶ the order effectively gave OMB a form of substantive control over rulemaking: under the order, OMB had authority to determine the adequacy of an impact analysis and to prevent publication of a proposed or final rule, even indefinitely, until the completion of the review process.¹²⁷ Executive Order 12,498, issued four years later, added a mandate that each agency submit for OMB review an annual regulatory plan listing proposed actions for the year, thus giving OMB an earlier opportunity to influence agency rulemakings.¹²⁸

These orders proved in practice, as promised on paper, more consequential than any prior review system, especially in their early years of operation.¹²⁹ During Reagan's tenure, roughly eighty-five rules each year were either returned to the agencies for reconsideration or withdrawn by the agencies in the course of review.¹³⁰ Although this figure amounted to less than four percent of all rules OMB reviewed, the rules that provoked OMB's displeasure tended to be among the most important.¹³¹ In 1986, responding to questions from Democrats

¹²⁴ Exec. Order No. 12,291 § 3, 3 C.F.R. 127, 128-30 (1981), *reprinted in* 5 U.S.C. § 601 (1994). The Reagan Administration almost certainly exempted the independent agencies because it feared provoking a Democratic Congress, rather than because it believed the law, as properly interpreted, required this course of action. The Reagan Justice Department in several other contexts challenged the insulation of administrative entities from the President, in what the then-Solicitor General has termed a "battle to rearrange government power." FRIED, *supra* note 10, at 133.

¹²⁵ Exec. Order No. 12,291 § 2, 3 C.F.R. at 128.

¹²⁶ The order stated that it was not to be "construed as displacing the agencies' responsibilities delegated by law." *Id.* § 3(f)(3), 3 C.F.R. at 130. In addition, the legal opinion approving the order issued by the Assistant Attorney General for the Office of Legal Counsel stated that neither the President nor the OMB Director had any authority under the order "to displace the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions" or "to reject an agency's ultimate judgment." Proposed Executive Order Entitled "Federal Regulation", 5 Op. Off. Legal Counsel 59, 63-64 (1981).

¹²⁷ Exec. Order No. 12,291 § 3(e)-(f), 3 C.F.R. at 129-30.

¹²⁸ Exec. Order No. 12,498, 3 C.F.R. 323 (1985) (repealed 1993).

¹²⁹ OMB probably achieved its greatest influence in the early to mid-1980s. By the end of that decade, with enthusiasm for deregulation on the wane, agencies appear to have regained strength in their negotiations with OMB. See W. KIP VISCUSI, *FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK* 251, 259-60 (1992).

¹³⁰ See MCGARITY, *supra* note 117, at 22.

¹³¹ See *id.*

in Congress, the OMB director could cite only six instances in which agencies had issued rules over OMB's objections: in four, the agencies had acted under judicial order, and in two, the agencies successfully had appealed their position to the White House.¹³² These statistics do not show that OMB won all other battles. In many cases in which OMB initially objected, including cases in which a rule was returned or withdrawn, OMB and the relevant agency eventually reached agreement, sometimes favoring OMB, sometimes the agency. But OMB used its powers under the executive orders to change or (less often) block some proposed rules deemed not fully consistent with Reagan's regulatory policies, including rules relating to environmental quality and workplace safety.¹³³

Proponents of this system stressed the need for a centrally policed requirement of cost-benefit analysis to guard against regulatory failures — in particular, excessive regulatory costs imposed by single-mission agencies with ties to special interest groups and congressional committees. If agency heads had to assess costs and benefits — and to offer their assessments for external review — they would begin to correct for what two former heads of OIRA termed “covert redistribution and overzealous pursuit of agency goals.”¹³⁴ More generally, advocates of OMB oversight argued that the increased complexity of government, along with the proliferation of administrative entities, enhanced the need for effective coordination and priority-setting. Given Congress's inability to provide overarching management of administration, demonstrated by its delegation of broad authority to agencies in the first place, only the President, acting through his advisors, could perform this coordinating function.¹³⁵

The Reagan oversight program, however, also provoked sharp criticism, most of which related to perceptions of the scheme's anti-regulatory bias.¹³⁶ The most fundamental, though least commonly accepted, objection held that the Reagan executive orders violated the separation of powers: because the Constitution allocated lawmaking power to Congress, and because Congress had delegated this power, in the form of rulemaking authority, not to the President, but to agency officials, the President (or his delegates) could not engage in substantive review of agency rules, even short of directing or displacing any

¹³² See Percival, *supra* note 2, at 150.

¹³³ See MCGARITY, *supra* note 117, at 274–79.

¹³⁴ DeMuth & Ginsburg, *supra* note 2, at 1081. DeMuth served as the head of OIRA from 1981 to 1984, and Ginsburg from 1984 to 1985.

¹³⁵ See ROADS TO REFORM, *supra* note 120, at 68–73, 84–88 (recommending the creation of a regulatory review system); Strauss & Sunstein, *supra* note 2, at 189 (commending Executive Orders 12,291 and 12,498).

¹³⁶ For good summaries of these criticisms, see MCGARITY, *supra* note 117, at 281–88, and Pildes & Sunstein, *supra* note 3, at 4–6.

decisions.¹³⁷ Although capable of statement in unadorned terms, this claim derived most of its power from accompanying assertions that OMB used oversight to drive regulation in a direction (toward *deregulation*) different from that which the delegees would have chosen. A second criticism focused even more explicitly on the substantive principles — most notably, the commitment to cost-benefit analysis — incorporated in Reagan's orders. Opponents urged that this analytical tool, especially as wielded by an office predisposed against regulation, worked against even socially gainful regulation because of the difficulty of quantifying certain benefits; they also claimed that the orders' emphasis on cost, even as qualified by the phrase "to the extent permitted by law," clashed with the policies underlying most regulatory statutes.¹³⁸ A final objection stressed the delay created by OMB review, which critics saw as both a harm in itself and a means of diluting regulatory initiatives.¹³⁹

Enmeshed with all these objections was concern about the secrecy with which President Reagan's regulatory oversight system operated.¹⁴⁰ Most of OMB's communications with the agencies, whether written or oral, never appeared in the public record of rulemakings or became otherwise subject to disclosure. OMB thus could induce changes in a proposed rule — before, during, or after the official comment period — in ways and for reasons that remained invisible to interested parties, the public, the courts, and Congress.¹⁴¹ Worse yet, in the view of critics, OMB could and did discuss rules with interest groups (often the regulated entities) and convey their views to the initiating agencies, as either the groups' analysis or OMB's own, without divulging the nature or content of these communications. The OMB process thus created an additional mechanism for the back-channel participation of industry groups, which reinforced the review system's antiregulatory inclinations.¹⁴²

¹³⁷ See Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199, 1205–20 (1981). Section IV.A, pp. 2320–31, below, addresses a related but more difficult constitutional question arising from President Clinton's assertion of authority to direct administrative action.

¹³⁸ See, e.g., Percival, *supra* note 2, at 186–89; Shane, *supra* note 3, at 178.

¹³⁹ See MCGARITY, *supra* note 117, at 282–83; Morrison, *supra* note 2, at 1065.

¹⁴⁰ See Morrison, *supra* note 2, at 1067–68; Percival, *supra* note 2, at 168–72.

¹⁴¹ In response to Congressional pressure, OMB began in 1986 to release, upon written request following publication of proposed or final regulations, the drafts of regulations sent to OMB for review as well as any written comments sent by OMB to the agency head. See Wendy L. Gramm, Adm'r, Office of Info. & Regulatory Affairs, Memorandum for the Heads of Departments and Agencies Subject to Executive Order Nos. 12,291 and 12,498 (June 13, 1986), reprinted in OFFICE OF MGMT. & BUDGET, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT, APRIL 1, 1990–MARCH 31, 1991 app. 3, at 605, 606 (1990).

¹⁴² The APA contains no prohibitions on *ex parte* contacts between agency personnel and outside persons in notice-and-comment rulemaking, but courts sometimes have required agencies to

C. A Postscript

Despite these criticisms, President Bush retained both of Reagan's executive orders. Bush's primary innovation was to assign responsibility for overseeing OIRA itself to a new body, the Council on Competitiveness, chaired by Vice President Quayle and run by his office.¹⁴³ Congress unwittingly triggered this new arrangement by refusing to confirm Bush's nominee for OIRA Administrator or to reauthorize the office in retaliation for Bush's refusal to sign legislation imposing time limits on OIRA's review of rules and requiring fuller disclosure of its processes. Although OIRA continued to review rules under a non-political acting administrator, the Council on Competitiveness assumed an increasingly important role with respect to controversial regulations. Like the Reagan OIRA, the Council advocated deregulatory policies; even more than OIRA, the Council spurned broad practices of disclosure. As a result, the Council provoked the same criticisms, except perhaps still more heated, formerly lodged against OIRA.

III. PRESIDENTIAL ADMINISTRATION IN THE CLINTON YEARS

In light of this criticism, observers might have predicted that when a Democratic President assumed office in 1993, a radical curtailment of presidential supervision of administrative action would follow. Instead, the very opposite occurred. President Clinton, to be sure, replaced Reagan's executive orders on regulatory review and eliminated Bush's Competitiveness Council. But as this Part will show, presidential control of administration, if with a different policy orientation and in a different form, expanded significantly during the Clinton Presidency, moving in this eight-year period to the center of the regulatory landscape.

President Clinton treated the sphere of regulation as his own, and in doing so made it his own, in a way no other modern President had done.¹⁴⁴ Clinton came to view administration as perhaps the single

include summaries of significant contacts in the rulemaking record. See *Sierra Club v. Costle*, 657 F.2d 298, 402-05 (D.C. Cir. 1981); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57-59 (D.C. Cir. 1977). The Reagan OMB agreed early on to identify for inclusion in the agency's rulemaking record any "factual" (but not "policy") material developed or received from outside parties and transmitted to the agency. See Memorandum from David Stockman, Director, Office of Management and Budget, Certain Communications Pursuant to Executive Order 12,291 (June 11, 1981). Five years later, OMB agreed both to send to the agency and to make public all written materials received from outside sources, as well as a complete list (but no summaries) of meetings between OMB personnel and persons outside the federal government. See Gramm, *supra* note 141, at 606.

¹⁴³ For a critical analysis of the Council on Competitiveness, see Shane, *supra* note 3, at 165-73.

¹⁴⁴ Among legal academics, Peter Strauss alone, to my knowledge, has noted Clinton's increased involvement in regulatory action. Strauss observed in a recent highly critical essay — perhaps focused somewhat more than my treatment on the public relations aspects of Clinton's

most critical — in part because the single most available — vehicle to achieve his domestic policy goals. He accordingly developed a set of practices that enhanced his ability to influence or even dictate the content of administrative initiatives. He exercised this power with respect to a wide variety of agency action — rulemakings, more informal means of policymaking, and even certain enforcement activities. The new practices, to be sure, had significant limits, some internally and others externally imposed, and they left untouched a wide swath of regulatory activity. But to a considerable extent, Clinton built on the legacy Reagan had left him to devise a new and newly efficacious way of setting the policy direction of agencies — of converting administrative activity into an extension of his own policy and political agenda. In so doing, Clinton also showed that presidential supervision of administration could operate, contrary to much opinion,¹⁴⁵ to trigger, not just react to, agency action and to drive this action in a regulatory, not deregulatory, direction.

In the first section of this Part, I offer by way of prologue a brief description of two examples of rulemaking in the Clinton Administration, focusing in each case on the President's involvement. In the second section, I describe the techniques Clinton developed to direct administrative policymaking and discuss the frequency with which he employed them. In the third section, I consider the effective span of these practices, delineating the kinds of administrative matters in which Clinton became involved (or declined to do so). I discuss in the fourth section both the causes of Clinton's engagement with agency action and the responses it evoked, especially from Congress. I conclude in the fifth section by drawing some comparisons between Reagan's and Clinton's respective styles of presidential administration and tendering some predictions about the future.

A. *Two Examples*

To gain an initial sense of presidential administration during the Clinton years, consider two rulemakings:

On August 10, 1995, President Clinton began a press conference by announcing publication of a proposed rule to reduce youth smoking. He explained his action as follows:

practices — that “the proprietary interest in particular [administrative] outcomes that President Clinton has taken in public political actions appears to be a new phenomenon.” Strauss, *supra* note 5, at 967. Several of Washington's most respected journalists also have written about President Clinton's focus on administration in ways that support my analysis. See, e.g., James Bennet & Robert Pear, *How a Presidency Was Defined by the Thousand Parts of Its Sum*, N.Y. TIMES, Dec. 8, 1997, at A1; Robert Pear, *The Presidential Pen Is Still Mighty*, N.Y. TIMES, June 28, 1998, § 4, at 3; Alexis Simendinger, *An Executive Endgame Takes Shape*, 32 NAT'L J. 628 (2000); Alexis Simendinger, *The Paper Wars*, 30 NAT'L J. 1732 (1998).

¹⁴⁵ See *supra* note 6.

Today I am announcing broad executive action to protect the young people of the United States from the awful dangers of tobacco. . . . Today and every day this year, 3,000 young people will begin to smoke. One thousand of them ultimately will die of . . . diseases caused by smoking Therefore, by executive authority, I will restrict sharply the advertising, promotion, distribution, and marketing of cigarettes to teenagers. I do this on the basis of the best available scientific evidence Fourteen months of study by the Food and Drug Administration confirms what we all know: Cigarettes and smokeless tobacco are harmful, highly addictive, and aggressively marketed to our young people So today I am authorizing the Food and Drug Administration to initiate a broad series of steps all designed to stop sales and marketing of cigarettes and smokeless tobacco to children.¹⁴⁶

With that, Clinton laid out the six principal measures proposed in the rule to limit the marketing and advertising of tobacco to children, and noted that Congress could make the rule unnecessary by passing legislation containing these restrictions.¹⁴⁷ The announcement by the President effectively opened the public comment period (here, lasting ninety days) that the APA requires for regulations. Following the comment period, the Food and Drug Administration (FDA) (a component of an executive branch agency), with the participation of White House, OMB, and Justice Department staff, spent some nine months preparing the 921-page final rule and supporting annex. Although the final rule incorporated a number of changes, none went to the heart of the regulatory proposal (or to the President's public comments).¹⁴⁸ The final documents, containing new proscriptions on tobacco manufacturers and vendors, a statement of the health-related justifications for those proscriptions, and a lengthy defense of FDA jurisdiction over the issue, nowhere mentioned the President; rules, as a historic matter, very rarely have done so, and this one was no exception. Nonetheless, Clinton stepped up again to announce the issuance of the rule, this time in a Rose Garden ceremony.¹⁴⁹

On May 23, 1999, Clinton publicly entered a rulemaking at an even earlier stage — not with the announcement of a proposed regulation,

¹⁴⁶ The President's News Conference, 2 PUB. PAPERS 1237 (Aug. 10, 1995).

¹⁴⁷ See *id.* at 1237-38.

¹⁴⁸ See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (Aug. 28, 1996) (codified at 21 C.F.R. pts. 801, 803, 804, 807, 820 & 897); Annex: Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44,619 (Aug. 28, 1996). By a 5-4 vote, the Supreme Court ultimately struck down the rule as exceeding the FDA's authority under the Food, Drug, and Cosmetic Act. See *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315-16 (2000).

¹⁴⁹ Remarks Announcing the Final Rule To Protect Youth from Tobacco, 2 PUB. PAPERS 1332 (Aug. 23, 1996).

but before there was any proposal to speak of. Delivering one of his yearly commencement addresses, Clinton announced that he would “us[e] [his] executive authority as President” to “direct[] the Secretary of Labor to issue a rule to allow States to offer paid leave to new mothers and fathers” through the unemployment insurance system.¹⁵⁰ A written memorandum accompanying this announcement gave the Secretary slightly more leeway than did Clinton’s oral remarks, but also made the announcement official. It stated:

I hereby direct the Secretary of Labor to propose regulations that enable States to develop innovative ways of using the Unemployment Insurance (UI) system to support parents on leave following the birth or adoption of a child In this effort, the Department of Labor is to evaluate the effectiveness of using the UI system for these or related purposes.¹⁵¹

A little more than six months later, Clinton appeared with the Secretary and others to announce the proposed Labor Department rule, which indeed would allow states to use the unemployment insurance system to offer paid leave to new parents. Although the public comment period on this proposal had yet to begin, Clinton spoke of the plan (as he had of the proposed tobacco regulation) as essentially consummated. He contended in this announcement that “giving States the flexibility to experiment with paid employment leave is one of the best things we can do to strengthen our families,” stated that “[w]ith this act, the United States joins the rest of the world’s advanced economies, all of whom already have some form of paid leave for parents,” and expressed his “hope [that] States will take advantage of this new option.”¹⁵² Six months later still, following OMB review of a draft rule, Clinton used his weekly radio address to unveil the final Department of Labor regulation, which in fact gave states this option.¹⁵³

B. Techniques: Review, Directives, and Appropriation

Presidential administration during the Clinton Presidency proceeded in three stages, each of which played some role in one or both

¹⁵⁰ Commencement Address at Grambling State University in Grambling, Louisiana, 1 PUB. PAPERS 836, 839 (May 23, 1999).

¹⁵¹ Memorandum on New Tools To Help Parents Balance Work and Family, 1 PUB. PAPERS 841, 841 (May 24, 1999).

¹⁵² Remarks Prior to Departure for San Francisco, California, and an Exchange with Reporters, 35 WEEKLY COMP. PRES. DOC. 2466, 2466 (Nov. 30, 1999). While the rule was in the proposal stage, Clinton also announced in a weekly radio address that he would ask Congress to approve a \$20 million competitive grant program to help states develop new approaches for providing paid parental leave, whether through the unemployment insurance system or in some other manner. The President’s Radio Address, 36 WEEKLY COMP. PRES. DOC. 292 (Feb. 12, 2000).

¹⁵³ The President’s Radio Address, 36 WEEKLY COMP. PRES. DOC. 1333 (June 10, 2000).

of the examples just cited. The first and most important was the use of formal directives (generally styled as memoranda to the heads of departments) instructing one or more agencies to propose a rule or perform some other administrative action within a set period of time. Consider here the directive to the Secretary of Labor to issue a proposed regulation on the use of unemployment insurance for paid family leave. The second, applying to rules alone, was a modified form of OMB review, in practice less intrusive on agency decisionmaking than Reagan's, but in theory going further — and in doing so, providing a harbinger of the other two methods of presidential control. The third was the personal appropriation by Clinton of regulatory action, accomplished through regular public events sending a message, to the public and agency officials alike, that the action in question was his own rather than the agency's product. Consider here the number of public announcements Clinton made in connection with the tobacco and family leave rules and the rhetoric he used in these announcements. I discuss below these three techniques or modes of presidential control, which together comprised the arsenal Clinton used to impress his policy and political agenda on administrative decisionmaking.

i. Review. — Of these techniques, Clinton's OMB review process counts, however paradoxically, as both the least significant and the most foundational. The process in operation largely followed the Reagan model, except probably to less effect. Yet the executive order that established the process, issued in the first year of the Clinton Presidency, implicitly articulated a stronger view than its predecessor had of the President's authority over the administrative state — most notably, as to the question whether the President had ultimate power over the exercise of discretion delegated to agency officials. The answer provided in the executive order — a not quite absolute yes — suggested an aggressive attitude on Clinton's part toward the administrative state and portended his development of other techniques, outside the OMB review process, to assert this power. For this reason, Clinton's executive order on OMB regulatory review is the appropriate place to start this discussion.

President Clinton's Executive Order 12,866, issued in September 1993 as a replacement for Executive Orders 12,291 and 12,498, retained the most important features of President Reagan's oversight system. The new order again required that agencies submit major regulations to OMB for review.¹⁵⁴ It made clear that cost-benefit analysis, to the extent permitted by the relevant statute, would con-

¹⁵⁴ Exec. Order No. 12,866 §§ 2(b), 6(a)(3)(B), 3 C.F.R. 638, 640, 645 (1993), *reprinted in* 5 U.S.C. § 601 (1994).

tinue to serve as the basic criterion in assessing regulatory decisions.¹⁵⁵ And it established an annual regulatory planning process similar to that initiated by Executive Order 12,498.¹⁵⁶

The differences in the new order that most observers highlighted were those moderating controversial aspects of the Reagan oversight system.¹⁵⁷ As an initial matter, much of the rhetoric in the order downplayed the substantive importance of OMB's role in reviewing agency decisions. The order listed as one of its objectives "to reaffirm the primacy of Federal agencies in the regulatory decision-making process" and pledged that "the regulatory process shall be conducted . . . with due regard to the discretion that has been entrusted to the Federal agencies."¹⁵⁸ Backing up this statement of intent, the order limited the time available for OMB review, thus preventing OMB from using delay as a tool for pressuring agencies to revise proposed rules.¹⁵⁹ The order further restructured the regulatory planning process to encourage earlier consultation and coordination between OMB and the agencies in an effort to reduce the incidence of last-minute conflicts in the review process. Finally, the order suggested a generally more positive attitude toward regulatory efforts, particularly on health and safety matters. In addition to reciting language about the potential benefits of regulation, the order eased the mandate that agencies use cost-benefit analysis as the basis of decisionmaking by authorizing the agencies to incorporate in this analysis "equity," "distributive impacts," and "qualitative measures."¹⁶⁰ A later executive order continued in the same vein by requiring agencies to conduct, and submit to OIRA for review, evaluations of the environmental, health, or safety effects on children of proposed major regulations.¹⁶¹

Perhaps the most heralded changes in the new executive order related to *ex parte* contacts and disclosure issues. Under the order, only the Administrator of OIRA could receive oral communications from persons outside the executive branch, and agency personnel had the right to be present at any such meeting.¹⁶² The order further required OIRA to forward to the relevant agency all written communications

¹⁵⁵ *Id.* §§ 1(b)(5), 1(b)(6), 6(a)(3)(B)(ii), 6(a)(3)(C), 3 C.F.R. at 639, 645.

¹⁵⁶ *Compare id.* § 4, with Exec. Order No. 12,498, 3 C.F.R. 323 (1985) (repealed 1993).

¹⁵⁷ See Pildes & Sunstein, *supra* note 3, at 27 (stating that "Executive Order 12866 is significant mostly for the constraints it imposes on presidential oversight"); Shane, *supra* note 3, at 192 (stating that the Clinton order intended to achieve "greater consistency between the aims of regulatory review and the value structure animating Congress, greater deference to individual agencies as policy makers, and more openness in regulatory review").

¹⁵⁸ Exec. Order No. 12,866 pmb1., 3 C.F.R. at 638.

¹⁵⁹ *Id.* § 6(b)(2), 3 C.F.R. at 646-47.

¹⁶⁰ *Id.* § 1(a), 3 C.F.R. at 639.

¹⁶¹ Exec. Order No. 13,045, 3 C.F.R. 198 (1997), *reprinted in* 42 U.S.C. § 4321 (Supp. III 1997).

¹⁶² Exec. Order No. 12,866 § 6(b)(4)(A)-(B)(i), 3 C.F.R. at 647.

from outsiders and to maintain a log, available to the public, of both written and oral communications involving these parties.¹⁶³ And after publication of the regulatory action (or a decision not to go forward with it), OIRA was required to disclose all written communications between itself and the agency.¹⁶⁴ Taken together, these provisions substantially opened the review process to public view and comment.

The new review system produced fewer battles between OMB and the agencies than had occurred in the Reagan and Bush Administrations, although the reasons are uncertain. Some statistics suggest no less activism by Clinton's OMB than by its two predecessors. Of the rules reviewed by the Clinton OMB, the percentage approved without change sharply decreased from prior years, the percentage approved with change increased proportionately, and the small percentage either returned to or withdrawn by the initiating agency remained roughly constant.¹⁶⁵ These figures may imply that the abatement of open conflict between OMB and the agencies in the Clinton years had less to do with decreased scrutiny in the review process than with the absence of a Democratic Congress ready to ally itself with the agencies in defense of regulation. But that analysis is open to question on two grounds. First, the statistics to some degree compare apples and oranges, because the Clinton OMB chose to review fewer rules than did its predecessors, so as to focus resources on the most important; thus, an equivalent percentage return by the Clinton OMB of this smaller group of rules would indicate decreased activism if prior OMBs returned only (or mostly) rules meeting this level of significance. Second, the statistics cannot negate the possibility that the Clinton OMB, even if revising or returning the same number of important rules, chose less often than prior OMBs to cross swords with the agencies on the most critical matters. On this hypothesis, the lack of conflict arising from regulatory review in the Clinton years indeed resulted from a less interventionist stance on the part of OMB, attributable either to the deference pledged to agencies in the new executive order or to a convergence of views about regulatory policy between rulemaking agencies and the OMB of a Democratic President.¹⁶⁶

¹⁶³ *Id.* § 6(b)(4)(B)(ii), 6(b)(4)(C), 3 C.F.R. at 647-48.

¹⁶⁴ *Id.* § 6(b)(4)(D), 3 C.F.R. at 648.

¹⁶⁵ See CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 222 tbl.6-5 (2d ed. 1999) (summarizing these statistics).

¹⁶⁶ This hypothesis may receive support from recent empirical findings that the Clinton OMB failed to enforce rigorously its requirement that agencies include full cost-benefit analyses (including consideration of alternatives) in their regulatory impact statements. See Robert W. Hahn, Jason K. Burnett, Yee-Ho I. Chan, Elizabeth A. Mader, and Petrea R. Moyle, *Assessing Regulatory Impact Analyses: The Failure of Agencies To Comply With Executive Order 12,866*, 23 HARV. J.L. & PUB. POL'Y 859, 861-62 (2000). The authors of this study note, however, that economic analy-

But beneath the apparent restraint of the Clinton executive order, as both written and applied, lay two hints of an expansive understanding of the President's authority over the sphere of administration. The first came in the executive order's treatment of independent agencies. Whereas the Reagan orders had exempted the independent agencies, the Clinton order included them to a certain extent. Although not requiring the independent agencies to submit individual rules for review, the order did subject the independents to the regulatory planning process administered by OMB and overseen by the Vice President.¹⁶⁷ This provision enabled the other participants in the process (including the Vice President) to "request further consideration" of proposed rules that appeared in conflict with other agency action, the regulatory principles set out in the executive order, or "the President's priorities."¹⁶⁸ Clinton might have taken this extra step because he had less reason than Reagan to fear the reaction of a still-Democratic Congress, but the provision nonetheless signified a strong commitment to presidential oversight of administration, extending even beyond the executive branch to the independent agencies.¹⁶⁹

Even more important, the Clinton executive order, unlike the Reagan orders, suggested that the President had authority to direct executive department (though not independent agency) heads in the exercise of their delegated rulemaking power. The order did so by setting up a formal process, with the President serving as arbiter, for resolving disputes arising out of OMB review. According to the order, conflicts between agencies or between OMB and an agency were to be resolved, "[t]o the extent permitted by law, . . . by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials)."¹⁷⁰ If the last clause in this provision raised a question whether agency heads had some shared role in making these decisions (beyond the opportunity to present their views to the President), a later provision suggested they did not: "At the end of this review process,

ses of regulations by agencies "were not necessarily better" in the Reagan and Bush Administrations. *See id.* at 879 n.51.

¹⁶⁷ Exec. Order No. 12,866 § 4(c), 3 C.F.R. at 642.

¹⁶⁸ *Id.* § 4(c)(4)-(6), 3 C.F.R. at 643.

¹⁶⁹ *See* Pildes & Sunstein, *supra* note 3, at 29 (discussing the inclusion of independent agencies in the Clinton executive order). Although extending the President's authority over the independent agencies in this way, the Clinton Administration declined to pursue the Reagan Administration's legal campaign, mentioned in note 124, above, against these agencies' very existence. Cass Sunstein has suggested to me in comments on this Article that the reason legal scholars have neglected Clinton's involvement in administrative decisionmaking relates to this abandonment of the constitutional attack on independent agencies. If so, my claim that legal scholarship has focused excessively on the constitutional status of independent agencies, *see supra* pp. 2273-74, becomes even stronger.

¹⁷⁰ Exec. Order No. 12,866 § 7, 3 C.F.R. at 648.

the President, or the Vice President acting at the request of the President, shall notify the affected agency . . . of the President's decision with respect to the matter."¹⁷¹ The order, to be sure, included the phrase "to the extent permitted by law," thus allowing a resistant agency head to argue that the law prohibited presidential displacement of her authority — otherwise put, that the law enabled the President to issue only an advisory opinion. But the fairly clear premise of the order was that the simple delegation of rulemaking authority to a specified agency head (the kind of delegation which underlies almost all regulations) would not prevent the President from making a final decision. There was no hint that the qualifying phrase would swallow the conflict resolution procedure.

It is questionable whether this provision made much difference in the actual practice of OMB review of regulations. First, Presidents Reagan and Bush had found moderately effective, if informal, ways to resolve conflicts between OMB and an agency (or between different agencies).¹⁷² Indeed, much of the Democratic Congress's criticism of rulemaking in these administrations focused on the way the EOP (OMB itself or the White House) had succeeded in altering or even displacing agency judgments. Viewed from this perspective, the Clinton executive order's provision on conflict resolution might have seemed only a way of making the emergent exercise of presidential power over administrative action more open and accountable to the public.¹⁷³ Second and conversely, officials in the Clinton administration in fact used this formal procedure very rarely.¹⁷⁴ Perhaps few disputes rose to this level of importance; or perhaps officials in both the EOP and the agencies found advantages in the use of more informal — that is, less open and accountable — ways of resolving even significant conflicts. In either event, the dispute resolution provision of the Clinton executive order did not change the essential way that OMB regulatory review operated.

As a theoretical matter, however, the conflict resolution provision of the Clinton executive order constituted a striking assertion of executive authority. Consider here the historical context: Presidents before Reagan, as the ABA study noted, usually had shunned direct EOP involvement in any administrative rulemaking, and even Reagan, in cre-

¹⁷¹ *Id.*

¹⁷² See *supra* pp. 2278–80.

¹⁷³ Pildes and Sunstein understand the provision in this way. See Pildes & Sunstein, *supra* note 3, at 27.

¹⁷⁴ Sally Katzen, the Administrator of OIRA from 1993 through 1998, can recall only one occasion on which a dispute between OMB and an agency went to President Clinton as contemplated by this provision. Telephone Interview with Sally Katzen, former Administrator of OIRA (Mar. 2, 2001).

ating a mechanism for this involvement, had disclaimed any authority ultimately to displace the judgment of agency officials.¹⁷⁵ The Clinton order, by contrast, implied precisely this power — presidential directive authority over discretionary decisions assigned by Congress to specified executive branch officials (other than the President). Under this view, the President would not need to resort to his power of removal over executive branch heads to ensure a certain rulemaking result: that result would — or at least should — follow by virtue of a presidential (displacing a secretarial) order.¹⁷⁶ For the Clinton executive order to make this claim was to say something significant about the nature of the relationship between the agencies and the President — to say that they were *his* and so too were their decisions. That assertion, although proving to have a marginal impact in the sphere of OMB review, served as the foundation for the innovative techniques Clinton used in other contexts, to far greater practical effect, to impress his own regulatory views on the administrative agencies.

2. *Directives.* — The claim of directive authority Clinton made in his executive order manifested itself most concretely and importantly in the frequent issuance of formal and published memoranda to executive branch agency heads instructing them to take specified action within the scope of the discretionary power delegated to them by Congress. These directives, issued prior to OMB review (in the case of rules) or independent of this review (in the case of other administrative action, not subject to the OMB process), enabled Clinton and his White House staff to instigate, rather than merely check, administrative action. The memoranda became, ever increasingly over the course of eight years, Clinton's primary means, self-consciously undertaken, both of setting an administrative agenda that reflected and advanced his policy and political preferences and of ensuring the execution of this program.

To view in context Clinton's use of these directives to initiate and shape administrative action, consider first a decades-old legislative proposal, initially made by Lloyd Cutler¹⁷⁷ shortly before he began his tenure as Counsel to President Carter and subsequently adopted with slight modification by the American Bar Association report to which I

¹⁷⁵ See *supra* p. 2277; p. 2278 & note 126. As noted earlier, see *supra* p. 2250, and as discussed in section IV.A, pp. 2320–31, below, this disclaimer coincided with the generally accepted — though never judicially settled — view of the President's legal authority.

¹⁷⁶ I discuss in the next section, whether this directive power makes any practical difference — otherwise stated, whether it adds anything of significance to the removal power — in the actual, workaday world of politics and administration.

¹⁷⁷ See Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1414–17 (1975).

referred earlier.¹⁷⁸ Cutler proposed that Congress enact a statute giving the President authority to:

[D]irect any regulatory agency (a) to take up and decide a regulatory issue within a specified period of time, or (b) to modify or reverse an agency policy, rule, regulation, or decision Such action could be taken only by Executive Order published in the Federal Register, setting forth presidential findings that the action or inaction of an agency on a regulatory issue . . . threatened to interfere with or delay the achievement of an important national objective, and stating the reasons for such findings.¹⁷⁹

Cutler made clear in explicating this proposal that the directive authority he contemplated was substantive in nature: it included the authority, with respect to both initiation and repeal of agency action, not only to compel consideration of an issue (as the language of section (a) might have suggested), but also to compel a particular result (as the language of section (b) indicated).¹⁸⁰ Cutler proposed that Congress grant the President this power over both independent agencies and executive branch agencies, given that the latter were currently “no more subject to presidential directives on specific policy issues” than were the former.¹⁸¹ The ABA amended the proposal only by insisting that the regulatory action in question be “critical” in nature.¹⁸²

Presidents, of course, discovered long ago that they could use executive orders and similar vehicles (for example, proclamations) to take various unilateral actions, sometimes of considerable importance.¹⁸³ Consider, by no means as typical examples but as historical highlights, Thomas Jefferson’s Louisiana Purchase, Theodore Roosevelt’s reservation of public lands for a system of national parks, Harry Truman’s desegregation of the armed forces, Lyndon Johnson’s requirement that federal contractors adopt affirmative action policies, and as already seen, Ronald Reagan’s initiation of OMB regulatory review. Most executive orders, significant and insignificant alike, involved (if foreign policy orders are placed to the side) the administration of public lands, the public workforce, or other public operations — although they also sometimes affected, and indeed were intended to affect, nongovern-

¹⁷⁸ See *ROADS TO REFORM*, *supra* note 120, at 79–84; *supra* p. 2277.

¹⁷⁹ Cutler & Johnson, *supra* note 177, at 1414–15.

¹⁸⁰ See *id.* at 1418 (“Under our proposal the President . . . would have the power to set and execute [national policy] priorities when he believes that an agency has failed to do so.”).

¹⁸¹ *Id.* at 1404 n.28.

¹⁸² *ROADS TO REFORM*, *supra* note 120, at 79.

¹⁸³ For discussions of these actions, which both the legal and the political science literature largely ignored until recently, see Phillip J. Cooper, *Power Tools for an Effective and Responsible Presidency*, 29 *ADMIN. & SOC’Y* 529, 531–40 (1997); George A. Krause & David B. Cohen, *Presidential Use of Executive Orders, 1953–1994*, 25 *AM. POL. Q.* 458, 458–74 (1997); and Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 *J.L. ECON. & ORG.* 132, 155–61 (1999).

mental actors.¹⁸⁴ The President in these cases, whether claiming authorization from a federal statute delegating him power or from the Constitution itself, asserted his right as head of the executive branch to determine how its internal processes and constituent units were to function.

President Clinton issued his full share of these orders, thus continuing what some scholars see as a modern trend toward increased use of this tool of administration and policy.¹⁸⁵ Although no single order equaled in consequence the few historic examples just cited, the sum total significantly affected federal operations and often, albeit indirectly, the actions of private parties. Clinton, for example, designated vast tracts of public land as national monuments, thus placing them off-limits to development and other commercial activity.¹⁸⁶ He also extended federal nondiscrimination policies to prohibit actions based on sexual orientation, parental status, and genetic information;¹⁸⁷ initiated procurement policies to prevent federal contracting with companies making use of striker replacements or child labor;¹⁸⁸ ordered federal entities to comply with certain energy and environmental policies;¹⁸⁹ required federal agencies to hire set numbers of welfare recipients and people with disabilities, to adopt new workplace rules relating to religious expression and family and medical leave, and to ensure the payment of child support by their employees;¹⁹⁰ and, as discussed above,

¹⁸⁴ Phillip J. Cooper, *By Order of the President: Administration by Executive Order and Proclamation*, 18 ADMIN. & SOC'Y 233, 238 (1986).

¹⁸⁵ See Moe & Howell, *supra* note 183, at 133 (arguing that "the president's formal capacity for taking unilateral action" through the promulgation of executive orders and similar vehicles "has grown over time and become more consequential" such that it today "virtually defines what is distinctively modern about the modern American presidency").

¹⁸⁶ E.g., Proclamation No. 7295, Establishment of the Giant Sequoia National Monument, 3 C.F.R. 60 (2000); Proclamation No. 7265, Establishment of the Grand Canyon-Parashant National Monument, 3 C.F.R. 7 (2000); Proclamation No. 6920, Establishment of the Grand Staircase-Escalante National Monument, 3 C.F.R. 64 (1996). See generally Margaret Kriz, *Call of the Wild*, 31 NAT'L J. 3038, 3039 (1999) (detailing the extent of these designations).

¹⁸⁷ Exec. Order No. 13,152, 3 C.F.R. 264 (2000) (parental status); Exec. Order No. 13,145, 3 C.F.R. 235 (2000) (genetic information); Exec. Order No. 13,087, 3 C.F.R. 191 (1998) (sexual orientation).

¹⁸⁸ Exec. Order No. 13,126, 3 C.F.R. 195 (1999) (child labor), *reprinted in* 41 U.S.C. § 35 (Supp. V 1999); Exec. Order No. 12,954, 3 C.F.R. 329 (1995) (striker replacements), *reprinted in* 40 U.S.C. § 486 (Supp. I 1995). An appellate court struck down the striker replacement order on the ground that it conflicted with the National Labor Relations Act. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1339 (D.C. Cir. 1996).

¹⁸⁹ Exec. Order No. 13,149, 3 C.F.R. 254 (2000); Exec. Order No. 13,123, 3 C.F.R. 180 (1999); Exec. Order No. 13,031, 3 C.F.R. 241 (1996), *reprinted in* 42 U.S.C. § 13,212 (Supp. II 1996).

¹⁹⁰ Exec. Order No. 13,163, 3 C.F.R. 285 (2000) (disabilities); Memorandum on Religious Exercise and Religious Expression in the Federal Workplace, 2 PUB. PAPERS 1104 (Aug. 14, 1997); Memorandum on Expanded Family and Medical Leave Policies, 1 PUB. PAPERS 432 (Apr. 11, 1997); Memorandum on Government Employment for Welfare Recipients, 1 PUB. PAPERS 266

substituted his own scheme of regulatory review for that of President Reagan.

Cutler's proposal, however, concerned orders of a different kind. Whereas traditional executive orders addressed federal lands, employees, and operations, Cutler's proposed orders would have addressed the regulation of parties outside the government. The distinction, to be sure, might have little significance in certain cases: for example, Reagan's orders on regulatory review, though technically affecting only governmental processes, exceeded in importance, to regulated entities and regulatory beneficiaries alike, any directive he could have issued specifying the content of a regulation. But across the wide range of cases, the two kinds of authority — to direct the structure and processes of government on the one hand and to direct substantive regulatory policy on the other — permit different actions and produce different results, and Cutler's proposal thus countenanced a significant increase in presidential power over agency action. In addition, whereas traditional executive orders usually had relied on a claimed delegation (through a statute or the Constitution) to the President alone, Cutler's proposed orders would have operated on top of a statutory delegation to an agency official. This difference would have made no difference if, as Cutler advocated, Congress were to pass legislation specifically authorizing the President to direct agency officials in the exercise of their statutory discretion; then, a "superdelegation" would exist to countenance the superimposition of presidential authority. But in the absence of this legislation (as Cutler implicitly conceded by calling for its passage), Cutler's proposed orders would raise questions of legality inapplicable to orders of the more traditional kind.¹⁹¹

President Clinton's principal innovation in the effort to influence administrative action lay in initiating a regular practice, despite these outstanding questions, of issuing formal directives to executive branch officials regarding the exercise of their statutory discretion — effectively doing something very like what Cutler and the ABA had proposed without the authorizing legislation they had recommended.¹⁹²

(Mar. 8, 1997); Exec. Order No. 12,953, 3 C.F.R. 325 (1995) (child support), *reprinted in* 42 U.S.C. § 659 (Supp. I 1995).

¹⁹¹ I will address these legal questions — otherwise stated, whether the President has authority to direct an agency official in the exercise of discretion delegated specifically to her — in section IV.A, pp. 2320–31, below. I do not mean to suggest here that the traditional kind of executive order is always legal; the legality of such an order will depend on its terms and the delegations thought to justify it. My point is only that in the absence of legislation specifically authorizing the practice, a presidential order directing an administrative official as to the exercise of power legislatively delegated to her (rather than to the President) raises a distinct set of legal questions.

¹⁹² As discussed in the next section, the scope of Clinton's directives fell short of the ambit allowable under Cutler's proposal in that they applied only to executive branch agencies. *See infra* pp. 2306–07. They went beyond this ambit, however, in that they concerned not only rulemaking but also other administrative action. *See infra* p. 2308.

The directive authority claimed but never really used within the OMB process became prior to and outside that process a powerful mechanism for steering the administrative state toward Clinton's policy objectives. Clinton thus added to the system of presidential oversight that he had inherited a scheme for direct presidential intervention.

Some numerical comparisons of presidential directives since 1980 tell the story.¹⁹³ President Reagan issued, by my count, nine directives to heads of domestic policy agencies regarding substantive regulatory policy — four in his first term and five in his second. His first directive, issued in conjunction with his initiation of the OMB review process, postponed all proposed and pending regulations for a short period;¹⁹⁴ his most detailed subsequent directives concerned nuclear energy, narcotics, HIV, and family policy.¹⁹⁵ President Bush issued four directives in his single term, two imposing moratoria on rulemaking and ordering an administration-wide review and reform of existing regulations,¹⁹⁶ and two relating to discrete policy issues.¹⁹⁷ President Clinton, by contrast, issued 107 of these orders. Beginning slowly, he

¹⁹³ I do not include in these statistics any directives not communicated to agencies in written form and contemporaneously released to the public. I consider below the possibility that Presidents prior to Clinton may have instructed agencies in more informal ways to commence regulatory action. See *infra* pp. 2298–99. I also do not include in these statistics presidential directives regarding only management of federal operations, employees, or lands, of the kind I have described above. See *supra* pp. 2291–92. It is possible, given the room for judgment in making this categorization and the simple potential for error in reviewing many volumes of presidential papers, that other researchers might arrive at slightly different numbers; I do not think, however, that any could challenge the essential comparative point made in this paragraph. Finally, I did not review, given the constraints of time, the directives of Presidents prior to Reagan. The general consensus, as I noted earlier, is that these earlier Presidents and White House staffs took a less active role in administrative policymaking. See *supra* p. 2277. In addition, two persons I interviewed for this Article, who served in both the Carter and the Clinton Administrations (respectively, at the Justice and Education Departments), confirmed that the Clinton White House intervened far more aggressively in directing administrative policy. Interview with Philip Heymann, former Deputy Attorney General and former Assistant Attorney General for the Criminal Division, in Cambridge, Mass. (Jan. 9, 2000); Telephone Interview with Marshall Smith, former Acting Deputy Secretary of Education and former Chief of Staff to the Secretary of Education (Feb. 22, 2001) [hereinafter Smith Interview].

¹⁹⁴ See Memorandum Postponing Pending Federal Regulations, PUB. PAPERS 63 (Jan. 29, 1981).

¹⁹⁵ See Memorandums on Governmentwide Family Policy, PUB. PAPERS 1139 (Sept. 9, 1988); Memorandums on the Human Immunodeficiency Virus Epidemic, PUB. PAPERS 1027–30 (Aug. 5, 1988); Memorandum on Federal Initiatives for a Drug-Free America, PUB. PAPERS 1325 (Oct. 4, 1986); Statement Announcing a Series of Policy Initiatives on Nuclear Energy, PUB. PAPERS 903 (Oct. 8, 1981). None of Reagan's directives instructed agency heads to commence or complete rulemaking proceedings.

¹⁹⁶ See Memorandum on Implementing Regulatory Reforms, PUB. PAPERS 665 (Apr. 29, 1992); Memorandum on Reducing the Burden of Government Regulation, PUB. PAPERS 166–68 (Jan. 28, 1992).

¹⁹⁷ See Memorandum on Social Security Card Changes, PUB. PAPERS 220 (Feb. 10, 1992); Memorandum on Education of Hispanic Americans, PUB. PAPERS 1659 (Dec. 6, 1989).

issued five, four, and six, respectively, in his first three years in office; then leaping to another plateau, he issued in subsequent years seventeen, seventeen, eighteen, twenty, and twenty.

A review of one three-month period — roughly corresponding to the second quarter of 1999 — gives an initial sense of the variety of these directives.¹⁹⁸ During that period, in addition to directing the Secretary of Labor to propose the unemployment insurance regulation mentioned earlier,¹⁹⁹ Clinton (in chronological order) directed the Attorney General and the Secretary of Education to collect and disseminate data on hate crimes in schools and colleges;²⁰⁰ directed the Secretary of Energy and the Administrator of the EPA to analyze and report data relating to carbon dioxide emissions;²⁰¹ directed a wide range of agency heads to undertake a joint effort with state and local government agencies to reduce crime in seaport cities;²⁰² directed the Administrator of the EPA and the Secretaries of Agriculture and the Interior to propose a rule and adopt enforcement measures to enhance environmental protection of the nation's waters;²⁰³ directed the Attorney General and Secretaries of the Treasury and Interior to collect and report data on racial profiling;²⁰⁴ and directed the Secretaries of HHS and the Treasury to adopt new standards and enforcement policies to enhance the safety of imported foods.²⁰⁵ The mandates specified in these directives were often quite detailed: the directive on imported foods, for example, instructed the Secretaries to increase inspections, prevent "port shopping" by importers, set standards for private laboratories engaged in analyzing imported food, and impose enhanced civil monetary penalties on importers who had violated food safety laws and regulations.²⁰⁶

Presidential directives of this kind, in the view of both Clinton and his closest White House advisors, constituted a central part of his governing strategy; stated more precisely, directives to agency heads were

¹⁹⁸ In section III.C, pp. 2303–06, below, I attempt to show how Clinton's various techniques of controlling administration, including but not limited to the issuance of formal directives, worked together to shape regulatory policymaking in two discrete areas — health care and firearms control. I have chosen the three-month period I review here in large part because consideration of the directives issued in this period will not overlap with that discussion.

¹⁹⁹ See *supra* p. 2284.

²⁰⁰ Memorandum on Hate Crimes in Schools and College Campuses, 1 PUB. PAPERS 505 (Apr. 6, 1999).

²⁰¹ Memorandum on Carbon Dioxide Emissions Reporting, 1 PUB. PAPERS 561 (Apr. 15, 1999).

²⁰² Memorandum on Establishment of the Interagency Commission on Crime and Security in U.S. Seaports, 1 PUB. PAPERS 649 (Apr. 27, 1999).

²⁰³ Memorandum on Clean Water Protection, 1 PUB. PAPERS 857 (May 29, 1999).

²⁰⁴ Memorandum on Fairness in Law Enforcement, 1 PUB. PAPERS 906 (June 9, 1999).

²⁰⁵ Memorandum on the Safety of Imported Foods, 35 WEEKLY COMP. PRES. DOC. 1277 (July 3, 1999).

²⁰⁶ *Id.*

a critical means of spurring administrative initiatives, and these initiatives were an important aspect of his tenure in office. In addressing a question about his use of one executive order, Clinton declared with some pride: "I think if you go back over the whole reach of our tenure here, I have always tried to use the executive authority."²⁰⁷ Clinton frequently instructed White House advisors to devise and prepare executive directives on matters of administrative policy, and indeed many members of his White House staff, including some of his closest advisors, understood that task to be a central part of their portfolio.²⁰⁸ One of his closest domestic policy advisors, referring to these directives, remarked that "it's a broader way of thinking about the Presidency . . . not just what you can do legislatively, but the full panoply of what you can do with the office."²⁰⁹ A self-conscious effort in the last year of his Presidency to generate still more of these orders became known in Washington circles as "Project Podesta," named after the then-chief of staff of the White House.²¹⁰ Another, equally close domestic policy advisor noted in that year, "We joke about it, but we expect that we'll be producing executive orders until the morning he leaves office."²¹¹ Six months later, the same advisor was still at the task; preparing for what would become an especially aggressive end-of-Presidency finale, he commented: "We're approaching the next six months the same way we've approached the last seven and a half years" with the President "determined to get as much as he can done . . . through executive action."²¹²

²⁰⁷ The President's News Conference, 35 WEEKLY COMP. PRES. DOC. 2537, 2541 (Dec. 8, 1999).

²⁰⁸ Telephone Interview with Rahm Emanuel, former Senior Advisor to the President for Policy and Strategy (Dec. 11, 2000) [hereinafter Emanuel Interview]; Telephone Interview with Bruce N. Reed, former Assistant to the President for Domestic Policy and Director of the Domestic Policy Council (Dec. 11, 2000) [hereinafter Reed Interview].

²⁰⁹ James Bennet & Robert Pear, *How a Presidency Was Defined by the Thousand Parts of Its Sum*, N.Y. TIMES, Dec. 8, 1997, at A1 (quoting Gene Sperling, former Assistant to the President for Economic Policy and Director of the National Economic Council) (internal quotation marks omitted).

²¹⁰ *Washington Whispers*, U.S. NEWS & WORLD REP., Nov. 1, 1999, at 13.

²¹¹ Alexis Simendinger, *An Executive Endgame Takes Shape*, 32 NAT'L J. 628, 628 (2000) (quoting Reed) (internal quotation marks omitted). The frequency of these orders indeed became something of a Washington joke. At a White House Correspondents Association dinner, an event noted for its self-mocking speeches, Clinton said: "I took a look at those ticket prices. They seem pretty high to me. So tonight, by Executive order, I am authorizing the release of 1,000 additional tickets." Remarks at the White House Correspondents Association Dinner, 1 PUB. PAPERS 689, 690 (May 4, 1996).

²¹² Charles Babington & Joby Warwick, *White House Seeks Legacy in New Rules*, WASH. POST, Aug. 25, 2000, at A1 (quoting Reed) (internal quotation marks omitted); see David E. Rosenbaum, *Bush Rules! It's Good To Be the President*, N.Y. TIMES, Jan. 28, 2001, § 4, at 16 (noting the preliminary findings of one academic researcher that no President had succeeded in locking in as many "midnight regulations" as Clinton did).

The significance of this stream of directives turns in part on two inversely related questions. First, to what extent did the directives only ratify initiatives that the agencies would have taken independently? If the directives did no more than put in President Clinton's voice, presumably for public relations purposes, decisions the agencies had already reached, then the practice would seem barely relevant to the study of administration (though perhaps still important to the study of the Presidency). Second, to what extent did the directives only formalize decisions that the White House could have imposed on agencies by other means? If the directives did no more than make official an otherwise informal practice, then they might seem less than fundamental as a tool for establishing presidential control of administrative action.

The first question elicits a consistent response from both White House and agency officials involved, who note varying but often significant White House participation in formulating the content of the directives, as well as in overseeing their execution.²¹³ The initial ideas for the regulatory actions ordered came sometimes from the agencies, but often from policy advisors in the White House, most notably those in the Domestic Policy and National Economic Councils.²¹⁴ Consultations between the White House and agencies concerned the substantive policy at issue, as well as such ancillary matters as the appropriate specificity of the directive (and thus the amount of discretion left to the agency) and the requisite timeline.²¹⁵ The staff, deputies, or heads of the agencies and White House policy councils typically resolved any disagreements, with the level of decisionmaking dependent on the matter's importance; on very few occasions did disputes reach the President before one side deferred to the other. All parties to the process, however, shared a background understanding (consistent with the view

²¹³ The material in this paragraph comes from my own recollections and telephone interviews with, among others, the following persons. See Emanuel Interview, *supra* note 208; Reed Interview, *supra* note 208; Telephone Interview with William Schultz, former Deputy Commissioner of the FDA (Feb. 7, 2001); Smith Interview, *supra* note 193; and Telephone Interview with Kevin Thurm, former Deputy Secretary for the Department of Health and Human Services (Feb. 7, 2001) [hereinafter Thurm Interview]. The White House and agency officials interviewed offered remarkably similar descriptions — which is not to say assessments — of the process by which presidential directives developed. (Evaluations of the process diverged, most notably, with respect to the question discussed in section IV.C.3, pp. 2358–64, below — whether presidential command improperly displaced the substantive expertise that agencies otherwise would have brought to bear on the development of regulatory policy.)

²¹⁴ Kevin Thurm divides the directives into two kinds, with some meant to “jumpstart” actions that the White House believed one or more agencies should undertake and others reflecting actions already on an agency's agenda. Thurm Interview, *supra* note 213.

²¹⁵ Not surprisingly, the agencies usually pressed for both more discretion and more time, while the White House pushed for the opposite. The specificity of any given directive depended mainly on the scope of unresolved issues, the complexity of the subject matter, and the form of the administrative action directed. See interviews cited *supra* note 213.

taken in Executive Order 12,866 and the premise of the directives themselves) that the final call indeed came from the President — or as to matters that the agency thought unworthy of bringing to his attention, from his closest policy advisors.²¹⁶ The actual drafting of the directives almost invariably occurred at the White House, although the agencies usually had some opportunity to review a draft and offer revisions. After a directive issued, White House staff monitored the agency — with the rigor of the review varying with the importance of the subject — to ensure that agency officials complied in a timely and effective way with the directive's terms and exercised any discretion left to them consistently with its objectives. All this, sometimes to the agencies' consternation, was no routine, post hoc endorsement of their policy decisions.

The second question, concerning the role directives played in exerting this level of presidential influence, is difficult to answer so securely. Even absent any assertion of directive authority, a President has many resources at hand to influence the scope and content of administrative action. Agency officials may accede to his preferences because they feel a sense of personal loyalty and commitment to him; because they desire his assistance in budgetary, legislative, and appointments matters; or in extreme cases because they respect and fear his removal power. President Reagan, as noted earlier, successfully relied on these points of leverage to induce reconsideration of some agency decisions;²¹⁷ another President might be able to employ these devices to impel the initiation of administrative action. Conversely, even given the assertion of directive authority, a President may face considerable constraints in imposing his will on administrative actors. Their resistance to or mere criticism of a directive may inflict political costs on the President as heavy as any that would result from an exercise of the removal power. This fact of political life accounts in part for the consultations and compromises that prefaced many of the Clinton White House's uses of directive authority. In this context, to put the matter simply, persuasion may be more than persuasion and command may be less than command — making the line between the two sometimes hard to discover.

All that said, a line remains, and by so often asserting legal authority to direct regulatory decisions, President Clinton crossed from one side of it to the other. Clinton's use of directives at the least signified a

²¹⁶ None of the officials with whom I spoke had the slightest doubt about where final decisionmaking authority on regulatory matters resided; as one deputy secretary stated, "Of course, the White House got the final say." Another deputy secretary noted, however, that the Secretary of a department, faced with a particularly unpalatable order, had the option of offering his resignation. See interviews cited *supra* note 213.

²¹⁷ See *supra* pp. 2278–79.

change in the form of presidential involvement in administrative decisionmaking. The unofficial became official, the subtle blatant, and the veiled transparent in ways that reasonably might affect evaluation, especially with respect to norms of accountability, of the underlying practice.²¹⁸ But more, the change in form likely led to a change in substance — a change in the practice itself — for two associated reasons. First, overt command sometimes, though not always, can accomplish what backdoor pressure cannot in impelling agency action and, perhaps even more important, locking in that action over time. Especially when agency resistance to presidential preferences need take only the form of inertia, publicity can serve as a useful weapon in the hands of a President — turning a spotlight on and creating a constituency for the action ordered, and thereby increasing the costs of noncompliance to agency officials. Second and more broadly, the explicit and repeated assertion of directive authority probably alters over time what Peter Strauss has called the “psychology of government”²¹⁹ — the understanding of agency and White House officials alike of their respective roles and powers. This change, in turn, makes presidential intervention in regulatory matters ever more routine and agency acceptance of this intervention ever more ready. The Clinton White House’s use of presidential directives thus created the conditions for a significant enhancement of presidential power over regulatory matters.

3. *Appropriation.* — The final piece of Clinton’s brand of presidential administration lay in his public assertion of ownership of agency action. Clinton himself unveiled, regardless whether he earlier had ordered formally, quantities of administrative work product — reports, grants, regulatory waivers, guidance, rulings, regulations, even lawsuits. Forums for these announcements included major and minor speeches, public ceremonies and events, news conferences, and radio addresses. This mechanism of appropriation, even though used at the back end of the administrative process, further enhanced Clinton’s ability to shape the nature and content of regulatory action.

Political scientists have spoken for several decades about the increasingly public and — a term they often use synonymously — rhetorical aspect of the Presidency.²²⁰ Although Theodore Roosevelt in-

²¹⁸ I discuss this issue further in my normative evaluation of presidential administration, see pp. 2332–33, 2337, below.

²¹⁹ Strauss, *supra* note 5, at 986.

²²⁰ See generally GEORGE C. EDWARDS III, *THE PUBLIC PRESIDENCY: THE PURSUIT OF POPULAR SUPPORT* (1983); SAMUEL KERNELL, *GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP* (3d ed. 1997); JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987); Lawrence R. Jacobs & Robert Y. Shapiro, *The Politicization of Public Opinion: The Fight for the Pulpit*, in *THE SOCIAL DIVIDE: POLITICAL PARTIES AND THE FUTURE OF ACTIVIST GOVERNMENT* 83 (Margaret Weir ed., 1998); Bruce Miroff, *The Presi-*

vented the phrase “bully pulpit,” and both he and subsequent (indeed, even prior) Presidents used that platform on occasion, most political scientists agree that Presidents significantly stepped up their appeals to and appearances before the public in the second half of the twentieth century. Moreover, the trendline throughout this period has pointed steadily upward. The most thorough empirical study, which includes an analysis of most of President Clinton’s tenure in office, shows that “the more recent the president, the more often he goes public”²²¹ — the more often, that is, he reaches out to the populace through speeches, events, and press opportunities to promote himself and his policies. A more informal survey by Clinton’s chief speechwriter found that in a typical year, Clinton spoke in public 550 times, compared with 320 for Ronald Reagan and eighty-eight for Harry Truman.²²² In the words of two presidential scholars, “Bill Clinton set a new standard” in communicating directly with the public.²²³

Many if not most of Clinton’s appearances included what his speechwriting department and gradually his whole White House staff called “deliverables”²²⁴ — really just news announcements — which more often than not concerned administrative action. Clinton’s chief speechwriter recently wrote, referring to the beginning of Clinton’s second term:

The White House settled into a rat-a-tat-tat of announcements and statements. A “message event” of the day. Each one with an element of news — issuing an executive order, announcing the results of a study, setting a regulation, passing out grants. In previous administrations, many of these had been the province of cabinet secretaries . . .²²⁵

In this administration, however, nothing was too bureaucratic for the President. In event after event, speech after speech, Clinton claimed ownership of administrative actions, presenting them to the public as his own — as the product of his values and decisions. He emerged in public, and to the public, as the wielder of “executive authority” and, in that capacity, the source of regulatory action. As a result, during the Clinton years, the “public Presidency” became unleashed from the merely “rhetorical Presidency” and tethered to the “administrative Presidency” instead.

dency and the Public: Leadership as Spectacle, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 301 (Michael Nelson ed., 6th ed. 2000).

²²¹ KERNELL, *supra* note 220, at 104.

²²² See MICHAEL WALDMAN, *POTUS SPEAKS: FINDING THE WORDS THAT DEFINED THE CLINTON PRESIDENCY* 16 (2000).

²²³ See Jacobs & Shapiro, *supra* note 220, at 96.

²²⁴ Telephone Interview with Michael Waldman, Assistant to the President and Director of Speechwriting (Dec. 11, 2000).

²²⁵ WALDMAN, *supra* note 222, at 164.

A return to the second quarter of 1999, discussed above in my analysis of directives,²²⁶ will show as well the variety of administrative actions Clinton unveiled to the public. In this time period, Clinton announced two major regulations — a final rule to implement welfare reform and a proposed rule to set pollution standards for new cars and sport utility vehicles.²²⁷ He also announced, among other matters, measures to enhance enforcement of laws prohibiting Internet and other consumer fraud, to promote parity of mental health treatment by medical insurers, and to assist communities in preventing school shootings.²²⁸

Some of this activity no doubt related more to strategies of public relations than of administrative governance. All methods of “going public,” in the sense that political scientists use the term, aim to cultivate public support, and Clinton focused on this goal with equal or greater intensity than any of his predecessors.²²⁹ If, as I have indicated, his “going public” strategy had a peculiarly administrative cast, a prime cause lay in his understanding that announcing new actions captured more and bigger headlines than did simple opining on policy issues.²³⁰ And this recognition sometimes led him to commandeer, wholly after the fact, regulatory decisions made in the bureaucratic trenches, with little prior or subsequent White House interest or involvement.²³¹

In three different ways, however, Clinton’s strategy of publicly appropriating administrative action exerted a substantive pull on administrative decisionmaking. First, Clinton’s announcement of an administrative action often constituted a directive of sorts because the action in question had yet to become final. Consider Clinton’s unveiling of the proposed tobacco rule, discussed above, in which he made pristinely clear that the FDA would adopt a final rule similar, if not identical, in all important respects to the agency’s proposal.²³² In this case, the very language used in the announcement (of the proposed rule) took on the tone of an order (as to the final rule). Or consider, in the

²²⁶ See *supra* p. 2295.

²²⁷ See The President’s Radio Address, 1 PUB. PAPERS 535 (Apr. 10, 1999) (welfare); The President’s Radio Address, 1 PUB. PAPERS 667 (May 1, 1999) (pollution).

²²⁸ Remarks Announcing the Financial Privacy and Consumer Protection Initiative, 1 PUB. PAPERS 682 (May 4, 1999); Remarks at the White House Conference on Mental Health, 1 PUB. PAPERS 894 (June 7, 1999); Remarks on School Safety and an Exchange With Reporters, 1 PUB. PAPERS 604 (Apr. 23, 1999).

²²⁹ See KERNELL, *supra* note 220, at ix–x, 34–35 (discussing “going public” strategies and Clinton’s focus on public opinion).

²³⁰ See HOWARD KURTZ, SPIN CYCLE: INSIDE THE CLINTON PROPAGANDA MACHINE 171–72 (1998) (discussing the dependence of the Clinton White House’s press strategy on administrative initiatives).

²³¹ See interviews cited *supra* note 213.

²³² See *supra* p. 2283.

same policy area, Clinton's declaration in his State of the Union Address of 1999 that "the Justice Department is preparing a litigation plan to take the tobacco companies to court."²³³ Here, the terms of the announcement sounded less like a directive, but the mere public notice of the preliminary action helped to lock in a final result — that the developing litigation plan of the Justice Department's lawyers indeed would become a lawsuit, regardless what new thoughts the lawyers might entertain in the future. These announcements, in intent and effect, served much as formal directives did to determine subsequent administrative decisions.²³⁴

Second, Clinton's practice of announcing regulatory actions, whether preliminary or final, often prompted the White House staff to participate actively, if privately, in the administrative process that gave rise to them.²³⁵ These staff members sometimes instigated an agency's consideration of an action precisely so Clinton later could unveil it. Perhaps less aggressively, they also monitored, speeded, and molded the development of agency-initiated policies that appeared suitable for eventual presidential announcement. This level of engagement, to be sure, could have occurred, and occasionally did so, without any prospect of presidential appropriation of the resulting regulatory product. But this prospect provided White House staff members with both an additional incentive and an additional justification to become involved in agency business. The need to feed the schedule of presidential announcements thus imposed a powerful backend pressure on administrative decisionmaking.

Finally, Clinton's appropriation of regulatory product, even when wholly post hoc, sent a loud and lingering message: these were *his* agencies; *he* was responsible for their actions; and *he* was due credit for their successes. The public might have failed to appreciate this communication's import, but no one within the EOP or agencies could have done so. In asserting, time and again, ownership of and responsibility for the administrative sphere, Clinton may have made the prospects of substantive presidential intervention in any given regulatory matter ever more likely. And in repeatedly brooking this assertion — indeed, in facilitating it by providing Clinton with the raw material for his strategy of appropriation — the agencies themselves may have done so as well. The point here, again, relates to the changing psychology of governmental actors, perhaps resistant to empirical proof, but still potentially of significance. If nothing else, the message of authority conveyed in the appropriation of regulatory product buttressed

²³³ Address Before a Joint Session of Congress on the State of the Union, 1 PUB. PAPERS 62, 66 (Jan. 19, 1999).

²³⁴ See Reed Interview, *supra* note 208.

²³⁵ The material in this paragraph comes from the interviews cited in note 213, above.

the other ways in which that practice — along with the others Clinton used — exerted substantive pressure on administrative decisions and, in so doing, reshaped the relationship between the agencies and President.

C. Scope and Limits

The techniques Clinton developed to control administration played out in varying ways and to varying degrees across the range of administrative policymaking. In this section, I aim to provide a sense of the reach of these practices taken in combination. To do so, I first discuss two policy areas — health care and gun control — in which Clinton made frequent use of his new techniques of control over administration. In providing a representative list of various actions that Clinton took in these areas, I wish to illustrate the kinds of administrative activities in which he involved himself and administrative policies he thereby promoted. I then attempt to delineate more generally, using this discussion as a base, the scope and limits of these practices — essentially, the span of presidential administration as practiced by Clinton, defined by reference to the form, subject matter, and source of administrative action.

Consider first health care regulation. A single memorandum concerning patients' rights in federally administered or regulated health care programs, signed at a public event in 1998, illustrates the range of agency actions that Clinton routinely subjected to his directive authority.²³⁶ This memorandum itself followed an earlier one, also signed at a public event, ordering the heads of all departments with responsibility for health care programs to report to him on the extent to which those programs complied with a model "patients' bill of rights" recommended by an advisory commission Clinton previously had established.²³⁷ Upon receiving these reports, Clinton ordered each department head to take the administrative steps necessary to achieve the fullest possible compliance with this model, consistent with existing statutes. The provisions of the directive included: an order to the Secretary of Labor to propose regulations requiring health plans regulated under ERISA to meet strengthened standards regarding internal appeals of decisions to deny benefits; an order to the Administrator of the Office of Personnel Management, in her management of federal employees' health plans, to contract only with insurance carriers that agreed to comply with the model bill of rights and to propose regula-

²³⁶ See Memorandum on Federal Agency Compliance with the Patient Bill of Rights, 1 PUB. PAPERS 260 (Feb. 20, 1998).

²³⁷ See Memorandum on the Health Care "Consumer Bill of Rights and Responsibilities," 2 PUB. PAPERS 1621 (Nov. 20, 1997).

tions to ensure enforcement of one of the bill's provisions; and orders to the Secretaries of Health and Human Services (HHS), Veterans Affairs, and Defense to issue specified policy directives, notifications to relevant state officials, and other "appropriate administrative actions" to bring into compliance Medicare, Medicaid, and the veterans' and military health systems. Over the next several months, in radio addresses and still more public events, Clinton announced the accomplishment of each of the actions he had ordered.²³⁸

In other formal directives on health care issued during his second term, Clinton directed the Secretary of HHS to revise Medicare program guidance to cover the costs of clinical trials of new drugs and medical treatments;²³⁹ ordered eight department heads to take specified measures, many also involving coordination and information sharing with state and local officials, regarding the use of promotional materials, application procedures, training, and research to promote the enrollment of children in Medicaid and the Children's Health Insurance Program;²⁴⁰ and in the wake of an independent research report on the frequency of preventable medical errors, directed the department heads responsible for administering or regulating health programs to develop new ways to track medical errors and reduce errors associated with misuse of medications and medical devices.²⁴¹ A public announcement of a proposed regulation requiring enhanced testing and labeling of drugs prescribed for children served as a more informal directive, with Clinton stating that "[t]he executive action that I take"²⁴² constituted "one more significant step toward assuring quality

²³⁸ See Remarks to the Convention of the International Brotherhood of Electrical Workers, 2 PUB. PAPERS 1601 (Sept. 17, 1998); The President's Radio Address, 2 PUB. PAPERS 1476 (Aug. 29, 1998); Remarks on the Patients' Bill of Rights in Louisville, Kentucky, 2 PUB. PAPERS 1416 (Aug. 10, 1998); The President's Radio Address, 2 PUB. PAPERS 1384 (Aug. 1, 1998); Remarks in a Roundtable Discussion on the Patients' Bill of Rights, 2 PUB. PAPERS 1233 (July 15, 1998).

²³⁹ See Memorandum on Increasing Participation of Medicare Beneficiaries in Clinical Trials, 36 WEEKLY COMP. PRES. DOC. 1311 (June 7, 2000). The memorandum also directed HHS to initiate measures to inform beneficiaries of the new coverage option, track Medicare payments made for this purpose, and report back to the President on other means to promote medical research important to Medicare participants. See *id.*

²⁴⁰ See Memorandum on Actions To Improve Children's Health Insurance Outreach, 1 PUB. PAPERS 1017 (June 22, 1998). Like the principal directive on the patients' bill of rights, this memorandum resulted from another, which required the same agency heads to coordinate with each other in developing detailed plans on these matters for submission to the President. See Memorandum on Children's Health Insurance Outreach, 1 PUB. PAPERS 239 (Feb. 18, 1998).

²⁴¹ See Memorandum on Improving Health Care Quality and Ensuring Patient Safety, 35 WEEKLY COMP. PRES. DOC. 2530 (Dec. 7, 1999). Following receipt of a report on these matters, Clinton announced two months later that he had accepted its recommendations on new FDA labeling standards and a nationwide, state-based system of reporting medical errors. See Remarks on Efforts to Improve Patient Safety, 36 WEEKLY COMP. PRES. DOC. 351 (Feb. 22, 2000).

²⁴² Remarks Announcing Action on the Safe and Effective Use of Medications To Treat Children, 1 PUB. PAPERS 1098, 1098 (Aug. 13, 1997).

health care for our children."²⁴³ And Clinton similarly appropriated, except at no fewer than three stages of the regulatory life-cycle, a regulation on medical privacy: first declaring in his State of the Union address that unless Congress acted on the subject, the administration would propose regulations within the year,²⁴⁴ then publicly issuing the proposed rule with the statement that "I'm honoring the pledge made in the State of the Union Address and using the full authority of this office to create the first comprehensive national standards for protection of medical records,"²⁴⁵ and last announcing the final rule in a public event designed for that purpose.²⁴⁶

A similar pattern of presidential orders and announcements emerged quickly in the area of firearms regulation, with Clinton here directing and appropriating not only rulemakings but enforcement strategies. Early in his first term, Clinton instructed the Secretary of the Treasury, through two formal directives, to begin the rulemaking necessary to suspend the importation of foreign-made assault pistols as well as to take specified steps to improve enforcement of gun-licensing requirements.²⁴⁷ Similarly, near the beginning of his second term, Clinton ordered the Secretary to propose regulations requiring firearms dealers to issue certain notifications to purchasers;²⁴⁸ to declare an immediate moratorium on the importation of modified assault weapons (through the suspension of existing permits) and initiate the proceedings that would make this cessation permanent;²⁴⁹ and, with the Attorney General and in reliance on partnerships with state and local officers, to begin enforcement efforts to trace all guns used to commit

²⁴³ *Id.* at 1099.

²⁴⁴ See Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 62, 65 (Jan. 19, 1999).

²⁴⁵ Remarks on Action To Preserve Privacy of Medical Records and an Exchange with Reporters, 35 WEEKLY COMP. PRES. DOC. 2188, 2188 (Oct. 29, 1999).

²⁴⁶ See Remarks on the Issuance of Final Regulations on Protection of Medical Records Privacy, 26 WEEKLY COMP. PRES. DOC. 3138 (Dec. 20, 2000).

²⁴⁷ See Importation of Assault Pistols, 3 C.F.R. 763 (1993); Gun Dealer Licensing, 3 C.F.R. 764 (1993). The language of these early directives was more deferential to the Secretary than was typically the case in later documents. The directive on assault pistols referred to the advice given to the President by the Secretary on the appropriateness of a rulemaking, and the directive on gun dealer licensing superimposed the President's order to the Secretary on a statement of the Secretary's intent to order the Bureau of Alcohol, Tobacco and Firearms to undertake the enumerated actions. When Clinton publicly signed and announced the directives, however, he said only that he was ordering the Treasury Department to take these actions. See Remarks Announcing the Anticrime Initiative and an Exchange with Reporters, 2 PUB. PAPERS 1360, 1362 (Aug. 11, 1993).

²⁴⁸ See Memorandum on Enforcing the Youth Handgun Safety Act, 1 PUB. PAPERS 720 (June 11, 1997); Remarks at the Juvenile Justice Conference, 1 PUB. PAPERS 717, 720 (June 11, 1997).

²⁴⁹ See Memorandum on Importation of Modified Semiautomatic Assault-Type Rifles, 2 PUB. PAPERS 1575, 1576 (Nov. 14, 1997); Remarks to the Women's Leadership Forum in Las Vegas, Nevada, 2 PUB. PAPERS 1567, 1571 (Nov. 14, 1997).

crimes in cities throughout the United States.²⁵⁰ Still later, Clinton endorsed a threat of suit against gun manufacturers made by the Secretary of Housing and Urban Development and announced the agreement of Smith & Wesson, prompted in part by that threat, to make certain changes in the design and marketing of the company's firearms.²⁵¹

As these directives and announcements show, Clinton effectively placed himself in the position of a department head with respect to nearly every possible method of administrative policymaking. In rulemakings, he ordered and announced the issuance of proposed regulations for public comment, as well as the issuance of final regulations after the legally prescribed comment period had ended. If he never technically directed the issuance of a final regulation prior to a public comment period (though he certainly made this result more likely), he merely followed in this respect the legal strictures, imposed by the APA, applicable to any secretary. He additionally took full advantage of the opportunities the APA provided for more informal policymaking, by ordering and announcing, just as a department head might, final agency action through guidance, policy statements, and the like. And he involved himself in the development and implementation of enforcement policy, even (albeit rarely) as to decisions to prosecute identifiable parties like manufacturers of handguns or tobacco products. The only mode of administrative action from which Clinton shrank was adjudication. At no time in his tenure did he attempt publicly to exercise the powers that a department head possesses over an agency's on-the-record determinations.

Clinton simultaneously used his central position in the governmental structure to direct administrative action transcending individual departments. Many of the matters in which he took a special interest, evident again in the spheres of health care and firearms regulation, involved multiple agency heads possessing partial or competing jurisdictions. Here, Clinton's actions demanded simple coordination or, perhaps still more often, joint adoption of new policy goals, as in his efforts to enhance protections for patients or increase the tracing of firearms. Many, too, involved the incorporation of state and local actors into the sphere of federal administration, as in his steps to expand children's health insurance or his repeated directives to agencies, in health care and other areas, to collect and disseminate best practices

²⁵⁰ See Memorandum on the Youth Crime Gun Interdiction Initiative, 2 PUB. PAPERS 1084 (July 8, 1996); Remarks on the Youth Crime Gun Interdiction Initiative, 2 PUB. PAPERS 1082, 1083 (July 8, 1996).

²⁵¹ See The President's News Conference, 35 WEEKLY COMP. PRES. DOC. 2537, 2541 (Dec. 8, 1999); Remarks on the Gun Safety Agreement with Smith & Wesson and an Exchange with Reporters, 36 WEEKLY COMP. PRES. DOC. 569 (Mar. 17, 2000).

information.²⁵² Department heads sometimes could and did promote these cooperative arrangements with state and local entities, but Clinton's central position in national political life, as well as his detachment from historic tensions and competition between federal and non-federal administrative actors, perhaps made him especially apt to reach outside the federal bureaucracy for ideas and assistance.

Clinton's activity in the regulatory spheres just discussed, as well as others involving core domestic policy, usually targeted issues prominent on the national agenda. Clinton's strategies of control, even in these areas, touched but a small fraction of administrative activity: the number of federal register pages devoted in his Presidency to health care and firearms regulation, to use one measure, doubtless far exceeded the number whose content Clinton could claim to have influenced. But when the focus turns to issues in these policy areas that inspired legislative and public debate, the frequency and vigor of Clinton's interventions becomes apparent: most of the actions noted in this section (for example, those regarding patients' rights, medical privacy, and assault weapons and handgun control) arose from and in turn became part of serious policy discussion. Perhaps this focus does not align precisely with matters of substantive import; Congress and the public have been known to misdirect their efforts, and Clinton's activity may have spurred, as well as responded to, their attention to these issues. The focus yet reveals (at a minimum) that in domestic policy areas such as health care and gun control, Clinton directed or otherwise played a role in the administrative action most connected to hotly debated public issues.

In exercising his techniques of administrative control, however, Clinton declined to cross certain subject-matter boundaries. Clinton asserted and achieved his greatest influence over agency action in the areas he considered the staples of domestic policy: education, welfare, child care and support, and crime, in addition to health care and gun control. He used these techniques far less to direct what often are viewed as the paradigmatic cases of regulation: standards governing exposure to hazardous substances and materials. Even here, Clinton at times directed and appropriated agency action in the ways previously discussed: he made the regulation of tobacco products entirely

²⁵² See, e.g., Memorandum on Improving Immunization Rates for Children at Risk, 36 WEEKLY COMP. PRES. DOC. 3061 (Dec. 11, 2000); Memorandum on School-Based Health Insurance Outreach for Children, 35 WEEKLY COMP. PRES. DOC. 2013 (Oct. 12, 1999); Memorandum on Low-Performing Public Schools, 2 PUB. PAPERS 1442 (Oct. 28, 1997); Memorandum on Adoption and Alternate Permanent Placement of Children in the Public Child Welfare System, 2 PUB. PAPERS 2209 (Dec. 14, 1996); Memorandum on Promoting Excellence and Accountability in Teaching, 2 PUB. PAPERS 1555 (Sept. 12, 1996); cf. Dorf & Sabel, *supra* note 65, at 345-56 (lauding the use of best practices information as a prime example of "democratic experimentalism").

his own, and he also participated, albeit more haphazardly, in issues of vehicular and food safety.²⁵³ But he rarely took a public role in formulating agency rules and other decisions relating to hazardous substances in the environment and workplace. This choice reflected his substantive interests as well as the structure and organization of the White House;²⁵⁴ but it also may have derived from a general, if unarticulated, sense that these actions involved significant levels of scientific expertise and thus offered less space for presidential involvement. Here, in any event, Clinton largely declined to drive his policy agenda through the agencies, but instead contented himself with using OMB to review, with a fair amount of deference, their regulations and other decisions.

Clinton also — and importantly — refrained from trying to exercise his usual techniques of control over independent agencies. As earlier discussed, Clinton did bring these agencies into an OMB-led, administration-wide regulatory planning process.²⁵⁵ He also occasionally wrote letters to independent agencies requesting them to investigate or take action on issues within their jurisdictions, and highlighted these appeals in public appearances.²⁵⁶ These were echoes, but only ever so faint, of how Clinton functioned with respect to executive branch agencies. When the independents were involved, he acted not as the commander, but as a simple petitioner of the administrative

²⁵³ See, e.g., Memorandum on Standards To Prevent Drinking and Driving, 1 PUB. PAPERS 318 (Mar. 3, 1998); The President's Radio Address, 1 PUB. PAPERS 160 (Feb. 15, 1997) (child safety seats); Memorandum on Increasing Seatbelt Use, 1 PUB. PAPERS 71 (Jan. 23, 1997); The President's Radio Address, 2 PUB. PAPERS 2236 (Dec. 28, 1996) (airbags); Memorandum on the Safety of Imported Foods, 35 WEEKLY COMP. PRES. DOC. 1277 (July 3, 1999); Memorandum on the Food Safety Initiative, 2 PUB. PAPERS 1285 (Oct. 2, 1997).

²⁵⁴ Environmental issues in the Clinton White House fell under the aegis of the Council on Environmental Quality, which reported not to President Clinton directly but to Vice President Gore. This structure reflected the relative interest of the two in environmental policy. Clinton did, however, repeatedly use presidential directives and other tools of presidential administration to protect federal lands and waters. See Exec. Order No. 13,158, 3 C.F.R. 273 (2000) (creating national system of marine protected areas); Memorandum on Protection of Forest "Roadless" Areas, 35 WEEKLY COMP. PRES. DOC. 2023 (Oct. 13, 1999) (directing Forest Service to propose regulations to protect roadless areas); *supra* p. 2292 & note 186.

²⁵⁵ See *supra* p. 2288.

²⁵⁶ See, e.g., Letter to the Attorney General and the Chairman of the Federal Trade Commission on a Study on Youth Violence and Media Marketing, 1 PUB. PAPERS 864 (June 1, 1999); Remarks Announcing a Study on Youth Violence and Media Marketing, 35 WEEKLY COMP. PRES. DOC. 1009 (June 1, 1999); Letter to the Chairman and Members of the Federal Communications Commission on Free and Discounted Airtime for Campaign Advertising, 1 PUB. PAPERS 182 (Feb. 5, 1998) (requesting the FCC to require media outlets to provide free and reduced airtime to political candidates); Letter to the Federal Election Commission Requesting Action To End the Soft Money System in Domestic Politics, 1 PUB. PAPERS 702 (June 4, 1997) (requesting that the FEC change its regulations to permit national parties and candidates for federal office to raise only hard money); The President's Radio Address, 1 PUB. PAPERS 702 (June 28, 1997) (highlighting letter to the FEC).

state. Any other approach often would have proved futile (and therefore embarrassing): Clinton, after all, had appointed only a subset of the commissioners, could remove none of them, and lacked any claim recognized in either the legal or the political sphere to their submission. And even if a commission stood ready to comply with a presidential assertion of power, the congressional outrage potentially accompanying this action may have sufficed to deter the extension of presidential control to the independents.

D. Causes and Responses

Many factors contributed to President Clinton's turn toward administration as a means of realizing his domestic policy ambitions. Some were idiosyncratic, relating to his individual interests and governing style as set within potentially ephemeral features of the political context. But others had a more structural aspect, reflecting long-term trends that, although not irreversible, appear likely to apply as well to other Presidents. These factors — which essentially make the need for tangible achievement ever greater and its likelihood through legislation ever more remote — create a kind of political logic, pushing the President toward the administrative sphere as the forum most readily available for translating his policy objectives into action. The difficulty Congress faces in resisting these presidential efforts factors into the calculus that makes active involvement in, and even dictation of, administrative outcomes so attractive to Presidents.

Traits and circumstances peculiar to President Clinton (or at least not necessarily shared by other modern Presidents) explain some part of the developments I have described in this Article. A notorious policy “wonk,” knowledgeable about and engaged by the details of governmental programs, Clinton no doubt understood the importance of administration and enjoyed consideration of its sometimes esoteric aspects. Perhaps too, and even more important, he saw (or came to see) administration as a mechanism for promoting the activist government he favored in the face of the budgetary constraints and public skepticism he encountered. Through most of Clinton's tenure, budget deficits precluded large increases in federal spending, and popular hostility toward “big government,” as seen in and further spurred by the collapse of his initial health care plan, limited the potential for novel programs. In these circumstances, the apparent incrementalism of administration, as well as its absence of direct budgetary consequences, made it a natural *métier* for a President still devoted to showing that government could aid in solving national problems.

But more enduring, structural aspects of the modern Presidency and the political system in which it operates also likely contributed to Clinton's enhancement of the presidential role in administrative action.

Consider here the following multifaceted bind, and pity the modern-day President caught within it:

1. The American public harbors high and rising expectations about what a President should be able to accomplish.²⁵⁷ The unity and “personality” of the presidential office long has made it the dominant focus of public attention devoted to the political world. As the role and scope of government have grown, as Congress repeatedly has failed to demonstrate sustained capacity for political leadership, and as modern media technologies have placed the President ever more in the spotlight, the public increasingly has looked to him for all manner of policy direction. More than any other player in the political system, the President is in practice, even if not in constitutional theory, responsible for governance. Yet the President has a limited set of assets he can use to meet these expectations. A gap or imbalance thus emerges: in Theodore Lowi’s words, “the expectations of the masses have grown faster than the capacity of presidential government to meet them.”²⁵⁸

2. The modern press makes insatiable demands and places impossible pressures on the office of the President.²⁵⁹ The press covers the President relentlessly, reflecting as well as reinforcing the public’s focus on him. With the explosive growth of media outlets and accompanying competition, that coverage has become ever more fast-paced, aggressive, and scandal-oriented. For the President not to lose control of the debate about him, he must grab the public stage and make the news himself. Yet the President, once again, has a limited repertoire of ways to accomplish this objective. Hence another gap opens: the cravings of the press have grown faster than the ability of the President to satisfy them. And this gap exacerbates the first, for when the press “beast” is not fed, it forages in ways that further increase the President’s difficulty in meeting public expectations.

3. For these reasons, the pressure on Presidents to demonstrate action, leadership, and accomplishment has grown. Many past Presi-

²⁵⁷ A broad consensus has developed in political science literature on the extent to which Americans view the President as the center of government and invest their hopes and expectations for governance primarily in his person. See, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 302 (2d ed. 1979); BERT A. ROCKMAN, *THE LEADERSHIP QUESTION: THE PRESIDENCY AND THE AMERICAN SYSTEM* xvi (1984); Charles O. Jones, *The Separated Presidency — Making It Work in Contemporary Politics*, in *THE NEW AMERICAN POLITICAL SYSTEM* 1, 27 (Anthony King ed., 2d version 1990); Michael Nelson, *Evaluating the Presidency*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 3, 14–17 (Michael Nelson ed., 6th ed. 2000).

²⁵⁸ THEODORE J. LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED* xii (1985).

²⁵⁹ For recent accounts of this phenomenon, from both academic and popular perspectives, see generally BILL KOVACH & TOM ROSENSTIEL, *WARP SPEED: AMERICA IN THE AGE OF MIXED MEDIA* (1999); KURTZ, *supra* note 230; and THOMAS E. PATTERSON, *OUT OF ORDER* (1993).

dents, of course, have pursued activist courses — to implement their policy convictions, enhance their reputations, or win re-election. But the changing shape of public expectations and press relations may make this route less an option than a requirement, and less a broad governing stance than a daily performance. Overt action and achievement can aid in narrowing the gaps discussed above — by focusing media coverage and, relatedly, securing public support. And narrowing these gaps in turn plays a critical role in a President's ability to exert influence on any dimension²⁶⁰ and to realize his electoral and "legacy" interests.

4. Yet the possibility of significant legislative accomplishment — which gives the President his most obvious means of demonstrating leadership — has grown dim in an era of divided government with high polarization between congressional parties. The most striking feature of modern government lies in division of party control of the two branches, which necessitates bipartisan cooperation in legislative action. Between 1946 and 2000, different parties controlled the Presidency and Congress in thirty-four years, or sixty-three percent of the time; between 1968 and 2000, divided government reigned for twenty-six years, or eighty-one percent of the time; and between 1980 and 2000, a full eighteen years, or ninety percent of the total, featured divided rule. As I write, a single party controls the Presidency and Congress for the first time since 1994, but this circumstance rests on one Senator's vote, which may change even before this Congress adjourns; no one should inter divided government based on current conditions. Bipartisan cooperation of course remains possible, and Presidents often will try to induce it, given the incentives provided by a national constituency.²⁶¹ But the difficulty of the task has increased because congressional parties have grown more ideologically coherent and partisan as legislative districts have become more homogeneous and primaries have become the dominant means of candidate selection.²⁶² In recent

²⁶⁰ See, e.g., EDWARDS, *supra* note 220, at 1 ("The greatest source of influence for the president is public approval."); KERNELL, *supra* note 220, at 34 ("Under [modern] circumstances, the president's [public] prestige assumes the currency of power."); NEUSTADT, *supra* note 95, at 78 ("A President's [public] prestige is . . . a factor that may not decide the outcome in a given case but can affect the likelihoods in every case and therefore is strategically important to his power.").

²⁶¹ For scholarly commentary on past Presidents' relative lack of partisanship, see Sidney M. Milkis, *The Presidency and Political Parties*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM*, *supra* note 220, at 374; and Austin Ranney, *The President and His Party*, in *BOTH ENDS OF THE AVENUE: THE PRESIDENCY, THE EXECUTIVE BRANCH AND CONGRESS IN THE 1980S* 131, 148–51 (Anthony King ed., 1983). For a popular account of Clinton's attempt to blur partisan differences, widely known as "triangulation," see DICK MORRIS, *BEHIND THE OVAL OFFICE: WINNING THE PRESIDENCY IN THE NINETIES* 79–88 (1997).

²⁶² See JAMES G. GIMPEL, *FULFILLING THE CONTRACT: THE FIRST 100 DAYS* 13–14 (1996); BARBARA SINCLAIR, *LEGISLATORS, LEADERS, AND LAWMAKING: THE U.S. HOUSE OF REPRESENTATIVES IN THE POSTREFORM ERA* 50 (1995); Mark Tushnet, *The Supreme*

years, the center has fallen out entirely: in the 1999 Senate, according to a respected analysis of congressional voting, every Democrat had an average score to the left of the most liberal Republican.²⁶³ The strengthened role of party leadership within Congress²⁶⁴ and the increased use of the filibuster²⁶⁵ both reflect and exacerbate this heightened polarization — and thereby further dim the prospect for real legislative achievement in the context of divided government.²⁶⁶

It is not surprising, given these changes in the political landscape, that a President would turn to administration — a sphere in which he unilaterally can take decisive action. The more the demands on the President for policy leadership increase and the less he can meet them through legislation, the greater his incentive to tap the alternate source of supply deriving from his position as head of the federal bureaucracy. Administrative action is unlikely to provide a President with all he could obtain through legislation: Congress, after all, has set bounds on administration through prior statutory enactments. But as compared with legislative stasis, administrative action looks decidedly appealing. More, administrative action has the potential to spur legislative action by calling public attention to Congress's failure to act on the relevant issue.

The history of presidential involvement in administration during the Clinton years comports with this explanation. Clinton's use of directive authority over the executive branch agencies accelerated dramatically when the Democrats lost control of Congress in the third year of Clinton's Presidency: after a lag of one year, which the Clinton White House perhaps spent adjusting to the changed political environment, the number of directives issued to agency heads each year in-

Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration, 113 HARV. L. REV. 29, 43–51 (1999).

²⁶³ See Richard E. Cohen, *A Congress Divided*, 32 NAT'L J. 382, 382 (2000). In the House, only two Republicans were in that chamber's more liberal half, and only two Democrats (one of whom later became an independent) counted in the more conservative half. See *id.*

²⁶⁴ See SINCLAIR, *supra* note 262, at 5–7.

²⁶⁵ See BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 47–49 (1997).

²⁶⁶ See Tushnet, *supra* note 262, at 52–56. Political scientist David Mayhew found, in a study of legislative action since World War II, that the number of "significant" bills passed by Congress remained roughly the same in periods of divided government as in periods of one-party rule. See DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–1990, at 119–24 (1991). But other scholars have questioned or qualified his conclusions, arguing either that the use of a more limited definition of "significant" legislation produces more intuitive findings across the whole postwar period, see Sean Q. Kelly, *Divided We Govern? A Reassessment*, 25 POLITY 475 (1993), or that review of more recent stretches of divided government shows a marked change from the historical pattern Mayhew identified, see CHARLES O. JONES, THE PRESIDENCY IN A SEPARATED SYSTEM 287–89 (1994).

creased almost fourfold.²⁶⁷ And many, if not most, of these directives and associated announcements, as earlier suggested, had links to items on Clinton's legislative agenda.²⁶⁸ The many directives on patient protections, for example, would have had less purpose if Democrats had maintained a working majority of both houses of Congress throughout Clinton's time in office. These and similar directives functioned as an end run around Congress, and also a goad to Congress, in a context in which presidential inaction could incur a steep price from the press and the public.

Clinton White House aides indeed spoke of their administrative strategy in these terms — essentially, as a reaction to the set of incentives created by the political environment. Citing the media and public audiences to whom this strategy was addressed, Clinton's chief speechwriter recently wrote: "It was a way of showing the public that Bill Clinton was working on issues that . . . mattered a lot to ordinary citizens . . . [and of] forc[ing] the press to cover the thrust of the President's remarks."²⁶⁹ And focusing on the legislative link, Clinton's chief domestic policy advisor stated: "In our experience, when the [President] takes executive action, it not only leads to results while the political process is stuck in neutral, but it often spurs Congress to follow suit."²⁷⁰ Or as a less restrained advisor remarked, in comparing executive directives to legislative initiatives: "Stroke of the pen, law of the land. Kind of cool."²⁷¹

This political calculus depended on a judgment, confirmed in practice, that Congress would fail to override presidential directives. Even if Clinton might have seen occasional advantage in courting a losing battle with Congress, he presumably would have eschewed this ap-

²⁶⁷ See *supra* pp. 2294–95. In contrast to these findings, a recent study of formal executive orders avers that Presidents, including Clinton, issued fewer executive orders during periods of divided, than of unified, government. See Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445, 460, 462 (1999). This study, however, appears to include only documents officially styled and numbered as executive orders; it fails to take into account that Clinton typically used unnumbered memoranda to exercise directive authority. In addition, this study fails to distinguish among the orders it considers on the basis of their subject matter. It combines orders concerning foreign affairs with those concerning domestic policy, and orders affecting only governmental procedures and operations with those affecting other, usually more substantive regulatory policy.

²⁶⁸ See *supra* pp. 2307–08.

²⁶⁹ WALDMAN, *supra* note 222, at 164–65.

²⁷⁰ Marc Lacey, *Blocked by Congress, Clinton Wiolds a Pen*, N.Y. TIMES, July 5, 2000, at A13 (quoting Bruce Reed) (internal quotation marks omitted); see also Richard W. Stevenson, *Political Memo: Clinton Ending Term on a Busy Note*, N.Y. TIMES, Dec. 25, 2000, at A27 ("The president has had a sense that he has authority . . . that he can exercise to make progress for the American people, especially in areas where special interests have a hammerlock on Congress . . .") (quoting former White House Chief of Staff John Podesta) (internal quotation marks omitted).

²⁷¹ James Bennet, *True to Form, Clinton Shifts Energies Back to U.S. Focus*, N.Y. TIMES, July 5, 1998, § 1, at 10 (quoting Paul Begala, former Counselor to President Clinton).

proach as a general strategy. He needed exercises of presidential authority to withstand congressional disfavor, and he repeatedly collected on his wager that they would do so. Many members of Congress, to be sure, protested Clinton's actions, objecting not only to the specific policies he implemented, but also to his very assertion of power. Senator Hagel decried the "danger[] [of] a president . . . implement[ing] policy by essentially debasing the constitutional structure";²⁷² Senator Craig indicted Clinton for "thumbing [his] nose at an open legislative process";²⁷³ Congressman Watts accused him of "pretty much . . . acting as the king of the world."²⁷⁴ Members introduced and held hearings on bills to impose conditions on the use of presidential directive authority;²⁷⁵ they also attempted to reverse individual orders through stand-alone legislation and appropriations riders. A few of the particularized efforts met with success.²⁷⁶ But in general, a Republican Congress proved feckless in rebuffing Clinton's novel use of directive authority — just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan's use of a newly strengthened regulatory review process.²⁷⁷

The reasons for this failure are rooted in the nature of Congress and the lawmaking process.²⁷⁸ The partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power — or, what is almost the same thing, to deny authority to the other branches of government. Opposition to presidential action of course may arise from members' noninstitutional interests, especially when different parties control the White House and Congress. But members sometimes will decide that complaint serves these interests better than action does, because the former tactic allows them to evade responsibility for government. And even when this is not the case, members can make their opposition effective only through the laborious and costly process of passing legislation — and then, most critically, of overriding the President's probable

²⁷² Lacey, *supra* note 270 (quoting Sen. Hagel) (internal quotation marks omitted).

²⁷³ John J. Fialka, *Clinton Is Likely To Leave the Presidency with Record of Having Protected Lands*, WALL ST. J., Dec. 29, 2000, at A18 (quoting Sen. Larry Craig) (internal quotation marks omitted).

²⁷⁴ *NewsHour with Jim Lehrer* (PBS television broadcast, Jan. 22, 2001), http://www.pbs.org/newshour/bb/politics/jan-june01/abortion_1-22.html.

²⁷⁵ See, e.g., Separation of Powers Restoration Act, H.R. 2655, 106th Cong. (1999).

²⁷⁶ In the most notable example by far, Congress prohibited the Department of Education from using any funds to implement, administer, or distribute national education tests, which Clinton had instructed the Department to prepare. See Ronald Brownstein, *More Liberal than You Thought: Why Both Bradley and Gore Are Going Left*, AM. PROSPECT, Nov. 23, 1999, at 32.

²⁷⁷ See Moe & Wilson, *supra* note 123, at 38–41 (providing a detailed description of the congressional response to the initiation of OMB review); *supra* notes 141–142 (noting the relatively minor changes that Congress eventually forced on the review process).

²⁷⁸ For an excellent discussion of these issues, see Moe & Howell, *supra* note 183, at 143–48.

veto. Members of Congress play a stronger hand when they attempt to deny effect to executive action through the appropriations process, but even here, the veto power gives the President substantial leverage.²⁷⁹ None of this means that Congress is wholly incapable of effective response to presidential action or that a President can afford utterly to dismiss congressional opposition. Congress occasionally has served as a check, and the overall success of Clinton and Reagan before him in overcoming congressional disfavor may well have derived from a cognizance of and respect for the outer boundaries of that branch's tolerance. But institutional analysis, like history, suggests a fair degree of leeway from this quarter for presidential attempts to direct administrative policies.

E. Comparisons and a Prediction

The election of a new President last year raises obvious questions regarding what the history and analysis presented so far in this Article signifies for the future. I here consider these questions briefly, drawing on evidence from George W. Bush's first few months in office but necessarily also indulging in a fair amount of speculation. Before I do so, I set the scene with some further discussion of the distinctions between the Reagan and Clinton approaches to controlling administrative action. This discussion highlights the choices available to President Bush as he charts his own course concerning administrative matters.

I already have detailed the essential difference in the techniques used by Presidents Reagan and Clinton to control administration: Reagan relied almost exclusively on the review of regulations previously developed by executive branch agencies, whereas Clinton, although retaining a review process, relied principally on the issuance of directives to these agencies and the later appropriation of their regulatory action. This difference in large measure related to four others, noted earlier in passing but worthy, now that the descriptive part of this Article is complete, of more explicit mention.

First, the Clinton approach generally favored regulation, whereas the Reagan approach sought mainly to suppress it. Reagan wanted above all else to reduce the burden of regulation, and he accordingly put in place a gatekeeping mechanism to prevent the promulgation of unnecessarily stringent rules. Clinton wanted above all else to garner — and to prove — the benefits of active if incremental government, and so he established a triggering mechanism to promote, in a centralized way consistent with his policy vision, the development of regulatory solutions to national problems. There was no absolutely necessary connection between these purposes and mechanisms: review

²⁷⁹ See *supra* note 38.

processes can force broader regulatory action, and directives can prompt *deregulatory* initiatives. But the mechanisms that the two Presidents adopted were the most natural to achieve their respective goals of checking and prodding administrative action.

Second and related, the Clinton and Reagan approaches operated at different stages of the regulatory process. The Reagan review process usually commenced only after an agency had fleshed out a proposal; the process thus precipitated frequent conflicts between the agencies and OMB, while limiting the ability of OMB to influence regulatory initiatives as fully as it wanted. The Clinton executive order on regulatory review signaled a modest change by redesigning OMB's regulatory planning process to encourage early consultation regarding initiatives proposed by the departments.²⁸⁰ The use of presidential directive authority to initiate agency action then accelerated the shift toward early White House involvement by establishing an instrument for centralized control that functioned before the agencies had adopted a proposal (or perhaps even taken up an issue in the first instance). At the same time, Clinton's repeated end-stage appropriation of agency action (and the prospect of it) promoted, albeit did not ensure, White House involvement in certain regulatory proceedings throughout their lifespans.

Third, the Clinton approach in large part functioned in public view, whereas the Reagan approach often functioned in private. The Reagan OMB process assigned a high value to the confidentiality of internal government discussions, complying with only modest disclosure rules forced by Congress. Here too, the Clinton executive order on regulatory review signaled a new direction, with its emphasis on increased formality and openness in the OMB process.²⁸¹ But here as well, the most profound changes came from Clinton's issuance of official directives to agencies and his public announcements of both these directives and final agency action. These methods did not just disclose, but purposefully trumpeted (indeed, sometimes exaggerated) the President's involvement in agency proceedings, offering it up as grist for public review and comment.

Fourth and again related, the Clinton approach moved control of the agencies closer than it had been to the Oval Office. Reagan's regulatory review process relied on an office distanced physically (if only by a parking lot) from the White House and staffed primarily by civil servants. Perhaps more significantly, nothing in the design of this process necessarily brought its outcomes to the attention of the President. This is not to say that OMB functioned as just another bureauc-

²⁸⁰ See *supra* p. 2286.

²⁸¹ See *supra* pp. 2286-87.

racy, indistinguishable from the agencies themselves in its relationship to the President or its adherence to his priorities. It is only to note that the OMB review process was not a presidential review process in the strict sense and itself carried risks of routinization and detachment. The methods of administrative control on which Clinton principally relied reduced, albeit could not eliminate, those risks. The staff involved came mostly from the White House policy councils, units even smaller than OIRA which were based in the West Wing and consisted entirely of political appointees. More, Clinton's methods of control necessarily involved Clinton himself, if potentially only at the end of a staff-managed process. Because he signed the directives and he made the public announcements, presidential control of administration became more personal — became, in fact, more presidential — than before.

By noting these differences, I wish neither to understate nor to obscure the fundamental continuities between the Reagan and Clinton approaches to presidential administration. To the contrary, although the distinctions are significant in determining both what has happened to administration and whether this development is desirable, the essential story this Article has told concerns movement in a single direction, stretching across the two decades from Reagan's first term through Clinton's second, toward a new relationship between the executive agencies and the President. The point is not that the President rules; that would be an impossible change in a context in which Congress, bureaucratic experts, and interest groups historically have played important roles and retain powerful incentives to do so. The point is only — but this is no small "only" — that the President, in relation to these other actors, has attained an ever greater capacity to oversee, to supervise, and even to direct administrative action.

Focusing first on this general trend, I view as unlikely the prospect that President Bush will elect to cede this power. My prediction flies in the face of conventional wisdom regarding Bush's management style, which emphasizes his attachment to corporate models of organization. Former Senator Moynihan, no inexperienced observer of Washington ways, has asserted that Bush is "going back to cabinet government";²⁸² and the *New York Times* has reported broad consensus that Bush, as compared with Clinton, will "delegat[e] more authority" to executive agency heads, "[s]ignaling [a] [r]eduction in [the] [r]ole of [the] White House [s]taff."²⁸³ But Bush has close personal relationships with only a few of his cabinet or subcabinet officials; for the

²⁸² Richard L. Berke, *Bush Is Providing Corporate Model for White House*, N.Y. TIMES, Mar. 11, 2001, § 1, at 1 (internal quotation marks omitted).

²⁸³ Joseph Kahn, *Bush Filling Cabinet with Team of Power-Seasoned Executives*, N.Y. TIMES, Dec. 31, 2000, at A1.

most part, these officials belong to what might be termed the permanent GOP governing establishment. These officials likely will adopt elements of the mindsets of their departments or other players in the administrative process. For Bush to impose a personal governing agenda, he will have to locate decisionmaking authority closer to home, among the staff of his Executive Office.²⁸⁴ Indeed, this allocation of authority may have begun already, as Bush conspicuously has abandoned certain cabinet officials engaged in what he must have viewed as the independent articulation of governmental policy.²⁸⁵

The more interesting question concerns the form that Bush's control of administrative action will take, as compared with Reagan's and Clinton's. Bush's choice for the administrator of OIRA suggests an intent to renew an aggressive posture toward the agencies in the regulatory review process;²⁸⁶ so too do Bush's frequent references, in just the first few months of his tenure, to the economic costs of regulatory decisions.²⁸⁷ At the same time, Bush may well find advantage in incorporating Clinton's more affirmative strategies into his own approach to administration. The public and media demands for action and leadership that I previously discussed remain; so too does a Congress, if not technically divided by party from the White House, still capable, given its composition, of resisting the presidential agenda. Even during his campaign, Bush promised to issue a number of directives to administrative officials — for example, a Clintonesque directive to the Secretary of HHS to aid states in establishing registries of fathers of children born out of wedlock.²⁸⁸ Upon taking office, Bush immediately signed a memorandum directing an agency head to reinstate a ban on funding nongovernmental organizations engaged in abortion-related activities,²⁸⁹ which Clinton had lifted by directive during his first week

²⁸⁴ For a similar critique of the conventional wisdom, see Ryan Lizza, *White House Watch: Spokesmen*, NEW REPUBLIC, Jan. 29, 2001, at 18.

²⁸⁵ See Selwyn Crawford, *Cabinet Gets a Voice but Not the Last Word: Bush Overrules Officials on Some Policies*, DALLAS MORNING NEWS, Mar. 15, 2001, at 1A, LEXIS, News Library, Mapap File.

²⁸⁶ See Douglas Jehl, *Regulations Czar Prefers New Path*, N.Y. TIMES, Mar. 25, 2001, at A1.

²⁸⁷ Statement on Signing Legislation To Repeal Federal Ergonomics Regulation, 37 WEEKLY COMP. PRES. DOC. 477 (Mar. 20, 2001); Press Conference, 37 WEEKLY COMP. PRES. DOC. 536, 537-38 (Mar. 29, 2001).

²⁸⁸ See Frank Bruni, *Bush Closes In on Selecting Running Mate*, N.Y. TIMES, July 18, 2000, at A14.

²⁸⁹ Memorandum on Restoration of the Mexico City Policy, 37 WEEKLY COMP. PRES. DOC. 216 (Jan. 22, 2001). Bush also made aggressive early use of traditional executive orders, issuing government contracting rules hospitable to nonunion employers and employees, see Exec. Order No. 13,203, 66 Fed. Reg. 11,227 (Feb. 17, 2001); Exec. Order No. 13,202, 66 Fed. Reg. 11,225 (Feb. 17, 2001); Exec. Order No. 13,201, 66 Fed. Reg. 11,221 (Feb. 17, 2001), and establishing an emergency board whose effect was to prevent an airline strike, see Exec. Order No. 13,205, 66 Fed. Reg. 15,011 (Mar. 9, 2001).

in office.²⁹⁰ In addition, Bush instructed all agency heads, through a memorandum from his chief of staff, to review all regulations issued at the end of Clinton's term that had yet to take effect.²⁹¹ These incentives and early indications suggest that Clinton's methods of control will join Reagan's in Bush's arsenal, thus continuing the expansion of presidential administration this Article has chronicled.

IV. ASSESSING PRESIDENTIAL ADMINISTRATION

To describe recent developments in administrative process in this way is not to draw any conclusions about either their legality or their wisdom. In this Part, I turn to these questions, offering a broad though not unlimited defense of the emergent system of presidential administration. The first section considers and rejects constitutional objections. Issues of constitutionality, of course, often diverge from issues of normative appeal: much action that is constitutional is unwise, and (perhaps less acknowledged in our legal culture) some action that is unconstitutional has much to recommend it. In this context, however, for reasons I detail, the hardest issue of constitutionality turns on an issue of statutory interpretation which itself rests partly — although not wholly — on a policy judgment. The second section takes up in depth the relevant policy questions, arguing that in our current political and regulatory climate, concerns relating to both the accountability and the effectiveness of government action support a strong role for the President in setting administrative direction. In the third section, I consider objections to this claim, each of which has links to one of the alternative models of administrative control discussed in Part I. Although mostly rejecting these counterarguments, I locate the contexts in which they have the greatest force, and I suggest corresponding limits on the appropriate exercise of presidential power over the administrative process. Throughout this evaluation of legal and policy issues, I make certain distinctions arising from the different characteristics of presidential administration under Presidents Reagan and Clinton.

A. Constitutional Questions

President Clinton's assertion of directive authority over administration, more than President Reagan's assertion of a general supervisory authority, raises serious constitutional questions. In a nutshell, for now, the objection goes as follows. Basic separation of powers doctrine maintains that Congress must authorize presidential exercises of essentially lawmaking functions. In directing agency officials as to the

²⁹⁰ See Memorandum on the Mexico City Policy, 1 PUB. PAPERS 10 (Jan. 22, 1993).

²⁹¹ Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 20, 2001).

use of their delegated discretion, the President engages in such functions, but without the requisite congressional authority. Congress indeed has delegated discretionary power, but only to specified executive branch officials; by assuming responsibility for this power, the President thus exceeds the appropriate bounds of his office. This argument underlies the conventional, though never adjudicated, view that the President lacks directive authority over administrative officials. I accept here the rudiments of the constitutional argument; more specifically, unlike the unitarians, I acknowledge that Congress generally may grant discretion to agency officials alone and that when Congress has done so, the President must respect the limits of this delegation. My argument in defense of Clinton's practices concerns the statutory predicate underlying the conventional view. I suggest, that is, that most statutes granting discretion to executive branch — but not independent — agency officials should be read as leaving ultimate decisionmaking authority in the hands of the President. This rule of statutory construction appropriately derives from an effort to determine congressional intent as well as, given some uncertainty in doing so, an effort to promote good lawmaking practices.

Consider first, to see the problem, Justice Black's opinion for the Court in *Youngstown Sheet & Tube Co. v. Sawyer*,²⁹² which invalidated President Truman's seizure of the nation's steel mills. "In the framework of our Constitution," Justice Black famously wrote, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."²⁹³ Then, referring to the structure and terms of Truman's order to the Secretary of Commerce to carry out the seizure, Justice Black expounded:

The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution.²⁹⁴

This presidential act, Justice Black concluded, violated the Framers' decision to "entrust[] the lawmaking power to the Congress alone in both good and bad times."²⁹⁵

President Clinton's repeated invocation of a vaguely defined "executive authority" to direct administrative officials to adopt certain presidential policies appears in great tension with — or perhaps in outright opposition to — the understanding of constitutional structure

²⁹² 343 U.S. 579 (1952).

²⁹³ *Id.* at 587.

²⁹⁴ *Id.* at 588.

²⁹⁵ *Id.* at 589.

expressed in Justice Black's opinion. When Clinton ordered a given executive agency official, for example, to propose or (following a comment period) to issue regulations, he engaged in an exercise of the kind of policymaking authority Justice Black denied the President in *Youngstown*.²⁹⁶ Indeed, the terms of most of these directives fit almost precisely Justice Black's description of Truman's order: all set out "reasons why the President believe[d] certain policies should be adopted" and instructed designated executive officials to take the actions appropriate and necessary to implement those policies.

But consider now a difference between the steel seizure order and Clinton's directives, relating not to the President's own, but to Congress's prior exercise of lawmaking power. On Justice Black's view of the situation facing the President (and ultimately the Court) in *Youngstown*, Congress had passed no statute either expressly or impliedly delegating the power to take possession of private property.²⁹⁷ On two concurring Justices' view, Congress had gone so far as to pass statutes impliedly reserving this power for itself.²⁹⁸ By contrast, Clinton issued the directives this Article has discussed against a backdrop not of congressional silence, much less of congressional reservation, but of explicit congressional delegations to make regulations and otherwise exercise discretion. Congress had decided that there would be a decisionmaker other than itself.

But still there remains a rub, and not an insignificant one, for the persons that Congress explicitly chose for this function were agency officials, rather than the President. The *Youngstown* Court had no need to address this issue because no Justice in that case understood the relevant congressional history to suggest any distinction between the

²⁹⁶ It might be argued that Clinton's orders lacked the qualities of finality and concreteness that Truman's order possessed and so raise fewer constitutional issues. With respect to finality, Clinton's orders on rulemaking did adhere to the formal structures that the APA imposed: he ordered only proposed rules prior to notice-and-comment, waiting until after that period to order final regulations. See *supra* 2306-07. But in doing so, he did no more than an administrative official exercising discretionary power would have done — that is, follow an explicit congressional limit on the mode of exercising that discretion. No one would say that a head of department does not engage in policymaking when and because she follows APA procedures; similarly, no one should view a President's adherence to the APA as somehow mitigating the substantive content and effect of his actions. Moreover, Clinton ordered quantities of final agency action outside the rulemaking process (for example, administrative guidance and interpretive statements), see *supra* pp. 2306-07, which even if not technically binding, effectively determined agency policy. With respect to concreteness, Clinton's orders did leave room for agency officials to fill in many details — but then, so too did Truman's directive to the Secretary of Commerce. Clinton's orders, like Truman's, usually specified the essentials of the policy matter at issue, confining the scope of action of the relevant agency official. For examples, see p. 2295, above. If there is a difference here, it is one of degree rather than kind, insufficient to eliminate or transform the legal question faced in *Youngstown*.

²⁹⁷ *Youngstown*, 343 U.S. at 585.

²⁹⁸ *Id.* at 599 (Frankfurter, J., concurring); *id.* at 639 (Jackson, J., concurring).

President and an agency official. But what if Congress had delegated specifically to the Secretary of Commerce the authority to seize property in certain circumstances? Could President Truman then have issued the order that he did? Could he effectively have substituted his decision as to the propriety of the seizure for that of the Secretary?²⁹⁹ This is essentially the question posed by Clinton's use of directive authority — by his assumption, expressed in formal terms, that when Congress designates an agency official as a decisionmaker, the President himself may step into that official's shoes.

Because no Supreme Court cases specifically address this question, analysis of it under current law must begin with the body of cases relating to the President's removal power. Just nine years after the Court in *Myers v. United States*³⁰⁰ appeared to recognize a plenary power on the part of the President to remove administrative officeholders, the Court approved in *Humphrey's Executor v. United States*³⁰¹ a statute providing that the President could dismiss a member of the Federal Trade Commission (FTC) only for "inefficiency, neglect of duty, or malfeasance in office."³⁰² The Court distinguished *Myers* on the basis that the FTC Commissioner exercised "quasi-legislative" and "quasi-judicial" duties, as opposed to performing purely "executive function[s]."³⁰³ Later cases downplayed the importance of this distinction, focusing instead on the question whether the removal provision at issue only limited the President (thus creating a more "independent" entity) or also gave Congress a hand in determining the official's tenure (thus effecting a legislative "aggrandizement" of executive power).³⁰⁴ If the former, but only if the former, the removal provision was permissible, provided it did not "unduly interfere" with the President's constitutionally assigned functions.³⁰⁵

²⁹⁹ This hypothetical question assumes that the initial delegation to the Secretary of Commerce is constitutionally permissible. The question also assumes that the content of the presidential directive falls within the scope of the delegation. If, to use the clearest case, Congress had delegated a mandatory duty, then the President, like the Secretary, would have to give it effect. As the Supreme Court early stated in *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1837), "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." Similarly, if Congress had delegated limited discretionary authority, then the President, like the Secretary, would have to act within those limits. With these important assumptions in place, the only remaining question is whether the President's involvement in carrying out the delegation would violate the Constitution.

³⁰⁰ 272 U.S. 52 (1926).

³⁰¹ 295 U.S. 602 (1935).

³⁰² *Id.* at 623.

³⁰³ *Id.* at 628, 630.

³⁰⁴ See *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986).

³⁰⁵ *Morrison*, 487 U.S. at 693-96. Although the "interference" test is notoriously vague, it presumably contemplates a core set of presidential functions, probably lying mainly in the defense and foreign policy spheres, that would prevent Congress from, say, restricting the President's power to remove the Secretary of Defense or State.

These cases strongly suggest that Congress may limit the President's capacity to direct administrative officials in the exercise of their substantive discretion. If Congress can create a zone of independent administration by preventing the President from removing officials at will, then it can advance the same end by barring the President from imposing his policy choices on them. This is true regardless whether Congress in fact has chosen to insulate the official from the President's at-will removal authority. If Congress has done so, the limit on the President's directive power seems but a necessary corollary: a for-cause removal provision would buy little substantive independence if the President, though unable to fire an official, could command or, if necessary, supplant his every decision. And even if Congress has not done so, it should be able, as an alternate means of ensuring a measure of independence, to limit the President's directive authority, thus forcing him to bear the burden of removing an official (and substituting a more compliant person) when he wishes to dictate an agency's decision.³⁰⁶ Indeed, a dictum from *Myers* suggests that even when Congress cannot at all limit the President's power to remove an official, Congress may be able to confine the President's capacity to direct that official as to the exercise of his delegated discretion. Said the Court: "Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance."³⁰⁷

The conventional view in administrative law, in apparent accord with these cases, holds that the President lacks the power to direct an agency official to take designated actions within the sphere of that official's delegated discretion.³⁰⁸ The President may have the power to

³⁰⁶ It is possible to argue, contrary to the claim in the text, that Congress must choose between limiting the President's removal power and giving him plenary control over administrative officials: in other words, once it has decided that the President should be able to remove an official at will, Congress cannot otherwise limit the President's hierarchical authority. The rationale for this stance might rest on a notion of political accountability: if the President can remove an official, the public will hold him accountable for that official's decisions; and if the public will hold the President so accountable, he ought to have all the tools available (not just the often ineffective removal power) to control these decisions. But this reasoning, aside from conflicting with the dictum from *Myers* discussed below in the text, seems both too empirically questionable (does the public's view of political responsibility really hinge on the President's removal power?) and too unhinged from conventional modes of constitutional interpretation to establish a prohibition on Congress.

³⁰⁷ *Myers v. United States*, 272 U.S. 52, 135 (1926). In making this statement, the Court tacitly acknowledged the practical limits on the President's removal power: this power alone does not ensure that all decisions made by administrative officials will accord with the President's views and priorities.

³⁰⁸ See sources cited *supra* note 8. Even administrative law scholars who protest this result, on the ground that the Constitution as correctly interpreted provides the President with plenary power over administration, see *infra* p. 2325, agree that current constitutional law deprives the

remove an official at will, because Congress either has not taken or (more rarely) could not take that power away. In addition, and critically, the President may have what Peter Strauss and Cass Sunstein have called "procedural" supervisory authority over administrative officers, enabling the President to demand information from and engage in consultation with them.³⁰⁹ Congress usually has done nothing to suggest that it wishes to interfere with this authority as to executive branch agencies;³¹⁰ and even if Congress has indicated this intent as to the independents, Article II of the Constitution, most notably its Opinions Clause, may bar Congress from such interference.³¹¹ This proce-

President of directive authority. See Lawson, *supra* note 20, at 1242-46. The consensus on this issue emerged following the Court's decisions in the removal cases. Attorneys General in the nineteenth century, for example, divided on the question whether the President possessed directive authority over administrative officials. Compare, e.g., 11 Op. Att'y Gen. 14, 15 (1864) (denying directive authority), and 1 Op. Att'y Gen. 624, 625 (1823) (same), with 6 Op. Att'y Gen. 326, 327 (1854) (sustaining directive authority), and 2 Op. Att'y Gen. 482, 487 (1831) (same). The *Myers* dictum and *Humphrey's Executor* holding appear responsible for tipping the balance against acknowledging a presidential directive authority.

³⁰⁹ Strauss & Sunstein, *supra* note 2, at 200; see Lessig & Sunstein, *supra* note 1, at 72; Strauss, *supra* note 8, at 646-47.

³¹⁰ When Congress does indicate a desire to deprive the President of procedural oversight power over executive branch agencies, the question becomes, as in the independent agency context, whether Congress may do so constitutionally. I address this question immediately below in the text and next footnote. Legislation passed in 1981, exempting several executive agency rulemakings from the OMB review process (a form of procedural oversight power), raised this constitutional issue. See Act of Oct. 9, 1981, Pub. L. No. 97-58, sec. 4(a)(2), § 109(d)(2), 95 Stat. 979, 984 (codified at 16 U.S.C. § 1379(d)(2) (1982)). President Reagan approved the legislation, but noted in his signing statement that he would not read the bill "to infringe in any way on the President's constitutional responsibility to supervise [the relevant secretaries] in their execution of the law." Statement on Signing a Bill Concerning the Protection of Marine Mammals, PUB. PAPERS 914 (Oct. 9, 1981).

³¹¹ U.S. CONST. art. II, § 2 (empowering the President to "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"). The Opinions Clause may receive reinforcement, for purposes of this argument, from the Take Care Clause, see U.S. CONST. art. II, § 3 (obligating the President to "take Care that the Laws be faithfully executed"). Although framed in the language of duty rather than power, this clause may imply some minimum amount of presidential oversight authority, on the theory that the President could not perform this function if unable to require information from and engage in consultations with agency officials. See Strauss, *supra* note 8, at 648-50. A third provision, the Vesting Clause, see U.S. CONST. art. II, § 1 (vesting "executive power" in the President), also may play a role in the argument, although it is notoriously uncertain whether this clause refers only to the powers specifically enumerated in the rest of Article II (such as those deriving from the Opinions and Take Care Clauses) or encompasses some more general grant of authority. Compare Calabresi & Prakash, *supra* note 1, at 570-85 (interpreting the Vesting Clause as a general grant of authority), with Lessig & Sunstein, *supra* note 1, at 47-55 (interpreting the Vesting Clause to refer to enumerated powers). The removal cases need not be read so broadly as to grant Congress the power to strip the President of this kind of procedural authority over administration. To be sure, a dictum in *Humphrey's Executor* lends support to this understanding of congressional power by stating that a member of the Federal Trade Commission was simply not an officer of an executive department. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935). On this account, neither the Opinions Clause (by its explicit terms) nor the Take Care and Vesting Clauses (also referring to law "execut[ion]") would apply. The reasoning in *Humphrey's*

dural oversight power, most administrative law experts agree, supports OMB review of at least executive agency (and perhaps independent agency) actions, so long as ultimate decisionmaking power resides in the hands of agency officials; the review system then operates as a channel through which the President can obtain information from and offer advice to the relevant administrators.³¹² So too this oversight power sustains Clinton's directives to agency officials demanding reports on various issues, even if these directives, like the demands of OMB review, suggested a preferred policy position.³¹³ But there the line is drawn. The President has no authority to act as the decision-maker, either by resolving disputes in the OMB process or by issuing substantive directives. This is because Congress, under the removal precedents, can insulate administrative policymaking from the President, and Congress has exercised this power by delegating the relevant discretion to a specified agency official, rather than to the President.

The work of the scholars and lawyers known as unitarians provides a basis for contesting this view by attacking the removal decisions on which it rests. The unitarians argue that, contrary to these decisions, Article II of the Constitution establishes a President with plenary control over all heads of agencies involved in executing, implementing, or administering federal law.³¹⁴ Most unitarians make this claim on the basis of the original meaning of the constitutional text.³¹⁵ A few rely on the identification of broad constitutional values and the translation of those founding values into the contemporary context.³¹⁶ In either event, the unitarians insist that the Court has allowed Con-

Executor, however, has never been repeated, and the question actually decided in the case was much narrower; although insisting that Congress may limit the President's power to remove many administrative officials — and thus making clear that Congress has broad power to insulate from the President these officials' exercise of discretionary authority — the Court did not hold that Congress could cut off agencies in all respects from the President by, for example, preventing the President from removing an agency officer for cause or, more relevant here, preventing the President from requiring the officer to provide reports and other information. See Strauss & Sunstein, *supra* note 2, at 199–203.

³¹² See sources cited *supra* note 309. The distinction between this kind of procedural oversight and the actual displacement of substantive authority lay at the heart of the Justice Department opinion authorizing Reagan's executive order initiating regulatory review. See Proposed Executive Order Entitled "Federal Regulation", 5 Op. Off. Legal Counsel, 59, 63 (1981); *supra* p. 2278 & note 126.

³¹³ For an example of these directives, see *supra* note 237.

³¹⁴ See FRIED, *supra* note 10, at 141–60; Calabresi & Prakash, *supra* note 1; Calabresi & Rhodes, *supra* note 10; Currie, *supra* note 10, at 34–36; Liberman, *supra* note 10; Miller, *supra* note 1; Theodore Olson, *Founders Wouldn't Endorse America's Plural Presidency*, LEGAL TIMES, Apr. 27, 1987, at 11; see also Lessig & Sunstein, *supra* note 1, at 93–119 (making a somewhat weaker unitarian argument).

³¹⁵ See, e.g., Calabresi & Prakash, *supra* note 1; Calabresi & Rhodes, *supra* note 10; Liberman, *supra* note 10.

³¹⁶ See Lessig & Sunstein, *supra* note 1, at 93–119.

gress too much power to insulate the agencies from the President. Although focusing on the question of removal, the unitarian position equally would bar legislative inroads into the President's directive authority.

I do not espouse the unitarian position in this Article, instead taking the Supreme Court's removal cases, and all that follows from them, as a given. I adopt this stance for two reasons. First, although I am highly sympathetic to the view that the President should have broad control over administrative activity, I believe, for reasons I can only sketch here, that the unitarians have failed to establish their claim for plenary control as a matter of constitutional mandate. The original meaning of Article II is insufficiently precise and, in this area of staggering change, also insufficiently relevant to support the unitarian position.³¹⁷ And the constitutional values sometimes offered in defense of this claim are too diffuse, too diverse, and for these reasons, too easily manipulable to justify removing from the democratic process all decisions about the relationship between the President and administration — especially given that this result would reverse decades' worth of established law and invalidate the defining features of numerous and entrenched institutions of government. Second and equally important, the cases sustaining restrictions on the President's removal authority, whether or not justified, are almost certain to remain the law (at least in broad terms, if not in specifics); as a result, any serious attempt to engage the actual practice of presidential-agency relations must incorporate these holdings and their broader implications as part of its framework.

But my acceptance of congressional authority in this area does not require the conclusion, assumed on the conventional view, that the President lacks all power to direct administrative officials as to the exercise of their delegated discretion. That Congress could bar the President from directing discretionary action does not mean that Congress has done so; whether it has is a matter of statutory construction. If Congress, in a particular statute, has stated its intent with respect to presidential involvement, then that is the end of the matter. But if Congress, as it usually does, simply has assigned discretionary authority to an agency official, without in any way commenting on the President's role in the delegation, then an interpretive question arises. One way to read a statute of this kind is to assume that the delegation runs to the agency official specified and to that official alone. But a second way to read such a statute is to assume that the delegation runs to the agency official specified, rather than to any other agency official, but

³¹⁷ For a powerful criticism of the originalist argument for unitarianism, see *id.* at 12–84. A principal dispute concerns the meaning of the Vesting Clause, noted *supra* note 311.

still subject to the ultimate control of the President. The lawfulness of a President's use of directive power depends on the choice between these two readings.

The availability of presidential directive authority thus usually will turn on the selection of an interpretive principle — really, a presumption — with which to approach a statutory delegation to an administrative official. The principle that advocates of the conventional view implicitly have adopted reads a standard delegation as excluding the President, in the absence of evidence to the contrary. The contrary principle would read a standard delegation as including the President, unless Congress indicates otherwise. Either principle would give clear guidance to courts and, equally important, provide Congress with a clear default rule against which to legislate. The choice between them appropriately rests on other considerations: in the first instance, on a judgment about legislative intentions; and to the extent these are in doubt, on a judgment about institutional competencies.

When the delegation in question runs to the members of an independent agency, the choice between these two interpretive principles seems fairly obvious. In establishing such an agency, Congress has acted self-consciously, by means of limiting the President's appointment and removal power, to insulate agency decisionmaking from the President's influence. In then delegating power to that agency (rather than to a counterpart in the executive branch), Congress must be thought to intend the exercise of that power to be independent. In such a case, the agency's heads are not subordinate to the President in other respects; making the heads subordinate in this single way would subvert the very structure and premises of the agency.

When the delegation runs to an executive branch official, however, Congress's intent (to the extent it exists) may well cut in the opposite direction. Congress knows, after all, that executive officials stand in all other respects in a subordinate position to the President, given that the President nominates them without restriction, can remove them at will, and can subject them to potentially far-ranging procedural oversight.³¹⁸ All these powers establish a general norm of deference among executive officials to presidential opinions, such that when Congress delegates to an executive official, it in some necessary and obvious sense also delegates to the President. It is true that these various pow-

³¹⁸ As noted above, the procedural oversight power may flow directly enough from the Opinions Clause and other provisions of Article II as to deprive Congress of the ability to place limits on it. See *supra* p. 2324 & note 311. And even if Congress possesses this ability, the prevailing view holds that Congress has left presidential procedural power in place with respect to at least the executive branch agencies. See *supra* p. 2324 & note 310. In discussing the regulatory review process under President Reagan, I showed how this ostensibly procedural power sometimes can determine the content of agency action. See *supra* pp. 2278–79.

ers do not give the President full ability to control an executive official's decisions, at least without incurring political costs; but then, for reasons discussed earlier, neither does directive power.³¹⁹ I in no way mean here to conflate the two. But the very subtlety of the line between directive authority and other tools of presidential control — or stated more fully, between the “command” expressed in the use of directive power and the “influence” deriving from the use (or threatened use) of appointment, removal, and procedural oversight powers — provides reason to doubt any congressional intent to disaggregate them, in the absence of specific evidence of that desire.³²⁰ An interpretive principle presuming an undifferentiated presidential control of executive agency officials thus may reflect, more accurately than any other, the general intent and understanding of Congress.

An old dictum from the Supreme Court supports something very like this rule of construction. Recall the statement in *Myers* to the effect that Congress may limit the President's substantive control of executive agency decisions: “Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance.”³²¹ The meaning of this statement is not free from doubt, but the Court's demand for a “peculiar[]” and “specific[]” commitment appears to refer to something other than an ordinary delegation. Although not going so far as to require Congress to preclude presidential directive authority through a clear statement, the dictum suggests a presumption in favor of reading statutes to leave this authority in the hands of the President. In that event, the critical question under a typical delegation statute about any exercise of presidential power, including directive authority, would concern not its legality but instead the subject of the next section: the action's desirability from the standpoint of administrative process and substance.

Advocates of the conventional view, however, might support a presumption against directive power with any of three arguments relating to congressional design. First, they might rely on the hoary principle of “*expressio unius est exclusio alterius*” — to include one thing is to exclude another — to justify the equation of silence with denial. But this canon is notoriously capable of producing errors,³²² and never

³¹⁹ See *supra* pp. 2298–99.

³²⁰ Pildes and Sunstein similarly comment on the subtlety of this line, but nonetheless adopt the conventional view that the President may not exercise directive authority when Congress delegates power to another executive official. See Pildes & Sunstein, *supra* note 3, at 24–26.

³²¹ *Myers v. United States*, 272 U.S. 52, 135 (1926).

³²² See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 229 (1994); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REG-*

more so than in the kind of situation here: when legislative drafters, given the surrounding context, may view the thing excluded and the thing included as standing on different planes entirely. Consider an analogy: a set of military regulations gives the captain of a Navy ship broad authority to make decisions about the ship's operation. Few would understand these regulations to preclude the captain's direct superior (as opposed, say, to his peers or underlings) from instructing the captain as to matters within the delegation, even if the regulations failed to note specifically the commander's authority to do so. Interpreters instead would read the regulations as consistent with, and indeed incorporating, a background understanding of a hierarchical relationship between the captain and his commander. So too here. Congress's delegation of authority to, say, the Secretary of Commerce ought to preclude the Secretary of Labor from exercising the delegated power. But given the essentially superior-subordinate relationship that Congress has left in place between the President and the Secretary of Commerce, the delegation of authority to the latter may say nothing about the former's directive power.

A second response to my argument might focus on Congress's occasional practice of delegating power directly to the President, on the understanding that he may assign that power (or a part of it) to a subordinate official.³²³ These delegations, the response would go, imply that when Congress takes the alternative route of granting power to an administrative official, Congress wishes to insulate the exercise of that power from the President. But this conclusion does not follow. A delegation to the President continues, under my statutory reading, to have a different effect than a delegation to an agency official. Most important, the former enables the President to choose who will function as the initial (and, in practice, usually the ultimate) decisionmaker, whereas the latter deprives the President of this choice. Perhaps too, the former expresses a preference, though not a command, that the President take some part in exercising the delegated authority; otherwise stated, a delegation to the President gives notice that Congress will hold him specially accountable for decisions made within its scope. For these reasons, Congress's delegations of power to the President logically coexist with a presumption that the President has ultimate control over all executive agency decisions. Only if Congress sometimes stipulated that a delegation of power to an agency official was subject to the ultimate control of the President — which Congress

ULATORY STATE 151-52 (1990). In the words of the ever-quotable Judge Posner, "Not every silence is pregnant." Ill. Dep't of Pub. Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983).

³²³ Presidential Subdelegation Act, ch. 655, § 10, 65 Stat. 712 (1951) (codified at 3 U.S.C. § 301 (1994)) (authorizing the President to designate any executive branch official appointed with the Senate's advice and consent to perform any function vested in the President).

has not, to my knowledge — would a claim of this kind (that is, a claim relying on the negative implication of other statutes) succeed in defeating my argument.

Finally, a critic might assert that the interpretive principle I have proposed must represent a faulty estimation of congressional intent because it conflicts with Congress's institutional interests. Surely, the argument would run, Congress generally prefers that final policymaking authority lie with administrative agencies, at least in part dependent on and responsive to the legislative branch, than with Congress's principal competitor for power in Washington. But this assumption does not square with many other aspects of Congress's behavior. If the premise were valid, independent agencies would swamp executive branch agencies; in fact, Congress has reposed considerable, and ever-increasing, authority in the latter.³²⁴ So too if the assumption were true, recent assertions of presidential authority over all agencies, executive and independent, would have met stiffer resistance from Congress than they in fact encountered. For reasons earlier discussed, Congress tends to defend its institutional interests poorly.³²⁵ There seems little reason to presume that as to the single matter of directive authority, Congress self-consciously has adopted such an uncommonly self-protective posture.

This entire discussion, in any event, has something of a fictive aspect. I have considered so far whether Congress, in drafting a standard delegation, generally intends to grant or negate presidential directive authority. But perhaps more likely than either possibility is a third: that Congress generally has no intent on the matter. Congress may have failed to consider the question, proved unable to reach consensus, or chosen to leave the decision to other actors to work out as the need arises. In this case, a sensible approach to addressing the broad interpretive issue would look to the same policy considerations — the effect of presidential control on administration — that optimally should determine Congress's and the President's choices (respectively, whether to withhold and whether to exercise directive authority in any particular instance) were the presumption I have suggested in place. Interpretive principles often derive from an effort to promote better lawmaking — perhaps most notably, by assigning particular roles and responsibilities to particular governmental institutions in accordance with their relative competencies.³²⁶ Under this reasoning, if presiden-

³²⁴ See *supra* note 104.

³²⁵ See *supra* pp. 2314–15.

³²⁶ For general discussion of this point, see SUNSTEIN, *supra* note 322, at 154–55. Sunstein places in this category such disparate principles as the presumption in favor of state autonomy, the presumption against implied repeals, and the *Chevron* deference rule. See *id.* I discuss the last of these at section V.B.1, pp. 2373–80, below.

tial control of executive agencies usually advances accountable and effective administration, then Congress should have to manifest any intent to limit that control. If, however, presidential control of these agencies usually detracts from these goals, then Congress should have to manifest the opposite desire. In either event, the statutory question (whether the President, in exercising directive authority, is acting in accordance with a standard delegation) on which, I have argued, hinges the constitutional question (whether the President can take this action consistent with Article I) itself turns on a policy question (whether the action promotes good administrative lawmaking). It is to this last question that I now turn.

B. *The Case for Presidential Administration*

All models of administration must address two core issues: how to make administration accountable to the public and how to make administration efficient or otherwise effective. The standard view is that these two goals often conflict with each other.³²⁷ Effective administration requires delegations that provide significant discretion to agency officials; these broad delegations, however, raise serious concerns about accountability because agency officials are not elected. The old congressional transmission belt model dealt with this problem by denying that discretion was necessary for effective administration.³²⁸ The expertise model, recognizing otherwise, resolved the issue by characterizing regulatory matters as apolitical and thus rejecting the need for accountability.³²⁹ The interest group model, refuting this characterization in its turn, attempted to ensure accountability by creating a surrogate political process within the bureaucratic sphere, even if at some cost to administrative efficiency.³³⁰ More recent iterations of the models rely on variants of these claims in attempting to strike the appropriate balance.³³¹ The presidential model must face the same challenge: how does it fare, on its own terms and in comparison with alternative approaches, in promoting the accountability and effectiveness of administrative government? This section argues broadly that the model succeeds on both counts, deferring to the next section discussion of limitations and caveats.

1. *Accountability.* — Presidential administration promotes accountability in two principal and related ways. First, presidential leadership enhances transparency, enabling the public to comprehend

³²⁷ See, e.g., Stewart, *supra* note 13, at 1676–79 (describing the historical understanding of this conflict).

³²⁸ See *supra* p. 2250.

³²⁹ See *supra* p. 2261.

³³⁰ See *supra* pp. 2265–66.

³³¹ See *supra* pp. 2257–58, 2262–63, 2268.

more accurately the sources and nature of bureaucratic power. Second, presidential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former. Modern attributes of the relationship between the President and the public make these claims stronger than ever before. A strong presidential role, to be sure, does not ensure strong accountability. The extent to which a system of presidential administration promotes responsiveness and transparency depends in large part on the form it takes and the methods it uses; and any system will depart from the ideal on all-too-frequent occasions. But presidential control of administration at the least possesses advantages over any alternative control device in advancing these core democratic values.

Consider first a fundamental precondition of accountability in administration — the degree to which the public can understand the sources and levers of bureaucratic action. Former Solicitor General Charles Fried, one of the architects of the Reagan Administration's efforts to establish a unitary executive, has stressed this goal for structuring the administrative state: "The lines of responsibility should be stark and clear, so that the exercise of power can be comprehensible, transparent to the gaze of the citizen subject to it."³³² Bureaucracy is the ultimate black box of government — the place where exercises of coercive power are most unfathomable and thus most threatening. To a great extent, this always will be so; the bureaucratic form — in its proportions, its reach, and its distance — is impervious to full public understanding, much less control. But for this very reason, the need for transparency, as an aid to holding governmental decisionmakers to account, here reaches its apex. To the extent possible, consistent with congressional command and other policy objectives, there is good reason to impose clear lines of command and to simplify and personalize the processes of bureaucratic governance.

Gauged by this standard, the President has natural and growing advantages over any institution in competition with him to control the bureaucracy. The Presidency's unitary power structure, its visibility, and its "personality" all render the office peculiarly apt to exercise power in ways that the public can identify and evaluate. The new strategies of presidential leadership, focused as they are on intensifying the direct connection between the President and public, enhance these aspects of the office and the transparency they generate; so too does the increased media coverage of the President, which is at once a cause and a result of these strategies.³³³ Even when a President wishes to

³³² FRIED, *supra* note 10, at 153.

³³³ For discussion of these modern developments in the nature of the Presidency, see pp. 2299–2300, 2310–11, above.

veil his actions, regarding regulatory policy no less than other matters, his capacity to do so is limited. The presidentializing of the bureaucracy is to at least some extent the publicizing of the bureaucracy, with respect alike to outcomes and processes.

Different methods of presidential control, however, can resist or, alternatively, embrace this inherent tendency. President Reagan usually tried, as I have shown, to veil his and his staff's influence over administration.³³⁴ The effort failed in the broadest sense: in part because of the nature of the Presidency, the Reagan OMB's involvement in rulemaking became a matter of intense debate, which both highlighted agency action and heightened the scrutiny it was given. The focus on confidentiality in the Reagan years nonetheless may have interfered in certain cases with the ability of the public, Congress, and interested parties to identify the true wielders of administrative authority. The methods of control Clinton introduced pose a stark contrast. By claiming authority to make discretionary decisions delegated to the agencies, by exercising that authority in public directives, and by speaking of and treating agency actions as his own, Clinton not only influenced, but also assumed political responsibility for regulatory decisions. I do not mean to claim that Clinton always adhered to these methods — or conversely said, that he never influenced agency decisions in ways designed to avoid leaving fingerprints (though his overall visibility in the regulatory arena may have limited his capacity to effect this strategy). The point here is more general: that as between these two models of presidential control, the more nakedly assertive (and legally aggressive) is the more desirable. It is, indeed, difficult to imagine a scheme for wielding administrative power that is more conducive to public understanding — and thus to the public assignment of blame or credit — than the one Clinton initiated.³³⁵

Consider now the related issue of which control mechanism best promotes responsiveness to the policy preferences of the general public. The place to start is with an important claim made by Jerry Mashaw in an article rebuffing academic demands for a more robust nondelegation doctrine. In defending broad delegations, Mashaw contended that more extensive bureaucratic, as opposed to legislative, decisionmaking actually would improve the connection between governmental action and electoral wishes. To accept the argument, Mashaw wrote, “[a]ll we need do is not forget [that] . . . presidents are heads of administra-

³³⁴ See *supra* p. 2280.

³³⁵ The comparative point made here (and repeated in a different context later in this section) relates to my discussion in Part V of whether and how administrative law doctrine should take account of presidential involvement in regulatory action. The proposals I make there essentially provide incentives for Presidents to exercise administrative influence openly and unabashedly, rather than behind closed doors.

tions.³³⁶ Presidents, after all, are popularly elected; indeed, they are the only governmental officials elected by a national constituency in votes focused on general, rather than local, policy issues. Bureaucratic action, in Mashaw's view, thus turns out to have a democratic pedigree purer even than Congress's in our system of government.

This argument assumed, to a greater degree than the facts warranted, that the President both could and did wholly control administrative action. As I have shown, agencies are pulled in many directions — not only toward presidential priorities, but also toward congressional, constituency, and bureaucratic goals and interests. Even were Presidents "heads of administrations" in the strongest possible constitutional sense, so that every administrative official was firmly ensconced in the executive branch, considerable swaths of agency decisionmaking would remain, in a practical sense, impervious to presidential direction and so still subject to democratic exception. But if Mashaw's argument fails for this reason (perhaps among others) to prove that administrative decisionmaking promotes democratic values better than legislative decisionmaking does, the argument at least may suggest that, given the current ubiquity of broad delegations, these values support the strongest feasible presidential control of administrative decisions.

The reason that Mashaw highlighted is retrospective in nature: a President has won a national election.³³⁷ More, this election, exactly because it was national in scope, probably focused on broad policy questions, conveying at least some information to the public about the future President's attitude toward regulation. The point is not trivial, especially when the President is compared with other administrative actors, but it also should not be exaggerated. As the election of 2000 demonstrated, winning a national election does not necessarily entail winning more votes than any other candidate; still less, as the two prior elections showed, does it mean winning a majority of the national electorate. And even assuming a popular majority for a presidential candidate, bare election results rarely provide conclusive grounds to infer similar support for even that candidate's most important positions, much less the sometimes arcane aspects of regulatory policy.³³⁸ Presidential claims of prior public validation indeed often have a tinny timbre.

³³⁶ Mashaw, *supra* note 54, at 95.

³³⁷ See *id.* at 95–96 (arguing that delegations enable administrative policy to shift with "voter preferences expressed in presidential elections").

³³⁸ See Robert A. Dahl, *Myth of the Presidential Mandate*, in *POLITICIANS AND PARTY POLITICS* 239, 244–49 (John G. Geer ed., 1998) (arguing that claims of presidential mandates are usually empty). As Sir Henry Maine reportedly once said: "The devotee of democracy is much in the same position as the Greeks with their oracles. All agreed that the voice of an oracle was the

The more important point is prospective: because the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests.³³⁹ A prudent President, once elected, works to expand his base of support among the public.³⁴⁰ In his first term, the desire for reelection alone provides a reason to do so, including through the adoption of policies favored by a majority of the voting public. And even in his second term, a President retains strong incentives to consider carefully the public's views as to all manner of issues — incentives here related to his ambition for achievement, and beyond that for a chosen successor or historical legacy. The sum and general direction of the President's policy decisions, after all, may well affect his standing with his national constituency, and it is by now a truism of presidential scholarship that a President's standing among the general public critically affects his ability to achieve his policy and political agenda (which, in an endless feedback loop, in turn affects his public standing).³⁴¹ Indeed, modern Presidents are more often criticized for excessively hewing to, than for blithely disregarding, broad public opinion.³⁴² The advent of what has become known as the permanent presidential campaign, a development linked to fundamental changes in polling technology and mass media, at once demonstrates and reinforces the President's attention to the national electorate's views and interests.³⁴³

This point too should not be overstated. The resolution of each individual regulatory issue, after all, probably will play a small role in

voice of god, but everybody allowed that when he spoke he was not as intelligible as might be desired." STANLEY KELLEY, JR., *INTERPRETING ELECTIONS* 134 (1983).

³³⁹ A number of scholars, in making the case for one or another version of strong presidentialism, have noted the President's ability, as the representative of a national constituency, to counter factional pressures on administration. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *ARK. L. REV.* 23, 58-67 (1995); Frank H. Easterbrook, *Unitary Executive Interpretation: A Comment*, 15 *CARDOZO L. REV.* 313, 318-19 (1993); Lessig & Sunstein, *supra* note 1, at 105-06.

³⁴⁰ See, e.g., NEUSTADT, *supra* note 95, at 78-79 (discussing the importance in a President's strategic calculations of guarding his popular prestige).

³⁴¹ See *supra* p. 2311 & note 260.

³⁴² The modern President's attention to public opinion is most clearly demonstrated by the White House's ever-accelerating accumulation and use of polling data. This trend, which dates back at least to President Kennedy's tenure, has provoked repeated complaints, perhaps culminating during the Clinton Administration, of presidential "pandering" to the public. See Jacobs & Shapiro, *supra* note 220, at 95-99. Contrary to the assumption usually underlying this charge, a President may use polling and other public opinion research not always to respond to but sometimes to shape existing public views and preferences. Common to all the purposes of these tools, however, is an interest in the "public will" at the broadest level. I explore the potential dangers of this interest in section IV.C.2, pp. 2352-58, below, which asks whether presidential control of administration too greatly displaces the role of expertise in regulatory decisionmaking.

³⁴³ See JAMES P. PFIFFNER, *THE MODERN PRESIDENCY* 40-50 (1994) (discussing the institutionalization of a campaign approach to governing in the White House).

the public's overall estimation of presidential performance, no less than in its prior electoral decisions. And on any given decision, the President accordingly may assign overriding weight to the views of more particular, focused constituencies or to a range of other considerations. Obvious recent examples of this phenomenon include President Clinton's midnight pardons and President Bush's reversal of certain regulations still pending when Clinton left office. Of course, even these actions may make a point about presidential responsiveness to majoritarian sentiment generally — the pardons just because they issued no sooner than Clinton's last day in office, the rule rescissions because they triggered, after wide public denunciation, near-frantic (though partial and possibly short-term) efforts by Bush to show devotion to popularly supported regulatory objectives.³⁴⁴ The incidents nonetheless should serve as a reminder that no institution can boast of perfect responsiveness to the public.

The critical analysis with respect to this issue, however, must be comparative in nature. Take the President out of the equation and what remains are individuals and entities with a far more tenuous connection to national majoritarian preferences and interests: administrative officials selected by the President himself;³⁴⁵ staff of the permanent bureaucracy; leaders of interest groups, which whether labeled "special" or "public" represent select and often small constituencies; and members of congressional committees and subcommittees almost guaranteed by their composition and associated incentive structure to be *unrepresentative* of national interests.³⁴⁶ All these participants may have important roles to play and contributions to make in the administrative process, if only because responsiveness to the general electorate is not the sole criterion by which to assess administrative action. But on this axis, which should play an important role in any conception of

³⁴⁴ See E.J. Dionne, Jr., *Hung Up on Clinton*, WASH. POST, May 1, 2001, at A23 (stating that "[w]hen the White House abruptly shifts its public posture on environmental issues in response to political attacks, it is not cynical to think its strategists have taken a teensy-weensy look at the polls"); Robert Novak, *Bush's Sudden Greening Leaves Red Faces*, CHI. SUN-TIMES, Apr. 26, 2001, at 35 (criticizing Bush's "dash for the green bandwagon"). Indeed, one respected policy analyst has argued that the most striking feature of Bush's initial forays into regulatory policy was not the number of the prior administration's unconsummated regulations that he abandoned, but the number he accepted. See Gregg Easterbrook, *Health Nut: W. the Environmentalist*, NEW REPUBLIC, Apr. 30, 2001, at 13, 13.

³⁴⁵ The President's nominations of executive branch officials, of course, are subject to the advice and consent of the Senate. But the Senate only rarely rejects presidential nominees to executive positions, or exerts much pressure through other means on nomination decisions. See LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 35-37 (4th rev. ed. 1997). This deference has remained largely intact even in periods of divided government. See MORRIS FIORINA, *DIVIDED GOVERNMENT* 95-99 (2d ed. 1996).

³⁴⁶ See *supra* pp. 2259-60.

political accountability and therefore in any structuring of administration, the President holds the comparative advantage.³⁴⁷

This argument, however, needs a further refinement, relating again to the openness of presidential involvement in administration (and thus drawing the connection between transparency and responsiveness). To the extent that presidential supervision of agencies remains hidden from public scrutiny, the President will have greater freedom to play to parochial interests. Reagan's insistence on the confidentiality of presidential involvement thus enhanced, as many of his critics asserted, the potential for factional influence over his actions.³⁴⁸ Even in this context, my basic comparative claim may hold. The Presidency is by nature a public institution, and almost no presidential exercise of authority, however masked or oblique, long can escape public notice; this scrutiny then will bring to bear on the President the pressures associated with a national constituency. But the greater openness of Clinton's methods of administrative control makes the argument far more potent. It should come as no surprise that the regulatory initiatives Clinton directed and appropriated proved time and again to attract the strong support of the public (which doubtless played a role in Congress's failure to reverse them). It is when presidential control of administrative action is most visible that it most will reflect presidential reliance on and responsiveness to broad public sentiment.³⁴⁹

³⁴⁷ A potential argument in opposition to this claim is that it relies on the wrong comparison. The question, on this view, is not whether the President is better than each single competitor in reflecting broad public opinion and resisting special interests, but whether the President is better in these respects than a pluralist system, in which he competes with all others to influence administration. I take Peter Shane to make this point when he insists, as many modern administrative law scholars do, that "accountability seems to depend quite strongly on the availability of multiple pressure points within the bureaucracy, a diffusion of policy making influence, public dialogue, and a general fluidity in the value structure that guides the bureaucracy's decision making." Shane, *supra* note 3, at 213; see Farina, *supra* note 10, at 989 ("[W]e must necessarily look to a plurality of institutions and practices as contributors to an ongoing process of legitimizing the regulatory state."); Strauss, *supra* note 5, at 965 ("The need for structural polyphony . . . is . . . strong[] today."). I think, however, that this framing of the issue (presidentialism versus pluralism) distorts matters more than mine (greater or lesser presidentialism within pluralism). As this Article stresses, we inevitably (and I will argue properly) live in a pluralist administrative system; nothing that has occurred in the last twenty years changes that fact, and nothing that will occur in the next twenty is likely to do so. The real issue concerns the balance we should strike among all the institutions struggling for administrative power — and more specifically, whether we should welcome (and in what contexts) the relative increase in presidential control that has emerged in the last two decades. As to this question, the President's national constituency, and his resulting comparative responsiveness to broad public interests, is highly relevant; so too is the comparative transparency of his actions, which I discussed above.

³⁴⁸ See *supra* p. 228o.

³⁴⁹ Perhaps the popularity of Clinton's regulatory initiatives also had another cause, which should be noted by those who claim that enhanced presidential control of administration is inherently antiregulatory in nature, see Farina, *supra* note 6, at 227. By asserting personal ownership of regulation, Clinton may have helped to make the case for regulation, thus shaping as well as

A final point relevant to this discussion concerns the role of EOP staff in presidential action. As earlier noted, the methods of control that Clinton introduced (as well as his individual attributes) made presidential administration more personal in nature.³⁵⁰ But even in this form, the role of EOP (and especially White House) staff remained crucial — in developing policy proposals, negotiating with agency staff, and seeing to fruition the resulting bargains.³⁵¹ Indeed, often when I refer to “the President” in this Article, I am really speaking of a more nearly institutional actor — the President *and* his immediate policy advisors in OMB and the White House.³⁵²

Recognition of this point, however, at most moderately changes the analysis. EOP staff members, to be sure, have no direct electoral constituency, national or otherwise; nor do they usually have the public visibility whose virtues I have trumpeted. But each of the President’s competitors for administrative power similarly relies on staff (or, in the case of the permanent bureaucracy, consists of staff only). To contrast, for example, the visibility of a congressional committee chair or agency head to that of a White House advisor, for purposes of assessing comparative accountability, would be to weight the scales unfairly, given that the former officials, no less than the President, stand at the apex of a staff structure. Further, the EOP (and especially the White House), though now large and hierarchical enough to count as a bureaucracy itself, remains, as bureaucracies go, relatively cabined and controllable.³⁵³ Indeed, even in the Reagan years, when according to conventional wisdom personal presidential control over the EOP staff descended to its nadir, it is difficult to identify instances of EOP intervention in agency action that deviated markedly from the policy orientation of the President. This is not to say that slack cannot develop between the President and his advisors; if it could not, the newspapers would contain fewer stories about staff disputes in the White House. But the role that EOP staff play in the scheme of presidential administration neither demands fundamental redefinition of the institutions

responding to public preferences. The claim is closely related to the argument in section IV.B.2, pp. 2339–46, below, about the capacity of the President to exert leadership over the general direction of administration. See *infra* pp. 2341–45.

³⁵⁰ See *supra* pp. 2316–17.

³⁵¹ See *supra* pp. 2297–98 & interviews cited note 213.

³⁵² In a future article, I intend to delve more deeply into what in this Article may appear the black box of the EOP, examining this office as itself an administrative agency and exploring the relationships (in part influenced by legal rules) among the President and all the EOP’s constituent parts.

³⁵³ See Terry M. Moe, *Presidents, Institutions, and Theory*, in RESEARCHING THE PRESIDENCY: VITAL QUESTIONS, NEW APPROACHES 337, 368 (George C. Edwards III, John H. Kessel & Bert A. Rockman eds., 1993).

subject to my comparative analysis nor alters the essential conclusion of that analysis with respect to political accountability.

2. *Effectiveness.* — Assuming that enhanced presidential control of administration serves democratic norms, it still must meet another and sometimes conflicting standard — that of regulatory effectiveness. In using this broad term, I mean to include a number of so-called technocratic values: cost-effectiveness, consistency, and rational priority-setting. I also and even more firmly intend to refer to a certain kind of dynamism or energy in administration, which entails both the capacity and the willingness to adopt, modify, or revoke regulations, with a fair degree of expedition, to solve perceived national problems. I conclude that on all these measures, the expansion of presidential control of administrative action offers significant benefits.

The place to start is with some general points about the President's incentives and institutional attributes. Because the public holds Presidents, and often Presidents alone, responsible for so many aspects of governmental performance,³⁵⁴ Presidents have a large stake in ensuring an administration that works, at least in the eyes of the public. This is not to say that Presidents value mere neutral competence in administration. As political scientist Terry Moe has argued, their needs are too political — too essentially strategic — in nature to allow Presidents to rest content with a bureaucracy that hums along on automatic pilot; Presidents want a bureaucracy that responds to them and provides them with the tools they need to be, and be perceived as, successful leaders.³⁵⁵ But among those tools is a high level of administrative effectiveness as commonly understood: the capacity to achieve set objectives, without undue cost, in an expeditious and coherent manner.³⁵⁶ Moreover, a President, by virtue of the attributes of his office, stands in a relatively good position to achieve these operational goals. Because he is a unitary actor, he can act without the indecision and inefficiency that so often characterize the behavior of collective entities.³⁵⁷ And because his "jurisdiction" extends throughout the administrative state (or at least, the executive branch), he can synchronize and apply general principles to agency action in a way that congressional committees, special interest groups, and bureaucratic experts cannot.

³⁵⁴ See *supra* p. 2310.

³⁵⁵ See Moe, *supra* note 122, at 147–48.

³⁵⁶ See Pildes & Sunstein, *supra* note 3, at 16 ("Any president is likely to seek assurance that an unwieldy federal bureaucracy conforms its actions to his or her basic principles. Any president is likely to be concerned about excessive public and private costs. And any president is likely to want to be able to coordinate agency action so as to ensure consistency and coherence . . .").

³⁵⁷ Cf. *supra* pp. 2256–59 (noting the difficulties involved in congressional oversight).

Early advocates of OMB regulatory review often stressed the capacity of the President to exploit his central position within the regulatory state to promote a variety of technocratic values.³⁵⁸ Perhaps foremost among these was simple coordination. As agencies proliferated and their tasks grew ever more varied, significant overlaps arose in their jurisdictional authorities.³⁵⁹ Central presidential oversight could identify and then eliminate the inconsistencies and redundancies that these intersecting delegations introduced into the regulatory process. A second, related goal concerned the more rational setting of administrative priorities. Here, the problem arose primarily from division rather than overlap: because each agency had no way of (or indeed, interest in) measuring the risks it regulated against the risks regulated by others, it would not make the comparative assessments necessary to establish overall priorities in a reasonable manner.³⁶⁰ A centralizing institution, once again, could mitigate this problem. Finally, such an institution could insist (within the bounds set by statute) on agency adherence to general regulatory principles, such as a standard of cost-effectiveness, designed to increase the efficiency of administrative action.³⁶¹

This argument has much to recommend it, yet does not fully explain a decision to lodge the central institution necessary to perform these functions within the hands of the President. The practice of OMB review over the last twenty years in fact has enhanced — even if not to the full extent desired (and desirable) — the capacity of the administrative system to achieve the just-stated efficiency values.³⁶² But a less political kind of central institution also might claim the ability to move administration in this direction; indeed, given the early rationale's focus on technocratic virtues, Justice Breyer's proposal for a centralized corps of regulatory experts, more detached from the President than OMB's current staff, might seem a superior alternative. One argument against this approach, as I previously have suggested, is that it would slight the distinct but no less important norm of democratic accountability over decisions that are not and cannot be entirely techno-

³⁵⁸ See *ROADS TO REFORM*, *supra* note 120, at 70–72; DeMuth & Ginsburg, *supra* note 2, at 1081–85; Strauss & Sunstein, *supra* note 2, at 189–90.

³⁵⁹ One standard example concerns energy policy, aspects of which are entrusted to over a dozen agencies. See Strauss & Sunstein, *supra* note 2, at 189.

³⁶⁰ See *ROADS TO REFORM*, *supra* note 120, at 70, 72–73; DeMuth & Ginsburg, *supra* note 2, at 1081–82; Pildes & Sunstein, *supra* note 3, at 8–9. The failure to set reasonable priorities occurs within as well as across agencies. Even here, a centralizing institution might do some good by establishing a general norm, applicable to all agencies, of comparative risk assessment.

³⁶¹ See DeMuth & Ginsburg, *supra* note 2, at 1081–82; Pildes & Sunstein, *supra* note 3, at 7–8.

³⁶² See BREYER, *supra* note 52, at 68–72; W. KIP VISCUSI, JOHN M. VERNON & JOSEPH E. HARRINGTON, JR., *ECONOMICS OF REGULATION AND ANTITRUST* 32–42 (2d ed. 1995); Pildes & Sunstein, *supra* note 3, at 16–19.

cratic in nature;³⁶³ presidential direction thus represents the best accommodation of democratic and efficiency values. Another argument against the Breyer proposal, also suggested earlier, points to the danger that this bureaucratic solution itself would fall prey to the common bureaucratic pathologies of rigidity and torpor; to achieve even technocratic goals, some real push from the political system is needed.³⁶⁴ Still a third argument, discussed in the remainder of the section, is the most fundamental: it insists that administrative effectiveness entails something more than the somewhat bloodless, technocratic virtues discussed so far and that presidential leadership can provide this additional component.

Call this additional aspect of administrative effectiveness “dynamism” or “activism” or simply, as Alexander Hamilton did, “energy.”³⁶⁵ It is the imposition of a coherent regulatory philosophy across a range of fields to produce novel regulatory (or for that matter, deregulatory) policies. It implies political direction, because electorally accountable institutions most possess the legitimacy that such administration requires. More, this quality of administration implies presidential direction, because as earlier suggested, Congress’s institutional structure and incentives — its difficulty in transcending collective action problems, its use of the committee system, its reliance on fire alarm mechanisms of oversight, and its recognition that the public usually will accord it neither credit nor blame for agency action — all prevent it from dealing with administration in the focused and proactive way necessary to energize regulatory policy.³⁶⁶ Alone among the actors competing for control over the federal bureaucracy, the President has the ability to effect comprehensive, coherent change in administrative policymaking.

There remains, of course, a question whether to count this presidential capacity for leadership over administration as virtue or vice, as a promise or a danger. Some will say that it is neither — or to state the point another way, that it is contingently both. The desirability of such leadership depends on its content; energy is beneficial when placed in the service of meritorious policies, threatening when associated with the opposite. The point doubtless is true in some general sense: questions of governmental structure and process in the end should be resolved by reference to substance; there is no such thing as a sound political system that consistently produces egregious policies. But if taken too seriously, this perspective would declare meaningless,

³⁶³ See *supra* section IV.B.1, pp. 2331–39.

³⁶⁴ See *supra* p. 2264.

³⁶⁵ THE FEDERALIST NO. 70, at 402 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (arguing that “[e]nergy in the executive is a leading character in the definition of good government”).

³⁶⁶ See *supra* 2256–60.

or at least unresolvable, all issues relating to the structure — or otherwise put, the constitution (with a small “c”) — of government. And this abdication as to structural issues in turn would have uncertain and potentially disastrous substantive consequences. So here, the political and legal systems alike must judge whether presidential control of administration, with its inherent tendency toward expedition, energy, and change — in all directions and of all kinds — is generally to be feared or welcomed.

The argument against this kind of activism in government has an august lineage in this country. The system of checks and balances established in the Constitution is in no small measure based upon it: James Madison’s famed prescription of “[a]mbition . . . counteract[ing] ambition”³⁶⁷ was designed to generate a kind of friction that would make governmental deliberation extensive and governmental action difficult to accomplish. From this perspective, now as then, institutional arrangements promoting dynamic government, such as the presidential control of bureaucracy, pose a risk of both tyranny and instability that should not be tolerated. Regardless whether these arrangements, in any particular case, produce regulatory or deregulatory policy, the muscular nature of the governmental action to which they give rise portends excessive departures from status quo ordering. The argument essentially lauds conservative values, making it ironic that in the current academic debate about presidential control of administration, self-professed conservatives are the President’s most loyal supporters.³⁶⁸

Throughout American history, however, a countertradition has flourished that calls for enhanced governmental, and in particular executive, vigor.³⁶⁹ At its core is Hamilton’s vision of a strong and effi-

³⁶⁷ THE FEDERALIST NO. 51, at 319 (James Madison) (Isaac Kramnick ed., 1987).

³⁶⁸ See sources cited *supra* note 314.

³⁶⁹ Some scholars have attempted to use the values associated with these two historic traditions to make a constitutional case either for or against enhanced presidential control of administration. Compare Lessig & Sunstein, *supra* note 1, at 93–94 (arguing that the founding value of “efficiency in government,” as “translated” into modern times, calls for constitutional recognition of a moderately strong unitary executive), with Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 128 (1994) (arguing that the founding commitment to diffusion of governmental power, again as translated into the modern era, demands a constitutional rule empowering Congress to regulate the President’s relation to the administration), and Flaherty, *supra* note 1, at 1730 (same). As indicated earlier, *supra* p. 2326, I find these competing arguments from founding values unpersuasive as the basis for constitutional decisionmaking in this area: both the articulation of the relevant values and the translation of those values into modern circumstances are too contestable to provide a secure foundation for a constitutional rule in either direction. (My own inclination to leave these matters largely to Congress rests precisely on the indeterminacy of the relevant constitutional commitments, as well as on the force of many decades’ worth of practice and precedent.) The arguments are useful, however, to the extent that they provide good policy reasons, worthy of respect by each branch of government in its proper

cacious government, with leadership provided by a chief executive operating with “[d]ecision” and “dispatch.”³⁷⁰ The system of separation of powers, as distinguished from its moderating system of checks and balances, was partly meant to attain this objective by creating and then concentrating certain powers in an executive capable of resolute action. From this perspective, now as then, institutional arrangements promoting dynamic government, such as presidential control of administration, play a critical role in a well-functioning political system. As Hamilton put the matter, harking back to Rome as well as to the American experience under the Articles of Confederation: “A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.”³⁷¹ The argument extols governmental activism and innovation, making it equally ironic that in today’s debate, those committed to what one scholar calls the “legacy of the New Deal” are the President’s principal opponents.³⁷²

In recent years, a number of political scientists and lawyers alike have argued that modern political developments, including most notably the demise of single-party control of the political branches,³⁷³ have tipped the balance in this historic argument toward the recognition of a greater need for energy in government.³⁷⁴ The constitutional system of checks and balances always held the potential for what Bruce Ackerman calls “cris[es] in governability,”³⁷⁵ produced by the inability of the executive and legislative branches to cooperate in exercising their

sphere of decisionmaking, for favoring or disfavoring enhanced presidential control of administration.

³⁷⁰ THE FEDERALIST NO. 70, at 403 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

³⁷¹ *Id.* at 402.

³⁷² Farina, *supra* note 6, at 227; see Shane, *supra* note 3, at 212–14; Strauss, *supra* note 5, at 984–86.

³⁷³ See *supra* pp. 2311–12.

³⁷⁴ See, e.g., Lloyd N. Cutler, *Some Reflections About Divided Government*, 18 PRESIDENTIAL STUD. Q. 485, 489–90 (1988) (claiming that contemporary divided government “most of the time, on essential issues, really remains either in a deadlock or in a state where no real decision can be made”); James L. Sundquist, *Needed: A Political Theory for the New Era of Coalition Government in the United States*, 103 POL. SCI. Q. 613, 633 (1988) (arguing that divided government has led to deadlock and that a “government with the capability to act will also have the capability to correct its errors (or its successor can) but there is no recourse when a government is inert, lethargic, paralyzed”). The force of this claim weakens to the extent that divided government is the result of a conscious (or even subconscious) choice by a significant bloc of the electorate to promote increased friction in governmental policymaking. Research on this question is still in an incipient phase. The available empirical evidence, however, suggests that at most a small fraction of the voting public — although potentially a decisive one — engages in this kind of purposive ticket-splitting. See FIORINA, *supra* note 345, at 153, 156–57; *id.* at 156 (suggesting as an alternative explanation “structural or otherwise nonpolitical features of political processes and/or institutions that advantage one party relative to the other”).

³⁷⁵ Ackerman, *supra* note 52, at 647.

shared powers. For most of American history, however, the power of party government held in check the centrifugal tendencies of this system by linking the two political branches in a bond of common interest and enabling the President (by virtue of his role as party leader) to provide the leadership and energy necessary for even minimally effective governmental process. With the advent of divided government in the mid-twentieth century, combined with the still more recent development of polarization between the congressional parties, this capacity for concerted action to meet national needs declined: partisan differences were superimposed on institutional differences, and the system increasingly succumbed to the phenomenon (and, indeed, by now the cliché) of gridlock.³⁷⁶ These new circumstances create a need for institutional reforms that will strengthen the President's ability to provide energetic leadership in an inhospitable political environment.

This argument becomes yet more powerful when the focus is narrowed from the surrounding political context to the administrative process. This is because political gridlock has had a counterpart in administrative ossification, emerging and intensifying at roughly the same time. In part, this increased rigidity in the administrative system was a natural part of its lifecycle; as earlier discussed, large-scale organizations, left to their own devices, exhibit over time a diminished capacity to innovate and a correspondingly greater tendency to do what they always have done even in the face of dramatic changes in needs, circumstances, and priorities.³⁷⁷ In part, too, this ossification arose because of the increased demands that courts made on agencies to include interest groups in their rulemaking processes; the resulting proliferation of procedural requirements, as noted earlier, made agencies unwilling to depart from even outmoded or otherwise undesirable administrative policies.³⁷⁸ The combination has made torpor a defining feature of administrative agencies, resulting both in inadequate and in overzealous regulatory efforts. The need for an injection of energy and leadership thus again becomes apparent, lest an inert bureaucracy encased in an inert political system grind inflexibly, in the face of new opportunities and challenges, toward (at best) irrelevance or (at worst) real harm.

Both Reagan and Clinton used their methods of administrative control to drive a resistant bureaucracy and political system. In two different directions, they pressed administrative agencies to act in ways

³⁷⁶ As noted earlier, some political scientists have challenged this account, *see supra* note 266, but their work has yet to demonstrate that divided government today often operates in an accommodationist mode, much less to explain the strong perception to the contrary among both participants in and lay observers of contemporary politics.

³⁷⁷ *See supra* p. 2264.

³⁷⁸ *See supra* p. 2267.

they had not before — to address problems not previously seen and devise solutions not formerly contemplated. And in so doing, both Presidents self-consciously put in place a set of policies that could not have succeeded in getting through Congress. Reagan's brand of presidential administration in some sense seems less activist, not only because deregulatory in nature but also because often accomplished through delay and obstruction rather than positive command; it was nonetheless highly effective in establishing a single, coherent direction, with an understood set of goals and principles, for nearly the full gamut of administrative policymaking.³⁷⁹ Clinton's brand of presidential administration in some sense seems less systematic, driven more by discrete policy goals than by an overall theory of regulation; it was nonetheless highly effective in establishing new priorities for agencies and in advancing a broad domestic policy agenda.³⁸⁰ Both Presidents, however well- or ill-advised their substantive policies, thus countered the dominant contemporary forces of bureaucratic and political lethargy through their practices of influencing agency decisions. If it is more important that government have some capacity for action and reaction than that it never make an error, then the resulting energy should count as a significant point in favor of presidential administration.³⁸¹

This conclusion, of course, would be less sound to the extent that the political and administrative systems fail to impose adequate limits on the President's exercise of administrative power. Then, the balance between friction and energy would tip toward the opposite extreme — away from the too broad curtailment of regulatory initiative to the too facile assertion of unilateral power. One reason not to fear this outcome relates to the President's accountability to the public: political accountability, as suggested earlier, serves to keep energy in check by

³⁷⁹ See *supra* 2277–79.

³⁸⁰ See *supra* 2294–2308.

³⁸¹ The analysis in this section might seem to conflict with recent legal scholarship stressing the value of decentralization, particularly to local officials, in promoting efficient and energetic administration. See Dorf & Sabel, *supra* note 65. This work raises many important and complex questions, which fall beyond the scope of this Article. But even assuming that local experimentation has all the virtues its proponents claim, the accretion of power in the President that I have described need not frustrate movement in that direction. Indeed, a more presidentialist system would promote local experimentation if and to the extent that features of the Presidency make the holder of that office more willing and able than agency heads to devolve decisionmaking authority to localities. In effect, centralization at the uppermost levels of the federal administrative state then would advance decentralization to local officials (whether employees of federal agencies or of state and local governments). I can draw no firm conclusions here about the likelihood of this scenario. But my prior discussion concerning presidential directives to agency heads to enter into cooperative arrangements with local officials to collect and disseminate their best practices, see *supra* p. 2307, suggests some evidence to support the hypothesis.

mooring it to current or at least potential public opinion.³⁸² This check is not perfect: especially if the President eschews transparency in his methods, as Reagan largely did, there is potential for slack between his actions and the public's revealed or shaped preferences. But neither is this check singular in nature: however much "final authority" Congress confers (explicitly or implicitly) on the President, he operates within an administrative world in which Congress itself, as well as agency officials, interest groups, and the judiciary, will continue to play significant roles. Indeed, one of the most vehement opponents of presidential administration relies heavily on the claim that it will heighten, rather than dissolve, institutional conflict in agency policymaking.³⁸³ As this argument implicitly suggests, the real question about presidential control is not whether it should exist to the exclusion of all other influences on administration, but whether within an inevitably pluralist system, the President should possess the strongest possible weapons. To explore this issue further, the next section addresses the competing claims of other administrative actors and the ways in which these claims either do or should limit the President's power to dictate agency decisions.

C. *Objections and Limitations*

In Part I of this Article, I explored the historic and current efforts of Congress, administrative officials, and interest groups to influence regulatory policymaking. I noted there some of the difficulties in relying on each of these actors to ensure an accountable and effective administrative process. In this section, I return to and rely on that discussion to address a differently focused question: whether the system of presidential administration that I have both described and advocated displaces too greatly the functions and contributions of these other actors in the formulation of agency policy. The section considers potential objections to enhanced presidential control of agency decisions raised, respectively, on behalf of Congress, agency experts, and affected constituencies. The section generally concludes that these objections fail, but identifies select areas in which the objections reveal a need for limits on the presidential role. Throughout, the section attempts to view presidential administration as it operates in practice — as a single, even if increasingly influential, component of a pluralist administrative process, in which a range of actors both necessarily and appropriately engage with, as well as accommodate, each other.

1. *Congress.* — Presidential administration may alter congressional oversight of agency action, making this activity less effective yet more

³⁸² See *supra* 2332–37.

³⁸³ See Farina, *supra* note 6, at 234–35. I address this argument further at pp. 2348–49, below.

vehement, especially in periods of divided government. I posit in this section, perhaps counterintuitively, that this result, viewed in combination with the effects of presidentialism itself, provides a peculiarly beneficial form of political engagement with administration. I see as a greater risk that presidential administration might displace the preferences of a prior (rather than of the contemporaneous) Congress by interpreting statutes inconsistently with their drafters' objectives. I conclude, however, that judicial review can provide a sufficient check against this danger.

Presidential control of administration in no way precludes Congress from conducting independent oversight activity. With or without a significant presidential role, Congress can hold the same hearings, engage in the same harassment, and threaten the same sanctions in order to influence administrative action. Congress, of course, always faces disincentives and constraints in its oversight capacity, as this Article earlier has noted.³⁸⁴ Because Congress rarely is held accountable for agency decisions, its interest in overseeing much administrative action is uncertain; and because Congress's most potent tools of oversight require collective action (and presidential agreement), its capacity to control agency discretion is restricted. But viewed from the simplest perspective, presidential control and legislative control of administration do not present an either/or choice. Presidential involvement instead superimposes an added level of political control onto a congressional oversight system that, taken on its own and for the reasons just given, has notable holes.

This account, however, may stand in need of modification in one or both of two ways. As an initial matter, Congress's oversight activity, assuming it remains at a constant level, probably will diminish in effect to the extent that the President is actively involved with agency action. In these circumstances, presidential powers — particularly the veto — will loom large in any congressional oversight effort; as Congress discovered during both Reagan's and Clinton's tenures, it cannot often marshal the resources necessary to overturn administrative action backed by a resolute (because responsible) President.³⁸⁵ By contrast, when the President has had little to do with agency action, the prospect that he will provide strong support for the agency declines, and the likelihood that the agency will succumb to congressional pressure correspondingly increases. This logic explains empirical data indicating that Congress can dictate more successfully to commissioners of independent agencies than to secretaries of cabinet departments;³⁸⁶

³⁸⁴ See *supra* pp. 2256–59.

³⁸⁵ See *supra* p. 2314.

³⁸⁶ Roger L. Faith, Donald R. Leavens & Robert D. Tollison, *Antitrust Pork Barrel*, 25 J.L. & ECON. 329, 331–42 (1982); cf. Frank H. Easterbrook, *Unitary Executive Interpretation: A Com-*

the logic similarly suggests (though this claim has yet to be empirically demonstrated) that Congress more easily can influence executive agency decisions in which the President has had a lesser involvement. When the President actively engages administration, presidential influence thus may displace to some degree legislative influence over regulatory policy.

At the same time, the sheer amount of Congress's oversight activity may fluctuate with the level of presidential involvement. Legal scholars have offered competing versions of this claim. Bruce Ackerman has suggested that once the President begins to engage in unilateral action over administration, Congress will cede the field: "[R]ather than protesting, representatives are relieved that they can evade political responsibility for making hard decisions."³⁸⁷ This effect, indeed, might seem to follow from the last: if Congress knows that its oversight will have less consequence, it will have less incentive to devote the necessary time and resources to the task. Cynthia Farina, however, has contended that presidential direction of administration will goad Congress into increased oversight activity: "By raising the stakes for other actors in the system, such hegemonistic claims may trigger an oversight arms race."³⁸⁸ Empirical data noted earlier, though perhaps explicable in other ways, suggests that Farina has the better of this argument: the advent of presidential administration roughly coincided with an increase in visible congressional oversight.³⁸⁹ Nor does this development seem surprising. Presidential dictation of administrative activity, especially if done in the very public manner President Clinton adopted, sounds a very loud "fire alarm"³⁹⁰ to a Congress controlled by the other party, and Congress's low probability of success in reversing such action interferes only minimally with its incentive to engage in political battle.

This odd combination of dynamic effects — the displacement of some old congressional influence on the one hand, the incitement of some new congressional activity on the other — may well generate the optimal form of political oversight over administrative action, measured in terms of both accountability and effectiveness. I earlier suggested reasons to welcome some substitution of presidential for congressional influence over administration.³⁹¹ When Congress acts in this sphere, it does so through committees and subcommittees highly

ment, 15 CARDOZO L. REV. 313, 318–19 (1993) (comparing Congress's power over independent and executive branch agencies).

³⁸⁷ Ackerman, *supra* note 52, at 647.

³⁸⁸ Farina, *supra* note 6, at 235.

³⁸⁹ See *supra* p. 2257.

³⁹⁰ See *supra* p. 2258.

³⁹¹ See *supra* pp. 2259–61.

unrepresentative of the larger institution (let alone the nation) and significantly associated with particularized interests. Relatedly, Congress acts in decentralized and reactive ways unlikely to promote coordination, increase efficiency, or provide leadership. The relative ascendancy of the President over Congress in administration thus should result in less factionally driven and more coherent and active political oversight. Yet I also implied an important role for legislative activity in this sphere by stressing the way in which transparency of control over administration promotes democratic values.³⁹² The visibility of presidential control is heightened when Congress responds (however futilely in a given case) to the President's involvement. The political debate thus provoked provides citizens with a basis for determining whether the administrative action taken accords with their own priorities and values; and the potential for this sharpened democratic scrutiny should help, in the first instance, to keep the President's exercise of authority within healthy parameters.³⁹³

A different kind of presidential displacement of legislative action — this time referring not to contemporaneous congressional oversight, but to prior congressional enactment of a statute — raises comparatively more serious concerns, here relating to rule of law principles. As I earlier noted, presidential direction can operate, if it can operate at all, only when an agency is exercising delegated discretion; the President has no greater warrant than an agency official to exceed the limits of statutory authority.³⁹⁴ But the history of presidential administration may suggest that it poses a danger of such lawlessness — that Presidents, more than agency officials acting independently, tend to push the envelope when interpreting statutes. A common critique of strong presidential control during the Reagan years held that it resulted in regulatory action less protective of health, safety, and the environment than the governing statutes, read fairly, required.³⁹⁵ The same kind of accusation, except charging overly aggressive regulation, reasonably might attach to some of the most high-profile initiatives that Clinton

³⁹² See *supra* pp. 2332–33.

³⁹³ Farina's horrified anticipation of what she calls an "oversight arms race" — and I here rebel heightened democratic scrutiny — appears to rest on the view that active political control over administration (whether presidential or congressional) threatens to corrupt sensible administrative outcomes. See Farina, *supra* note 6, at 235. I take up this argument in section IV.C.2, pp. 2352–58, below, when I consider the potential displacement of expertise by politics.

³⁹⁴ See *supra* p. 2270; note 299.

³⁹⁵ See Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 564 (1989) (arguing that "the Reagan administration's regulatory relief emphasis has been difficult to reconcile with the legislative history of some of the most stringent health and safety statutes"); Morrison, *supra* note 2, at 1070 (charging that the Reagan OMB had "little concern for what Congress has mandated" and engaged in "blatant efforts to end-run the law"); *supra* p. 2280.

ordered; indeed, courts invalidated several on just this basis.³⁹⁶ Although no empirical work confirms this tendency, it seems more than plausible as a matter of theory. Although administrative law often revels in discussion of “runaway agencies,” the real inclination of bureaucratic cultures, as this Article several times has underscored, is conservative in nature.³⁹⁷ The comparatively unitary, responsive, and energetic institution of the Presidency seems more likely than these organizations to deviate from accepted interpretations of delegation provisions.³⁹⁸

In two different respects, the answer to this threat of presidential lawlessness cannot lie in the hands of the current Congress. First, and apparently compounding the threat, Congress possesses neither the tools nor the incentives effectively to counter wrongful assertions of presidential authority. Congress cannot easily obtain the two-thirds vote in each house necessary (given the President’s veto power) to overturn a presidential order. And the Congress existing at the time of the order may have no desire to enforce the enacting Congress’s determination of the appropriate scope of administrative discretion. But second, and now placing the threat in some perspective, this very lack of continuity in congressional preferences suggests that in the absence of strong presidential control over administration, a similar, even if not fully equivalent, threat of congressional lawlessness might arise to fill the resulting vacuum. For any given Congress (or more precisely, its committees and subcommittees) also may be disposed to press agencies to engage in conduct unauthorized by prior statute. The threat of lawlessness thus cannot exclusively be associated with presidential control.

There is, in any event, a simple, if sometimes imperfect, solution to the problem: judicial review of agency action, including action that the President orders. In an article attacking Clinton’s assertions of control over agency action, Peter Strauss argued that a prime danger of this practice inhered in the President’s insulation from normal forms of judicial control.³⁹⁹ But Strauss offered no reason for concluding that such insulation necessarily accompanies presidential control. It is true

³⁹⁶ *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315–16 (2000) (invalidating tobacco regulation); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1338–39 (D.C. Cir. 1996) (invalidating an executive order barring the federal government from contracting with employers who hire permanent replacements during a lawful strike).

³⁹⁷ See *supra* pp. 2264, 2267, 2344.

³⁹⁸ Another reason to think that agencies, as compared with the President, might engage less often in lawless behavior relates to their greater dependence on Congress. This factor, however, would suggest bureaucratic fidelity only to the current Congress’s preferences as to statutory interpretation, which, as discussed immediately below in the text, may or may not coincide with those of the enacting Congress.

³⁹⁹ See Strauss, *supra* note 5, at 983 (asserting that the President is “remote from effective check by courts”); see also Strauss, *supra* note 8, at 636 (suggesting that presidential direction should be feared because it is not “subject to law”).

that the Supreme Court held in *Franklin v. Massachusetts*⁴⁰⁰ that the President is not an "agency" as defined in the APA and his actions therefore are not subject to the judicial review provisions of that statute.⁴⁰¹ This decision, however, arose from a challenge to an action that Congress had committed to the sole discretion of the President, separate from and subsequent to agency involvement. When the challenge is to an action delegated to an agency head but directed by the President, a different situation obtains: then, the President effectively has stepped into the shoes of an agency head, and the review provisions usually applicable to that agency's action should govern. Nothing in *Franklin's* interpretation of the APA or in its — or any other case's — underlying discussion of separation of powers issues is to the contrary.⁴⁰² As Strauss notes, ever since *Marbury v. Madison*,⁴⁰³ the Court has posited a sphere of "superstrong" presidential discretion over political matters, not amenable to judicial control;⁴⁰⁴ but never has the Court indicated, nor could it consistent with rule of law principles, that all exercises of presidential authority fall within this zone. And so long as the courts remain open to legal challenges, the use of presidential directive authority cannot too greatly displace the clear preferences of the prior enacting (as opposed to the current overseeing) Congress with respect to agency action.⁴⁰⁵

And if an enacting Congress wishes not just to protect its choices from potential presidential usurpations, but also to prevent its non-choices from becoming opportunities for the enlargement of presidential authority, it also has available a self-help mechanism: the delegation of less discretion to agencies in the first instance. This option plausibly exists only with respect to new statutes and even then will not exist in many cases: broad delegations often follow inevitably from both the complexity of modern government and the difficulty of collec-

⁴⁰⁰ 505 U.S. 788 (1992).

⁴⁰¹ *Id.* at 800–01.

⁴⁰² Even assuming APA review were unavailable in such cases, courts potentially could review outside the APA framework certain presidential action alleged to exceed statutory authority. In *Dalton v. Specter*, 511 U.S. 462 (1994), the Supreme Court left this question open, holding only that Congress's grant of open-ended discretionary authority to the President regarding military base closings impliedly precluded judicial review. *Id.* at 476–77. Outside, no less than inside, the APA framework, the question of congressional intent with respect to reviewability looks very different when the delegation is a bounded one to an agency official.

⁴⁰³ 5 U.S. (1 Cranch) 137 (1803).

⁴⁰⁴ Strauss, *supra* note 5, at 977 (citing Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299 (1997)).

⁴⁰⁵ When the enacting Congress's preferences are not clear, current law requires a court to defer to any reasonable interpretation adopted by the agency of its organic statute. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). I discuss in Part V the appropriate relationship between this rule of deference and presidential direction of administration.

tive bodies in reaching agreements on specifics. But enhanced presidential control of administration may make Congress deliberate more carefully about the necessity of broad delegations — and even more, may make Congress hesitate before resorting to broad delegations as a mechanism for punting on difficult decisions. The most extensive empirical study on the subject suggests that Congress delegated significantly less discretionary authority to the executive branch in the 1980s; although this development probably had many causes, one may relate to President Reagan's assertion, at just that time, of unprecedented power over administrative action.⁴⁰⁶ If this is so, presidential administration is inherently self-limiting, though only with respect to new legislation. Indeed, seen from this perspective, enhanced presidential control of administration becomes a political substitute for the nondelegation doctrine, pressuring Congress to take increased responsibility for initial policy choices, but without relying on judicial intervention.

2. *Experts.* — A more difficult issue than the last concerns the apparent tradeoff between politics and expertise as a basis for decision-making within the administrative system. On one account, the involvement of the President sends administration hurtling toward the former and away from the latter. In this section, I argue that this account is overdrawn, even with respect to decisions (or parts thereof) that appropriately hinge on neutral expertise, rather than (as so many do) on value choices. Agency officials often make decisions for reasons having little to do with expert knowledge; conversely, the President has some stake in the application of this knowledge to regulatory problems. An aggressive presidential stance toward administration nonetheless may diminish the proper influence of expertise in discrete and important cases; for this reason, some hesitation is warranted in applying (or countenancing the application of) the methods of presidential administration to a select category of administrative decisions — essentially, those most scientific or otherwise technical in nature and, as such, least connected to political judgment.

The essential concern discussed in this section is that the expansion of presidential administration impinges on the neutral application of substantive knowledge and skills to regulatory problems. On this

⁴⁰⁶ See EPSTEIN & O'HALLORAN, *supra* note 19, at 115. Epstein and O'Halloran attribute the change to the rise of divided government in the 1980s. *See id.* This factor, however, seems but one part of a satisfactory explanation. Although divided government has become more common since 1980, significant periods of division also occurred in the prior few decades with no noticeable effect on the incidence or extent of congressional delegation. A more complete explanation for the trend might refer as well to the widening gulf between the major parties. *See supra* pp. 2311–12. And finally, such an explanation might refer, as suggested in the text, to enhanced presidential control of administration, which is itself partly a result of the two just-stated factors.

view, the problem is not that the wrong political branch is exercising power over administration so much as that any political branch is doing so. Presidential authority is more deleterious than congressional authority only because the President, for the reasons stated, will be both more interested in and more capable of sustained and successful intervention.⁴⁰⁷ The core objection is that politics is anathema to efficient administration — or, in Bruce Ackerman's words, that politicians, because of their concern with electoral advantage, "are much more likely to consider how the facts appear to the general public than the way they look after disciplined and sustained investigation."⁴⁰⁸ As the influence of politics grows, this perspective will displace the long-term view, "scientific knowledge[,] and professional experience" that seasoned bureaucratic officials bring to the administrative enterprise.⁴⁰⁹

Responding to this criticism first necessitates placing it in the proper context. Bureaucratic expertise, for reasons I have indicated earlier, cannot alone or even predominantly drive administrative decisions. Most important for current purposes, agency experts have neither democratic warrant nor special competence to make the value judgments — the essentially political choices — that underlie most administrative policymaking. The skills and knowledge these officials possess cannot answer this kind of question; and none of their other shared characteristics makes them specially suited to lead in this field of decision. Indeed, these officials' insulation from the public, lack of capacity for leadership, and significant resistance to change pose significant risks to agency policymaking. Yet this familiar critique in no way discredits the need to incorporate in administrative decisionmaking the scientific, technical, and other kinds of professional knowledge and experience that agency officials possess. The ever-widening appreciation of the role of cost-benefit analysis and comparative risk assessment in the formulation of administrative policy testifies to this need;⁴¹⁰ so too does the emerging call for experimentalism and information sharing among locally based officials in addressing regulatory issues.⁴¹¹ However much political judgment pervades administration and however much political actors should take the lead as to these questions, an important place for substantive expertise remains in generating sound regulatory decisions. To the extent that presidential administration displaces this feature of agency decisionmaking in areas

⁴⁰⁷ See *supra* pp. 2256–59, 2347.

⁴⁰⁸ Ackerman, *supra* note 52, at 689.

⁴⁰⁹ *Id.* at 696.

⁴¹⁰ For able explications of the need for these techniques, see BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1981); and BREYER, *supra* note 52, at 3–29.

⁴¹¹ See Dorf & Sabel, *supra* note 65, at 345–56.

where it legitimately should operate, this substitution effect must weigh against the practice.

Not all presidential dictation of agency action, however, entails the displacement of bureaucratic expertise — initially, because not all agency action entails the application of expertise, even when the action properly should do so. A given agency decision (or nondecision) might derive instead from congressional pressure, interest group lobbying, bureaucratic (but nonexpertise-based) policy views, or bureaucratic protection of turf or other self-interest. The refusal to acknowledge this reality — and the consequent apprehension of a straight-line trade-off between presidential influence and administrative expertise — rests on an odd romanticism about bureaucracy not worthy of reflection in decisions about administrative structure and relationships. Justice Scalia in part made the point in an opinion he authored while a judge on the D.C. Circuit,⁴¹² which the Supreme Court affirmed in *Bowsher v. Synar*.⁴¹³ Commenting on the presuppositions of *Humphrey's Executor v. United States*,⁴¹⁴ Justice Scalia questioned not only whether agency decisions “so clearly involve scientific judgment rather than political choice,” but also whether agencies’ relative independence from the President would entail, rather than more frequent application of impartial expertise, “correspondingly greater dependence upon the committees of Congress.”⁴¹⁵ Expand the scope of this inquiry to consider other potential influences on agency action, and Justice Scalia’s skepticism about viewing the conflict as a simple one between the President and an expert administrator seems only more warranted.

Conversely, the incentive structure of the President sometimes will lead him not to suppress, but instead to rely on or even encourage the application of expertise to administrative problems. The public, as many observers have suggested, holds the President, of all relevant actors, most responsible for perceived administrative failures;⁴¹⁶ this tendency, indeed, may increase in proportion to one of the hallmarks of modern presidential administration — the President’s inclination to take credit for administrative successes. And the public’s assessment

⁴¹² *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C. 1986) (three-judge panel) (per curiam).

⁴¹³ 478 U.S. 714 (1986). For an overlapping discussion of this opinion, see Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 435–36 (1995).

⁴¹⁴ 295 U.S. 602 (1935).

⁴¹⁵ *Synar*, 626 F. Supp. at 1398.

⁴¹⁶ President Roosevelt’s Brownlow Committee, though perhaps not a disinterested commentator, made the point neatly many years ago: “The President is held responsible for the wise and efficient management of the Executive Branch of the Government. The people look to him for leadership.” PRESIDENT’S COMM. ON ADMIN. MGMT., *supra* note 105, at 40. Many scholars indeed have urged that the gap between the public’s expectation that the President will ensure the effective operation of government and the President’s actual capacity to do so plays a part in producing presidential failure. See sources cited *supra* note 257.

of administrative effectiveness presumably rests to some degree on the deployment of expertise; to deny this would be to deny any connection between public perceptions and administrative performance or between this performance and expert knowledge.⁴¹⁷ For these reasons, as political scientists Terry Moe and Scott Wilson have argued, Presidents have a stake in “build[ing] an institutional capacity for effective governance.”⁴¹⁸ The history of presidential administration, as noted earlier, in fact suggests a substantial concern with the efficiency and effectiveness of regulation, along the lines of what regulatory experts might favor if removed from their particular institutional settings and asked to consider administrative policy in a broader context. Reagan’s emphasis on the cost-effectiveness of regulation, endorsed in fair measure by Clinton’s regulatory review process, counts as one example; Clinton’s many directives to agencies to monitor local regulatory policies and to collect and disseminate best-practices guidance count as another.⁴¹⁹

Expertise gains insulation as well, and in the areas where most appropriate, from the inherent limits on the President’s capacity to control, or even interest in controlling, much administrative action. One critic of strengthened presidential control of agencies cites these limits as support; she notes the difficulty of asserting “top-down direction” as to many matters and argues that presidentialist practices “promise[] far more than any Chief Executive could possibly deliver.”⁴²⁰ But this argument, far from showing the perils of presidentialism, illustrates instead the constraints on its operation, and particularly on its capacity to displace technical decisionmaking. As practiced, presidential control has tended to function in two ways: first (as initiated by Reagan),

⁴¹⁷ Many studies have shown gaps between expert and public perceptions of particular risks (and thus presumably of appropriate regulatory responses), although commentators differ as to whether these gaps reflect mostly the public’s failure to grasp objective facts, *see* BREYER, *supra* note 52, at 33–39, or the public’s attachment to a competing system of values, *see* Pildes & Sunstein, *supra* note 3, at 48–52. If the latter explanation is correct, strict adherence to expert opinion becomes problematic; the political sphere would seem the appropriate place to resolve these value-laden conflicts. By contrast, if the former explanation is correct, the public accountability of the President would appear to tilt against appropriate application of expert knowledge, in exactly the way critics of presidential control charge. This effect, however, is mitigated by the very breadth of the President’s (as compared with any other actor’s) responsibility for administrative and other public policy outcomes. For whatever the public (here, I assume, mistakenly) desires as to specific agency outcomes, it presumably also wants — and thus will hold the President accountable for — an administrative system that works at an “optimal” level across all spheres and over time. *See* BREYER, *supra* note 52, at 55 (“The current hodgepodge of results does not reflect a public that really wants dirty Boston harbors and superclean swamps; rather, such policy priorities more likely reflect the psychological and practical difficulties of making risk decisions one substance at a time.”).

⁴¹⁸ Moe & Wilson, *supra* note 123, at 11.

⁴¹⁹ *See supra* pp. 2278, 2285–86, 2307.

⁴²⁰ Farina, *supra* note 6, at 232.

by establishing an overall direction and set of general principles to guide agency action; and second (most apparent in Clinton's use of directive authority), by ordering agency action that effects (in part or full) the President's domestic policy priorities. Most of these interventions reflect ideas about values, in ways that mark them as fundamentally political to both the agencies and the public. Far less common are presidential decisions that reverse essentially technical actions, either on their own terms or on any other. With respect to these matters, Presidents (and their staffs) do not often think enough, know enough, or care enough to impede the application of agency expertise. And even in areas where technical and value judgments combine, Presidents may steer clear of the whole — as, for example, Clinton often did with respect to environmental regulation — for fear that their involvement will appear excessively to politicize administrative action thought to rest on neutral competence.

All that said, White House and agency decisionmaking probably do differ in the degree to which they heed (or ignore) expert evaluations of regulatory issues, and these differences justify limiting the scope of presidential intervention. The President's interests, despite what I have argued, can collide with expert views, including in important cases. His desire to win reelection or notch other political victories can cause him to defer to public or constituency opinion even when ill-informed or self-interested; so too, and relatedly, these objectives can cause him to seek near-term results even when doing so will sacrifice long-term benefits. As important, his staff may tend to accede to these inclinations, given that they share his political interests and possess, in comparison with agency staff, less substantive knowledge. Conversely, an agency head's interests, again despite what I have argued, prominently include gaining a reputation (inside and outside the agency alike) for disinterested application of expertise to regulatory matters. As important and related, some members of his staff will push in this direction, given that they possess — and indeed partly define their careers in terms of — significant expertise and experience. These differences suggest at a minimum that a system of presidential administration operate with an attitude of respect toward agency experts and with a set of processes that encourage consultation. But more, these differences counsel hesitation both in acknowledging and asserting presidential authority in areas of administration in which professional knowledge has a particularly significant and needed function.

The clearest example, implied in what I have said above, consists of regulatory action that in large measure depends on scientific methodology and conclusions. In urging presidential restraint as to these decisions, I do not intend to minimize the extent to which issues of value — or otherwise put, political judgment — may factor into their resolution. Agencies, for example, often must confront the question, which science alone cannot answer, of how to make determinate

judgments regarding the protection of health and safety in the face both of scientific uncertainty and competing public interests. With respect to these matters, a strong presidential role is appropriate; Clinton's frequent practice of sidestepping involvement in such cases thus may have demonstrated too much caution. But there is no good reason for a President to displace or ignore purely scientific determinations — as to the kinds of questions, say, on which Congress often instructs agencies to seek opinions from outside advisory committees. The exercise of presidential power in this context would threaten a kind of impartiality and objectivity in decisionmaking that conduces to both the effectiveness and the legitimacy of the administrative process.

Similar considerations may apply, though here I think less generally, when the President directs specifically legal actions (say, to bring a case or file a brief), which likewise involve a distinctive form of professional expertise.⁴²¹ Full discussion of the law/politics distinction is far beyond the scope of this Article. For now, consider only two propositions, in some tension with each other. First, the integrity of the government's exercise of legal authority partly depends on the maintenance of a distinction between politics and law, far greater than any thought to exist between politics and policy. But second, a great many legal questions (particularly those in which a President is most likely to be interested) in fact involve a considerable element of political judgment, in the sense that they have no certain answers and rest less on technical proficiency than on general values and dispositions. These considerations, taken together, make me set the appropriate boundaries on presidential direction, absent unusual circumstances, in an untraditional place — prohibiting this direction when, but only when, the government exercises prosecutorial authority. Resolution of prosecutorial questions usually is conceived as lying at the heart of the executive power vested in the President.⁴²² But it is in this area, because so fo-

⁴²¹ Bruce Ackerman has questioned the inclination to see presidential involvement in legal matters as distinct from presidential involvement in administration generally, arguing that both kinds of involvement should be treated as equally problematic. Noting that "a presidential phone call to a judge about a pending case is treated as a crime against the Constitution," Ackerman suggests that "a similar call to a middle-level bureaucrat" should be viewed, though currently is not, as posing a comparable "threat to the separation of powers when considered as a doctrine of functional specialization." Ackerman, *supra* note 52, at 690–91. Perhaps the more apt comparison — given the numerous values other than "functional specialization" that presidential communication with a judge implicates — would involve presidential phone calls to paradigmatic "middle-level bureaucrats" in, say, the Department of Health and Human Services and the Department of Justice. That comparison is the one I address here. I treat separately, in section IV.C.3, pp. 2358–64, below, presidential involvement in agency adjudications, though the conclusions in the two sections — both of which focus on the distinction between focused and general action — largely coincide with each other.

⁴²² See *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) ("In what *other* sense can one identify 'the executive Power' that is supposed to be vested in the President (unless it in-

cused on particular individuals and firms, that the crassest forms of politics (involving, at the extreme, personal favors and vendettas) pose the greatest danger of displacing professionalism and thereby undermining confidence in legal decisionmaking.⁴²³

3. *Constituencies.* — A parallel objection to presidential administration focuses on its displacement of the public participatory processes associated with much agency action, particularly notice-and-comment rulemaking. I argue in this section that this objection has little merit as to any of the purposes of rulemaking worthy of respect, so long as the presidential involvement in question operates largely in view of the public. I draw a different conclusion with respect to presidential involvement in administrative adjudications, given the different functions of participatory requirements in these proceedings.

The objection discussed here arose often during the Reagan and Bush Administrations in conjunction with the charge, discussed earlier in this Article, that OMB's communications and influence on proposed agency rules remained hidden from the view of the full range of interests participating in the rulemaking process.⁴²⁴ With the advent of the Clinton Administration's more generous policies on disclosure of the OMB review process, this criticism subsided: much more rarely could affected interests claim that they had been denied an opportunity to evaluate and respond to information and analyses, communicated by OMB to an agency, that ultimately affected the content of an informal rule. President Clinton's use of directive authority, however, provided a different potential ground for complaint. Although fully transparent and thus subject to comment, his technique of controlling administration appeared, on its face, to frustrate the ability of affected interests, through those comments, to influence (much less to derail) regulatory proposals. For once the President had directed the basic content of a rule (even though his directive usually would order only a proposal), the prospects for fundamental change of the proposed rule became vanishingly small.

cludes everything the Executive Branch is given to do) *except* by reference to what has always and everywhere — if conducted by government at all — been conducted never by the legislature, never by the courts, and always by the executive Governmental investigation and prosecution of crimes is a quintessentially executive function.”)

⁴²³ I do not mean this prohibition to include the articulation of broad enforcement policy or strategy, of the kind President Clinton sometimes made part of his program of administrative governance, *see, e.g., supra* 2305–06. I do mean to raise serious questions about presidential direction of decisions to file suit against discrete entities such as Microsoft or the tobacco industry, even given that such suits raise important public policy issues.

⁴²⁴ *See Morrison, supra* note 2, at 1067 (“OMB provides information and misinformation to agencies and applies criteria for deciding whether to approve a rule that never appear in the public record and to which no reply is possible.”); Percival, *supra* note 2, at 168–72; Rosenberg, *supra* note 137, at 1227–32; Shane, *supra* note 3, at 172–73; *supra* p. 2280.

The force of these criticisms of presidential administration hinges largely on an assessment of the purposes that public (really, interest group) participation in rulemaking can and should serve. Consider here three possibilities: first, that interest representation in rulemaking establishes the structure and conditions for potentially affected parties to strike bargains among themselves as to the appropriate content of regulation; second, that interest representation helps to provide agency decisionmakers with the full range of information, analysis, and opinion they need to make the most sensible public policy decisions; and third, that interest representation creates a public record that allows judicial review of the rationality, thoroughness, and care of agency decisions.⁴²⁵ Different kinds of presidential administration affect these goals in diverse ways, thus generating in this area an intricate set of conflicts and trade-offs.

Presidential administration of any kind may prevent the administrative process from functioning simply as a formal setting for autonomous interest group deals, in the way suggested by classical pluralist theory and celebrated in the modern emergence of negotiated rulemaking. I intend this statement to be narrow — and not dependent at all on the view that Presidents themselves are immune from interest group pressures.⁴²⁶ I here note only that the active participation of Presidents in rulemaking — like that of any other governmental official — has the potential to disrupt a straight-line transference from private bargains to public policy. But for the reasons suggested earlier, many observers of administration (and I among them) will find little to mourn in this repudiation of pure factionalism, skewed as such a system often is by inequalities of bargaining power and divorced as it always is from any conception of a distinctive public interest.⁴²⁷ Whether clothed in the old pluralist rhetoric of competition or the recent rhetoric of collaboration, the reliance on interest group politics as the engine of policymaking, and the correlative relegation of government officials to the status of brokers, transforms administration into a dispenser of rents and amplifies all that Americans find most distasteful in government. And in its modern incarnation, this model of administration demonstrates as well a naïveté about the potential for win-win solutions that portends at best the obfuscation and at worst the avoidance of the difficult choices inevitably arising in administrative government.

⁴²⁵ As I discuss below, administrative law generally views other purposes of participatory requirements, relating to the fairness and acceptability of decisions, as having greater application to the adjudicative than to the rulemaking context. See *infra* pp. 2362–63.

⁴²⁶ For further discussion of this issue, see pp. 2335–38, above, and pp. 2360–61, below.

⁴²⁷ See *supra* pp. 2266, 2268.

A more difficult issue concerns the potential for presidential administration to render policymaking less informed, either by denying interest groups an opportunity to comment on important predicates of agency action or by inhibiting agency officials from modifying proposed action in response to these comments. Affected interests may provide new and valuable factual data and analyses; may demonstrate that government proposals will have unanticipated adverse consequences; and may devise creative and more effective alternative approaches. At the least, the comments of these entities may convey important information about their likely response to regulatory action, which is itself relevant to the sensible development of regulatory policy. If and to the extent that presidential control of administration prevents government from receiving or taking account of such input, it will harm sound policymaking.

There is little reason to think, however, that presidential administration changes fundamentally the ability of interest groups to provide effective input within the formal (though nominally "informal") process of notice-and-comment. As noted earlier, even absent presidential involvement, this process today has little to do with genuine exchange between regulators and interested parties.⁴²⁸ If during the Reagan Presidency, interested parties lacked an opportunity to comment officially on OMB participation in rulemaking, they did not thereby lose much preexisting influence in the proceeding; just as when an agency failed to disclose its own analyses, these parties, in all but the unusual case, lost only the ability to put their objections on record for later consideration in a judicial tribunal. And similarly, if during the Clinton Presidency, the exercise of directive authority made clear that some notice-and-comment processes were show, it less transformed than exposed their essential character.

Nor does presidential administration halt the prior, informal consultations that currently serve as the principal means for government officials to gain information from interested parties; indeed, if conducted largely in public, this mode of administration might reduce the danger of factionalism associated with such informal dialogue. The President and his aides, no less than any agency, have reason and means to consult with interested parties prior to making regulatory decisions (or taking public actions that will foreordain them). Depending on the nature and extent of presidential involvement, these contacts with outside parties either supplement or supplant (in fact or in effect) those usually undertaken by the agency. To the degree the former occurs, presidential involvement in administration serves to open the process to more affected interests, thus mitigating the risk of selective

⁴²⁸ See *supra* p. 2267.

access to agency decisionmakers. To the degree the latter occurs, the critical question becomes whether a single group of interests can capture more easily the White House or an agency. The answer to this question no doubt will vary depending on the circumstances — the nature of the issue as well as the identity of the interest groups and agency. But at least to the extent that presidential involvement in rulemaking has a substantial public dimension, the President's concern for maintaining the support of a national constituency, a concern not shared by any agency, should curb the extent to which he attends only to narrow interests. The President's participation in rulemaking thus seems more likely to broaden than to inhibit the informal communication of information from affected interests on which sound policymaking often depends.

If all this is so, the question remaining concerns the capacity of interest groups to contribute effectively to the creation of a record that will enable suitable judicial review of a rulemaking proceeding. The current law regarding the necessary characteristics of a rulemaking record under the APA is somewhat uncertain. The courts have left little doubt that in part to permit judicial review, an agency must compile a formal record even in an ostensibly informal proceeding, and that in part to ensure the adequacy of this record, the agency must adopt procedures that enable parties to comment not only on the agency's proposal, but also on at least certain materials relied upon by the agency in formulating its position.⁴²⁹ One fairly old and unusually aggressive decision interpreted this case law to mean that the materials before the agency, court, and public must all be identical, thus effectively prohibiting any agency decisionmaking that takes into account off-the-record considerations.⁴³⁰ This decision affected in some measure the actual practice of agencies in conducting rulemakings.⁴³¹ But the more common and recent judicial understanding is that affected interests need have access only to the materials that the agency includes in the record in support of its decision and that the reviewing court need only ensure that the decision is defensible on the basis of this record (which also includes the views of the affected interests and the agency's responses).⁴³²

⁴²⁹ See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1030 (D.C. Cir. 1978); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 248-52 (2d Cir. 1977).

⁴³⁰ See *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

⁴³¹ See PETER L. STRAUSS, TODD RAKOFF, ROY A. SCHOTLAND & CYNTHIA R. FARINA, *GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* 1050, 1056 (9th ed. 1995).

⁴³² See, e.g., *Action for Children's Television v. FCC*, 564 F.2d 458, 470-78 (D.C. Cir. 1977).

On the latter understanding of APA requirements, an active presidential role in agency rulemaking, however exercised, in no way interferes with the function of the participatory process in ensuring an adequate record for judicial review. Whether the President's contributions to agency outcomes are divulged to the public matters as little as whether other influences on these outcomes are so divulged. So long as affected interests have the opportunity to comment on the materials in the administrative record that the agency uses to justify its decision, the process functions as intended to permit informed judicial review. And even if the former, now largely discredited understanding is appropriate — on the ground that parties should have an opportunity to comment on, and a court should review, the real rather than the record basis for agency action — the necessary condition for presidential administration is only that it occur in public. As practiced in the Clinton administration, through public directives and announcements and broad disclosure of OMB communications, presidential participation in rulemaking amply met this requirement, allowing affected interests to comment on any presidential inputs and courts to take account of these comments in reviewing the action.

The analysis with respect to adjudications, however, is fundamentally different, reflecting the different nature of these administrative proceedings and the different purposes of participation in them. The famous, now always paired cases of *Londoner v. Denver*⁴³³ and *Bi-Metallic Investment Co. v. State Board of Equalization*⁴³⁴ drew the constitutional line of division, requiring notice and a hearing as a matter of due process when an administrative authority resolves disputes involving particular and identifiable parties, but not when it adopts rules of general application. The APA maintained the distinction, imposing much stricter procedural requirements on agencies when they act through adjudicative than through rulemaking processes.⁴³⁵ The divergent (constitutional and statutory) rules may reflect sheer pragmatism — a recognition that participatory rights are harder and more costly to implement in the rulemaking context. But the greater impetus behind the distinction comes from a sense that the participation of an affected party serves special values in adjudicative proceedings — that in these proceedings, which apply to and affect discrete individuals and firms, participation not only provides needed information to the decisionmaker, but also ensures fundamental fairness and protection against abuse, and thereby promotes the acceptability of decisions.

⁴³³ 210 U.S. 373 (1908).

⁴³⁴ 239 U.S. 441 (1915).

⁴³⁵ Compare 5 U.S.C. § 554 (1994) (requiring trial-type proceedings in adjudications), with *id.* § 553 (requiring only submission of written data or arguments in rulemakings).

In this context, presidential participation in administration, of whatever form, would contravene procedural norms and inject an inappropriate influence into the resolution of controversies. Even at the apex of constitutional doctrine favoring presidential power, the Supreme Court stated in *Myers v. United States*:⁴³⁶ “[T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control.”⁴³⁷ The dictum went unexplained, but must rest on the same distinction that informed the procedural requirements set out in *Londoner* and *Bi-Metallic*: a distinction between relatively open-ended policymaking potentially affecting and involving trade-offs among broad social groups and relatively circumscribed resolution of discrete claims involving identifiable firms or individuals.⁴³⁸ That the distinction is not hard-edged — that the prototypical forms of rulemaking and adjudication are indeed only prototypes and that the actual forms are often similar to each other — does not make the distinction less meaningful, as the bulk of administrative law attests. The consequence here is to disallow the President from disrupting or displacing the procedural, participatory requirements associated with agency adjudication, thus preserving their ability to serve their intended, special objectives.

V. ENHANCING PRESIDENTIAL ADMINISTRATION THROUGH LEGAL RULES

If presidential administration — in the form, to the extent, and with the limits I have noted — represents a salutary development in administrative process, then courts should attempt, through their articulation of administrative law, to recognize and promote this kind of control over agency policymaking. I have argued in this Article that most of administrative law is best understood as a set of rules for allocating control over agency action to diverse individuals and institutions.⁴³⁹ These rules have followed from some conception (more or less coherent) of the relative capacity of these controlling mechanisms to

⁴³⁶ 272 U.S. 52 (1926).

⁴³⁷ *Id.* at 135.

⁴³⁸ For judicial and academic discussions of this distinction in *Londoner* and *Bi-Metallic*, see *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 468–69 (7th Cir. 1988) (Posner, J.), and Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1256–57 (1992). As Strauss notes, see *id.* at 1257, Lon Fuller gave the distinction famous expression in his discussion of “bipolar” and “polycentric” disputes. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978).

⁴³⁹ See *supra* section I.D, pp. 2269–72.

produce accountable and effective administrative decisions. The current rules, however, largely disregard the potential of presidential control — again, in the manner and contexts appropriate — to perform this function. Recognition of this potential at the least would give courts a reason, in the event of a legal challenge, to read statutes delegating discretionary authority to executive agency officials as enabling the President, in the absence of any contrary congressional indication, to direct the exercise of this discretion.⁴⁴⁰ But more, recognition of this potential would support a body of doctrine granting preferred status to administrative action infused in the appropriate way with presidential authority, and thereby promoting this kind of presidential involvement. Full explication of this new doctrine could consume a separate article. For current purposes, I consider only two matters: the implications of presidential involvement in administration for application of the nondelegation doctrine and for judicial review of agency action.

A. *The Nondelegation Doctrine*

The nondelegation doctrine may seem, at first glance, a strange place to begin the discussion of how presidential involvement in agency decisionmaking should affect the judicial articulation and application of administrative law. It is, after all, a commonplace that the nondelegation doctrine is no doctrine at all. In only two cases, both in 1935, has the Supreme Court struck down a federal statute on the ground that it delegated too much authority to the executive branch.⁴⁴¹ As Cass Sunstein wrote one year ago, the nondelegation doctrine “has had one good year, and 211 bad ones (and counting).”⁴⁴² Since that time, the doctrine has suffered one more bad year, with the Supreme Court’s rejection in *Whitman v. American Trucking Associations*⁴⁴³ of a nondelegation challenge to the provision of the Clean Air Act authorizing the EPA to set air quality standards.

A little noted oddity of the nondelegation doctrine, however, suggests the aptness of this discussion. The Supreme Court has applied the doctrine only when Congress has delegated power directly to the President — never when Congress has delegated power to agency officials.⁴⁴⁴ The small sample size, to be sure, cautions against reading too

⁴⁴⁰ See *supra* pp. 2326–30.

⁴⁴¹ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

⁴⁴² Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

⁴⁴³ 121 S. Ct. 903 (2001).

⁴⁴⁴ This is not to say that the Supreme Court always has applied the nondelegation doctrine when Congress has delegated power directly to the President. To the contrary, many of the Supreme Court’s earliest cases upholding delegations involved legislation authorizing the President himself to exercise discretionary power. See, e.g., *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928); *Field v. Clark*, 143 U.S. 649 (1892); *The Cargo of the Brig Aurora v. United*

much into this history. It nonetheless accurately might be said, to borrow and modify Sunstein's construction, that the nondelegation doctrine has had countless good delegees and only one bad delegee (the President). The doctrine as applied thus expresses, albeit tenuously, some special suspicion of the President as a policymaker.⁴⁴⁵

I suggest in this section a more complex view. Considered as an accountability principle, the nondelegation doctrine should welcome active and open presidential involvement in administration, whether pursuant to a direct delegation or superimposed on a delegation to an agency official. Considered as a rule of law principle, the doctrine well might distrust presidential action, but only when this action derives from a direct delegation to the President. This analysis suggests that, all else equal, the nondelegation doctrine should tolerate most easily the kind of administration discussed in this Article — that is, presidentially directed actions taken pursuant to a delegation to an agency official. This conclusion receives some support from another Supreme Court decision, not classified as part of nondelegation law but relevant to precisely these issues.

Consider first, briefly, the cases in which the nondelegation doctrine confronted legislative authorizations to the President, to the downfall of those statutes. In *Schechter Poultry*, the Court invalidated a delegation contained in the National Industrial Recovery Act (NRA), entitling the President to approve as, when, and pursuant to whatever procedures he chose “codes of fair competition” proposed by management-labor groups to govern virtually all important matters in virtually all important sectors of the national economy.⁴⁴⁶ The awesome substantive breadth of this delegation, combined with its lack of procedural constraints and its effective subdelegation of authority to private parties, made it ripe for invalidation, assuming invalidation is ever proper, under the nondelegation doctrine. In *Panama Refining*, by contrast, the delegation at issue, contained in a separate provision of the NRA, did no more than enable the President to prohibit the interstate transport of oil produced in excess of state-imposed quotas.⁴⁴⁷ The supposed absence of standards specifying precisely when the President should exercise this power, on which the Court's decision

States, 11 U.S. (7 Cranch) 382 (1813). It is worth noting, however, that these delegations principally involved tariffs and other matters relating to foreign affairs, with respect to which the need for presidential power historically has seemed most urgent.

⁴⁴⁵ Todd Rakoff also understands the Supreme Court's cases invalidating statutory provisions on delegation grounds as stemming in part from the role of the President in the statutory scheme. See Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 2 TEL AVIV U. STUD. L. 9, 22–23 (1992).

⁴⁴⁶ *Schechter Poultry*, 295 U.S. at 523 (internal quotation marks omitted).

⁴⁴⁷ *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 405–06 (1935).

rested, paled in comparison (even at the time) to the vagueness associated with countless delegations to administrative agencies.⁴⁴⁸

Now to these cases add another of far more recent vintage, not decided under the nondelegation doctrine but presenting a delegation issue that likely shaped the Court's analysis. In *Clinton v. City of New York*,⁴⁴⁹ the Court reviewed a challenge to the Line Item Veto Act,⁴⁵⁰ which enabled the President to refuse to give effect to certain expenditure and tax benefit provisions contained in future legislation. Declining to consider the validity of this measure under the nondelegation doctrine, the Court held that the Act violated the "finely wrought" procedures of Article I, Section 7 of the Constitution by authorizing the President unilaterally to repeal parts of enacted statutes.⁴⁵¹ The two dissenting opinions in the case, however, demolished this claim by pointing out the technical adherence of the Act's cancellation mechanism to this constitutional provision: in exercising his authority under the Act, the President had done no more than execute a power, given to him by legislation enacted pursuant to Article I, Section 7, respecting the implementation of further legislation enacted pursuant to Article I, Section 7. The real question in the case, then, was whether the power granted to the President constituted an impermissible delegation.⁴⁵²

The majority itself seemed tacitly to recognize the dissenters' point by discussing at length how this delegation extended further than prior, structurally similar grants to the President of authority to cease giving effect to legislative provisions.⁴⁵³ What truly seemed to gall the majority, for all its claim of a violation of Article I, Section 7, was that Congress had authorized the President to implement his policy views in areas outside his special constitutional responsibility and in ways conflicting directly with prior legislative judgments.⁴⁵⁴ Although the

⁴⁴⁸ In the Supreme Court's most recent nondelegation case, Justice Scalia wrote that the statutory provision in *Panama Refining* contained "literally no guidance for the exercise of discretion." *American Trucking*, 121 S. Ct. at 913. But as Justice Cardozo wrote in his dissenting opinion in *Panama Refining*, Congress had specified the exact nature of the act left to the President and had made clear in the purposes section of the statute the kinds of considerations the President should take into account in choosing whether to take that step. See *Panama Refining*, 293 U.S. at 254-56 (Cardozo, J., dissenting).

⁴⁴⁹ 524 U.S. 417 (1998).

⁴⁵⁰ 2 U.S.C. § 691 (Supp. II 1997).

⁴⁵¹ *Clinton*, 524 U.S. at 439-40 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)) (internal quotation marks omitted).

⁴⁵² See *id.* at 463-69 (Scalia, J., dissenting); *id.* at 480-96 (Breyer, J., dissenting).

⁴⁵³ See *Clinton*, 524 U.S. at 442-47.

⁴⁵⁴ See *id.* at 445-46. The Court distinguished the cases cited in note 444, above, on the principal grounds that they involved statutes that related to foreign affairs and provided for the President to exercise his authority only when certain defined contingencies arose. See *id.* at 442-45.

majority did not reveal whether its concern about this delegation related to the identity of the actor given authority (as opposed to the simple scope of the authority granted), Justice Breyer's dissenting opinion faced this issue squarely, rejecting the nondelegation argument only after noting several reasons for holding delegations to the President to a stricter standard than delegations to administrative agencies.⁴⁵⁵

The heightened suspicion of presidential, as opposed to agency, policymaking suggested in these cases appears to conflict with the norm of democratic accountability often thought to reside at the core of the nondelegation doctrine.⁴⁵⁶ As then-Justice Rehnquist put the matter in the so-called *Benzene* case, the doctrine "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."⁴⁵⁷ Measured by this "responsiveness" yardstick, the President outstrips any agency official, for the reasons discussed earlier.⁴⁵⁸ On Justice Rehnquist's reasoning, the President thus should count as a specially favored, rather than disfavored, delegatee of lawmaking power.⁴⁵⁹ Likewise, the President's involvement in the exercise of discretion granted to agency heads should mitigate concerns arising from these delegations.

The argument, to be sure, has its limits; most notably, it does not countenance the abandonment of the nondelegation doctrine when the President features prominently in policymaking activity. As Cass Sunstein has noted, the democratic values that the nondelegation doctrine serves may involve not only the "responsiveness" that Justice Rehnquist noted, but also the "reflectiveness" associated (at least ideally) with legislative process.⁴⁶⁰ In Sunstein's words, the doctrine promotes the distinctive "kind of accountability that comes from requiring specific decisions from a deliberative body reflecting the views

⁴⁵⁵ See *id.* at 489–90 (Breyer, J., dissenting); *infra* note 464.

⁴⁵⁶ See Mashaw, *supra* note 54, at 82–84 (summarizing the view of various anti-delegationists that broad delegations are antidemocratic).

⁴⁵⁷ *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in the judgment).

⁴⁵⁸ See *supra* section IV.B.1, pp. 2332–39.

⁴⁵⁹ Justice Breyer's dissenting opinion in *Clinton v. City of New York* recognized this argument. Responding to his own suggestion that these delegations were especially problematic, see *infra* note 464, Justice Breyer wrote: "The President, unlike most agency decisionmakers, is an elected official. He is responsible to the voters, who, in principle, will judge the manner in which he exercises his delegated authority." *Clinton*, 524 U.S. at 490 (Breyer, J., dissenting). Justice Scalia had anticipated the argument in *Mistretta v. United States*, 488 U.S. 361 (1989), arguing that to the extent the exercise of delegated discretion is under the control of the President, "the recipient of the policymaking authority, while not Congress itself, would at least be politically accountable." See *id.* at 421 (Scalia, J., dissenting).

⁴⁶⁰ Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 336 (1999).

of representatives from various states of the union."⁴⁶¹ For this reason, presidential choices consistent with broad delegations are not the equivalent of legislative decisions. But once any delegation occurs, the peculiarly legislative accountability of which Sunstein speaks is gone. To the extent that this accountability at all includes, as it must, the idea of representing and responding to the public, the case seems strong for viewing the President's exercise of delegated discretion, assuming all else is equal, as presenting less, rather than more, severe difficulties than an agency official's.

The nondelegation doctrine, however, also may promote distinctive rule of law values, which should factor into the analysis. The idea here is that legislative standards — or what the Court has called "intelligible principle[s]"⁴⁶² — provide notice, prevent arbitrariness, and facilitate judicial review. In the course of upholding the Clean Air Act against nondelegation challenge, the *American Trucking* Court repudiated the D.C. Circuit's view, based on these rule of law values, that an agency could remedy an otherwise unconstitutional delegation by developing subsidiary standards.⁴⁶³ The Court thus resisted the lure of turning the nondelegation doctrine into merely a rule of law requirement, disconnected from any democratic mooring. But it would overread the Court's decision to conclude that rule of law values no longer play a role in determining the constitutionality of a given delegation to a given delegate; consider, for example, the likelihood (I think slim) that the courts would see no difference for purposes of nondelegation analysis between two broad delegations, identical in every respect except that one insulated the agency's exercise of power from all judicial review.

Measured by this rule of law yardstick, the distrust of presidential action pursuant to a direct delegation begins to assume a cogent basis; this concern, however, should not extend to presidential action taken through the medium of a delegation to an agency official. The key factor here relates to the availability of judicial review. Presidential action occurring under a direct delegation usually is insulated from legal challenge, except when the challenge is constitutional in nature.⁴⁶⁴

⁴⁶¹ *Id.* at 335–36; see Sunstein, *supra* note 442, at 319–20 (emphasizing as well the function of bicameralism in producing this distinctively legislative form of accountability).

⁴⁶² See *Industrial Union*, 448 U.S. at 686 (Rehnquist, J., concurring) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)) (internal quotation marks omitted); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935).

⁴⁶³ See *Whitman v. Am. Trucking Ass'ns*, 121 S. Ct. 903, 912 (2001).

⁴⁶⁴ See *Clinton* 524 U.S. at 489–90 (Breyer, J., dissenting) (noting that the insulation of presidential action from judicial review gives reason to distrust delegations to the President). Breyer also argued in his dissent in *Clinton* that delegations to the President are particularly problematic because a President is less prone than an agency to "develop subsidiary rules under the statute." *Id.* at 489. But even assuming that these standards retain some relevance to the delegation in-

The Court has held that presidential action is not reviewable under the APA for claims of statutory violations;⁴⁶⁵ and although formally reserving the issue whether review is available outside the APA framework, the Court has suggested firmly that presidential actions claimed to follow from either constitutional or statutory authority “embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate.”⁴⁶⁶ Given this stance — or otherwise stated, given the difficulty of controlling the exercise of discretion delegated to the President — rule of law values may counsel extra hesitation in allowing the delegation in the first instance.⁴⁶⁷ But this reasoning does not apply when the President directs or otherwise involves himself in action taken pursuant to a delegation to an agency official. In such a case, as I have argued earlier,⁴⁶⁸ the APA’s judicial review provisions should apply. The rule of law concerns arising from the potential finality of independent presidential action thus dissipate in the sphere of presidential administration that this Article has described.

This analysis suggests that, all else equal, administrative action taken pursuant to a delegation to an agency official, but clothed with the imprimatur and authority of the President, should receive maximum protection against a nondelegation challenge. The President’s involvement, at least if publicly disclosed, vests the action with an increased dose of accountability, which although not (by definition) peculiarly legislative in nature, renders the action less troublesome than solely bureaucratic measures from the standpoint of democratic values. And this kind of presidential participation gives rise to none of the rule of law issues that might loom large in the context of direct delegations. Again, this is not to say that presidential control of administration is the equivalent of congressional lawmaking. It is only to say that given the often urgent need for, and resulting omnipresence of, broad delegations, courts should understand and, by so doing, encourage this mechanism of control as mitigating the potential threat that administrative discretion poses.

American Trucking poses a challenge to this analysis, but the two may not be inconsistent. Justice Scalia’s opinion for the Court stated

quiry after *American Trucking*, they can coexist (or not) with a delegation to either an agency head or the President.

⁴⁶⁵ See *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992) (construing the APA in the light of the “separation of powers and the unique constitutional position of the President”).

⁴⁶⁶ *Dalton v. Specter*, 511 U.S. 462, 475 (1994) (quoting *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948)) (internal quotation marks omitted).

⁴⁶⁷ Cf. *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir.) (Leventhal, J., concurring) (“Congress has been willing to delegate its legislative powers broadly — and courts have upheld such delegation — because there is court review to assure that the agency exercises the delegated power within statutory limits . . .”).

⁴⁶⁸ See *supra* pp. 2350–51.

that “[w]e have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.”⁴⁶⁹ Similarly, it might be said that the participation of the President in an agency’s exercise of discretion cannot cure an unlawful delegation — because on this view, nothing outside the terms of the delegation is relevant to the constitutional issue. But in fact the Court has considered various control mechanisms arising outside the delegation, or even outside the statute generally, in deciding whether an unconstitutional delegation has occurred. In *Schechter Poultry*, the Court distinguished a delegation to the Federal Trade Commission partly on the ground that the Commission had to (and did) comply with strict procedural rules in exercising its power.⁴⁷⁰ And in *Fahey v. Mallonee*,⁴⁷¹ the Court sustained a delegation in part because customary practices in the field limited the agency’s effective authority.⁴⁷² The *American Trucking* Court might have viewed subsidiary standards as different because deriving from the agency itself, rather than from an outside source; on this view, only discipline, and not self-restraint, can factor into a nondelegation decision. Or the Court might have objected to the dispositive weight the D.C. Circuit suggested giving to the agency’s subsidiary standard; on this view, the existence of an agency standard, even if appropriately a factor in determining the legality of a delegation, cannot automatically resolve the constitutional issue (or in Scalia’s term, “cure”⁴⁷³ the illegality). In either event, the proposal here — to count presidential control of agency as a positive factor in nondelegation analysis — would survive the *American Trucking* opinion.

Further, the Supreme Court’s decision in *Hampton v. Mow Sun Wong*⁴⁷⁴ affirmatively may support this view of the significance of presidential participation for application of the nondelegation doctrine. The Court there considered the constitutionality of a rule issued by the Civil Service Commission barring aliens from employment in the federal civil service. The Court held that the rule — clearly within the bounds of a broad delegation to the Commission over the management of the civil service — violated the Due Process Clause of the Fifth Amendment.⁴⁷⁵ In so doing, however, the Court repeatedly noted that the same provision might have met constitutional standards if passed

⁴⁶⁹ *Whitman v. Am. Trucking Ass’ns*, 121 S. Ct. 903, 912 (2001).

⁴⁷⁰ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 531–34 (1935).

⁴⁷¹ 332 U.S. 245 (1947).

⁴⁷² *Id.* at 252.

⁴⁷³ *American Trucking*, 121 S. Ct. at 912.

⁴⁷⁴ 426 U.S. 88 (1976).

⁴⁷⁵ *Id.* at 114–17.

by Congress (and signed by the President) as legislation.⁴⁷⁶ For this reason, some legal scholars have interpreted the decision as exemplifying a discrete kind of nondelegation doctrine: when Congress wishes to act in constitutionally sensitive areas, it must take upon itself, rather than pass to an agency, responsibility for the decision.⁴⁷⁷ What makes the case interesting for purposes of the discussion here is that the Court likewise reserved the question whether the rule would have met constitutional standards, under the same delegation, if directed by the President:⁴⁷⁸ as the Court stated in just one of its many references to this possibility, "if the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption."⁴⁷⁹

The Court's reasoning in *Hampton* was notably opaque and the scope of its suggestion on this score correspondingly uncertain. Several particular features of the case might have given rise to the Court's repeated references to the desirability of presidential control (although the Court gave more than glancing notice to only the first): that the agency's decision implicated matters of immigration and foreign policy unrelated to its own expertise;⁴⁸⁰ that these matters fell within a sphere over which the President may have special constitutional authority;⁴⁸¹ and that the delegation at issue conferred a kind of joint authority on the President and Commission.⁴⁸² Moreover, as just noted, the Court's

⁴⁷⁶ *Id.* at 103, 105, 113 n.46, 116.

⁴⁷⁷ See Sunstein, *supra* note 442, at 336-37; see also Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 862, 866-67 (1997) (expressing the same understanding of the case in terms of "differential judicial restraint" as to statutes and agency decisions).

⁴⁷⁸ See *Hampton*, 426 U.S. at 103, 105, 113 n.46, 116.

⁴⁷⁹ *Id.* at 103 (emphasis added). In response to the *Hampton* decision, President Ford in fact issued an executive order generally barring aliens from the civil service, but giving the Civil Service Commission discretion to make exceptions to the rule. See Exec. Order No. 11,935, 3 C.F.R. 146 (1976), reprinted in 5 U.S.C. § 3301 (1994). A number of appellate courts subsequently upheld this order. See, e.g., *Mow Sun Wong v. Campbell*, 626 F.2d 739, 742-43, 745 (9th Cir. 1980); *Vergara v. Hampton*, 581 F.2d 1281, 1284-85 (7th Cir. 1978).

⁴⁸⁰ *Hampton*, 426 U.S. at 114-15.

⁴⁸¹ The same factor may explain the Court's decision in *Greene v. McElroy*, 360 U.S. 474 (1959). The question in that case concerned the constitutionality of a program established by the Department of Defense that denied security clearances to employees of defense contractors without affording them an opportunity for confrontation and cross-examination of witnesses. The Court invalidated the program on the ground that it was "not explicitly authorized by either Congress or the President," *id.* at 508, explaining that "explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws," *id.* at 507. In *Greene*, unlike in *Hampton*, the Court found that no legislative delegation covered, even in a general way, the action taken; a presidential directive thus could have helped to justify the action only by virtue of the President's independent and inherent constitutional authority over the subject matter at issue.

⁴⁸² See 5 U.S.C. § 3301(1), 1302(a) (1994).

decision concerned only administrative actions that somehow affect constitutionally protected interests.

But behind these idiosyncrasies and limitations, the Court appeared to express a general understanding of what Laurence Tribe has called, in discussion of this case, a "link between political process [here, the identity of the decisionmaker] and legal outcome."⁴⁸³ More particularly, the reasoning and language in *Hampton* suggests that presidential (like congressional but unlike agency) action enables political accountability and that this attribute, if lent to administrative action through presidential directive, can ease concerns relating to the exercise of broad grants of discretion.⁴⁸⁴ The *Hampton* decision thus supports not merely a distinctive nondelegation principle, but an adjustment of the general doctrine to take account of and thereby encourage overt presidential control of administration.

B. Judicial Review

A still more important way to promote this presidential role resides in two commonly invoked doctrines concerning judicial review of agency action. Whereas courts apply (or even consider applying) the nondelegation doctrine on only rare occasions, they regularly review agencies' legal conclusions under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁴⁸⁵ and agencies' decisionmaking processes under the "hard look" standard exemplified in *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*⁴⁸⁶ The issue of presidential control has arisen in both contexts, but the Supreme Court has recognized its relevance only tentatively in the first and has rejected its relevance outright in the second. A sounder version of both these doctrines of judicial review would take unapologetic account of the extent of presidential involvement in administrative decisions in determining the level of deference to which they are entitled.

1. *Chevron Review*. — The place to start is with *Chevron*, which held that courts should defer, in the event of legislative ambiguity, to

⁴⁸³ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 17-2, at 1682 (2d ed. 1988). Tribe groups *Hampton* with a number of other opinions, including Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 305 (1978), in which the identity of the decisionmaker assumed a prominent role in constitutional analysis. See TRIBE, *supra*, § 17-2, at 1680.

⁴⁸⁴ See, e.g., *Hampton*, 426 U.S. at 113 n.46 ("[I]n view of the consequences of the rule it would be appropriate to require a much more explicit directive from either Congress or the President before accepting the conclusion that the political branches of Government would consciously adopt [the] policy . . .").

⁴⁸⁵ 467 U.S. 837 (1984).

⁴⁸⁶ 463 U.S. 29 (1983).

agencies' "reasonable" constructions of their governing statutes.⁴⁸⁷ *Chevron* prescribed a by now well known two-step inquiry. The first question is "whether Congress has directly spoken to the precise question at issue";⁴⁸⁸ if so, the Court stated uncontroversially, agencies must comply with that judgment.⁴⁸⁹ The second question, reached only if Congress has failed to speak clearly, is whether the agency has adopted a reasonable interpretation of the statute; if so, the Court declared far more provocatively, courts must accept that interpretation even if they would have reached another as an original matter.⁴⁹⁰ As first conceived, the *Chevron* deference rule had its deepest roots in a conception of agencies as instruments of the President, entitled to make policy choices, within the gaps left by Congress, by virtue of his relationship to the public. Since that time, however, this rationale has receded, and the deference rule has become disconnected from considerations relating to presidential involvement. A new embrace of the Court's original reasoning — committed to and thus supportive of presidential control over administrative action — would counsel a variable deference regime, dependent on the role of the President in an agency's interpretive decisionmaking.

The passage of *Chevron* containing the Court's fullest justification of judicial deference to administrative constructions of statutes focused on the hierarchical relationship between the agencies and the President:

Judges . . . are not part of either political branch of the Government. . . . [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices

. . . 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."⁴⁹¹

The assignment of policymaking functions, on this understanding, appropriately tracks political accountability; and political accountability,

⁴⁸⁷ *Chevron*, 467 U.S. at 845.

⁴⁸⁸ *Id.* at 842.

⁴⁸⁹ *Id.* at 842–43.

⁴⁹⁰ *See id.* at 843 & n.11.

⁴⁹¹ *Id.* at 865–66 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

within the gaps left by Congress, attaches to and resides in choice by the President.

At the same time, however, the *Chevron* opinion suggested other, potentially conflicting bases for its rule of deference, corresponding to alternative forms of control — specifically by experts and Congress — over administrative decisions. The Court noted at several points the special expertise and experience that agencies bring to the task of interpreting and administering their governing statutes. The Court quoted a prior statement that deference was appropriate when “a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations”;⁴⁹² the Court then added that in the instant case “the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion,” and “judges are not experts in the field.”⁴⁹³ Still further augmenting the rationales for deference, the Court proposed that this approach comported with congressional intent. Gaps and ambiguities in legislation, the Court suggested, themselves could constitute explicit or implicit delegations to an agency to “elucidate . . . the statute by regulation,”⁴⁹⁴ including through the “accommodation of conflicting policies.”⁴⁹⁵

Both the Supreme Court and lower courts have invoked these alternative rationales, in a variety of contexts, to delimit the scope of the *Chevron* doctrine, thereby creating, with varying degrees of precision, spheres in which “step-two” deference will not apply. The courts, for example, have held that *Chevron* comes into play only when an agency has a distinctive, or even exclusive, responsibility over a statutory provision, reasoning that an agency lacking this responsibility has no warrant to claim either a congressional delegation or a special expertise in the area.⁴⁹⁶ The courts similarly have declined to give *Chevron* deference to an agency’s litigating positions on the grounds that “Congress has delegated to the administrative official and not to appellate coun-

⁴⁹² *Id.* at 844 (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961)) (internal quotation marks omitted).

⁴⁹³ *Id.* at 865.

⁴⁹⁴ *Id.* at 844.

⁴⁹⁵ *Id.* at 845 (quoting *Shimer*, 367 U.S. at 383) (internal quotation marks omitted).

⁴⁹⁶ See *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 152–53 (1991) (holding that an interpretation of the Secretary of Labor was entitled to greater deference than one of the OSHRC because the Secretary had greater expertise in the area and because Congress had indicated a preference that she have this responsibility); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–50 (1990) (holding that an agency’s interpretation was not entitled to deference because Congress had declined to give the agency authority in the area); *Prof’l Reactor Operator Soc’y v. U.S. Nuclear Regulatory Comm’n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (holding that an agency’s interpretation was not entitled to deference because the statutory provision in question was “outside the agency’s particular expertise and special charge to administer”).

sel"⁴⁹⁷ responsibility for resolving statutory ambiguities and that views raised in litigation likely reflect "*post hoc* rationalizations"⁴⁹⁸ rather than considered exercises of an agency's expertise. And in a recent, similarly grounded decision, the Supreme Court held in near-summary fashion, after many years of conflict in the lower courts, that *Chevron* did not apply to an agency's interpretive (as opposed to legislative) regulations.⁴⁹⁹ The Court indicated there that interpretive rules draw on no formal delegations of rulemaking or adjudicative power and emanate from no formal deliberative processes, such as public notice-and-comment.⁵⁰⁰ The latter point suggests yet another rationale for *Chevron* deference, corresponding to yet another form of control — this one by constituency groups — over administrative action.⁵⁰¹

The courts, by contrast, have ignored the President's role in administration action in defining the scope of the *Chevron* doctrine. Although this consideration took pride of place in *Chevron* itself, the figure of the President has barely appeared in recent judicial discussions of deference. Courts grant (or decline to grant) step-two deference to administrative interpretations of law irrespective whether the President potentially could, or actually did, direct or otherwise participate in their promulgation. Indeed, the Department of Justice occasionally counseled Clinton White House staff members (though not successfully) to maintain a public distance between the President and agency action, lest his personal direction and appropriation of administrative product undermine the expertise rationale for *Chevron* deference.⁵⁰² The Department's advice may have reflected some lawyerly overcau-

⁴⁹⁷ Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (quoting *Investment Co. Institute v. Camp*, 401 U.S. 617, 628 (1971)) (internal quotation marks omitted).

⁴⁹⁸ *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)) (internal quotation marks omitted); *IAL Aircraft Holding, Inc. v. Fed. Aviation Admin.*, 206 F.3d 1042, 1045–46 (11th Cir. 2000). *But cf.* Auer v. Robbins, 519 U.S. 452, 462 (1997) (giving deference to an interpretation advanced in a legal brief because the circumstances showed that it reflected the agency's "fair and considered judgment" rather than a "*post hoc* rationalization").

⁴⁹⁹ See *Christensen v. Harris County*, 120 S. Ct. 1655 (2000) (holding that only weak deference, as described in the pre-*Chevron* case of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), applies to interpretive rules). Prior lower court opinions addressing the issue had reached differing conclusions. Compare *Wagner Seed Co. v. Bush*, 946 F.2d 918, 922–23 (D.C. Cir. 1991) (granting deference to interpretive rules), with *S. Ute Indian Tribe v. Amoco Prod. Co.*, 119 F.3d 816, 832–34 (10th Cir. 1997) (denying deference to interpretive rules).

⁵⁰⁰ See *Christensen*, 120 S. Ct. at 1662–63.

⁵⁰¹ In these post-*Chevron* cases, courts have invoked institutional rationales for step-two deference as support for the delegation rationale, suggesting in particular that Congress must want experts in the field to resolve ambiguities in statutory provisions. See, e.g., *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696–97 (1991); *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1016 (D.C. Cir. 1999). This analytical approach, consistent with the tack taken in *Chevron* itself, makes sense in light of the usual absence of any real evidence regarding where Congress intends to confer interpretive authority. See *infra* pp. 2378–79.

⁵⁰² See Reed Interview, *supra* note 208. Reed recalls that the Department of Justice gave this advice in discussions relating to the administration's tobacco regulation.

tion — no court, after all, has refused to grant deference to agency action on this ground — but doubtless accurately read the courts' post-*Chevron* decisions as showing little solicitude for the "politicization," through the "presidentialization," of agencies' interpretations of statutes.

Chevron's primary rationale suggests a different approach, which would link deference in some way to presidential involvement. On this approach, the regulation under review in *Chevron* — a construction of the term "stationary source" in the Clean Air Act to allow plantwide rather than device-specific measurements of air pollution — merited deference, as the Court concluded, because that regulation exhibited clear signs of presidential influence. Although the regulation nowhere mentioned presidential priorities, it arose, as the Court recognized, from a "Government-wide reexamination of regulatory burdens and complexities" that President Reagan ordered in his first months in office.⁵⁰³ But other agency decisions will lack this kind of presidential imprimatur, proceeding as they do from considerations not fairly traceable to presidential policy.⁵⁰⁴ If deference follows, as *Chevron* stated, from the political leadership and accountability that the President offers, then deference should attach not to the whole but only to some subset of agency action. The task for post-*Chevron* courts, on this view, would involve developing doctrine that recognizes, and thereby promotes, actual rather than assumed presidential control over administrative action.

This doctrine would begin by distinguishing between actions taken by executive branch agencies and those taken by independent commissions. This line doubtless would have something of a rough cut about it. The strength of the President's removal power, which defines the core legal difference between these entities, fails to track precisely the strength of the President's policy influence. The power of removal, just because of its potency, often cannot ensure effective authority; conversely, other mechanisms — lesser sanctions, institutional incentives, and personal ties — can serve to bind agency action to presidential policy. But when (1) insulation from presidential removal power combines, as in most independent agencies, with (2) an organizational structure featuring multiple agency heads of diverse parties serving staggered terms and (3) longstanding (even if psychological) norms of independence, widely held within both the bureaucracy and Congress,

⁵⁰³ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 857 (1984) (quoting Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 46 Fed. Reg. 16,280, 16,281 (proposed March 12, 1981) (codified at 40 C.F.R. pts. 51, 52)) (internal quotation marks omitted).

⁵⁰⁴ Cf. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 996 (1992) (criticizing *Chevron* on the ground that "Presidential oversight has inherent limitations").

the gap between the agency and the President almost inexorably widens. The formal differences apparent in the way the Reagan and Clinton White Houses treated the independent and executive branch agencies reflected (and then exacerbated) this disparity in presidential control.⁵⁰⁵ A *Chevron*-type doctrine attuned to the role of the President would respond to this disparity by giving greater deference to executive than to independent agencies.⁵⁰⁶

A more refined version of this doctrine might take into account as well actual evidence of presidential involvement in a given administrative decision. The President and his immediate staff cannot offer input, much less direction, on all or even most interpretations of law reached by executive departments. Conversely, the President and his staff might participate extensively in the occasional legal interpretation offered by an independent commission. Given these realities, courts could apply *Chevron* when, but only when, presidential involvement rises to a certain level of substantiality, as manifested in executive orders and directives, rulemaking records, and other objective indicia of decisionmaking processes. As applied to *Chevron* itself, for example, this analysis would make critical the presidentially ordered reexamination of regulatory burdens noted in the opinion. Conditioning deference in this way at once would induce disclosure of any presidential role in administration and encourage expansion of this role to so far neglected areas of regulation.⁵⁰⁷

⁵⁰⁵ See *supra* p. 2278 & note 124; p. 2308.

⁵⁰⁶ A counterargument to this proposal might stress Congress's ability to influence independent agencies, claiming that, under *Chevron*'s "political choice" rationale, congressional no less than presidential control supports judicial deference to agencies' statutory interpretations. But even putting aside the institutional characteristics that make Congress a less reliable overseer of agency action than the President, see *supra* pp. 2256-61, the constitutional limits on Congress's ability to establish a hierarchical relationship with the independent agencies (most notably, by retaining removal power over their heads), see *supra* p. 2270, preclude equating the two kinds of control. Although for reasons discussed above, independent agencies may show more sensitivity than executive agencies to congressional preferences, the former remain true to their name in critical ways. Nonetheless, adoption of the proposal offered here need not entail the elimination of all deference to independent agencies. If nothing else, administrative expertise, also mentioned in *Chevron* as a factor counseling deference, exists in independent no less than in executive branch agencies. The appropriate doctrinal structure may mirror the Court's new distinction between legislative and interpretive rules, see *supra* p. 2375: *Chevron* deference (acknowledging the validating character of political process) for the one administrative category and weaker *Skidmore* deference (acknowledging the potential persuasive force of agency expertise) for the other.

⁵⁰⁷ A counterargument here might emphasize the possibility that this approach would encourage only a new kind of boilerplate in administrative action — a presidential seal of approval disconnected from real participation in the action by the President or his close White House aides. I doubt that this result would follow, given the substantial risks that the President would incur from essentially signing a blank check made out to the agencies; I also doubt that courts would prove unable to distinguish between these boilerplate statements and indicia of concrete policy guidance. And to the extent I am wrong, the worst that would happen is that the *Chevron* defer-

Such a focus on presidential action would reverse in many cases the courts' current suspicion of change in regulatory policy. Although *Chevron* itself arose from a revised understanding of a statutory ambiguity, the courts have continued to suggest, if often only in dicta, that administrative interpretations conflicting with previously held views should receive diminished deference on review.⁵⁰⁸ Some administrative law scholars have expressed even stronger distaste for revised and re-revised interpretations of statutes, often citing, as illustrations of administrative action unworthy of deference, the sudden issuance (in the Bush administration) and equally sudden suspension (in the Clinton administration) of the rule upheld in *Rust v. Sullivan*,⁵⁰⁹ prohibiting federally funded family planning clinics from providing information about abortion services.⁵¹⁰ But if courts should give increased deference to agency actions linked to the President, then new administrative interpretations following new presidential elections should provide a reason to think deference appropriate rather than the opposite. *Chevron* and *Rust* alike present prototypical examples.

One concern about hinging judicial deference on presidential action relates to Congress's intent in delegating authority to agencies. If, as *Chevron* tentatively proposed and the Court since has reiterated,⁵¹¹ the deference rule follows (at least in part) from a legislative delegation to agencies to resolve statutory ambiguities, then the President's role should make no difference: once Congress has specified that agencies, rather than courts, possess this power, courts would contravene legislative will in imposing further conditions. But whereas courts sometimes can rule out a congressional delegation of this kind — as the de-

ence regime would operate largely as it does now, with a few sentences (concerning White House involvement) appended to each regulation and corresponding judicial opinion.

⁵⁰⁸ *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (stating that "the consistency of an agency's position is a factor in assessing the weight that position is due," but ultimately deferring to an agency's changed interpretation); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 698 (1991) (stating that the "case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views," but finding that the interpretation at issue was not so inconsistent); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (declining to give deference on the alternative ground that the interpretation at issue was "contrary to the narrow view of that provision advocated in past cases"); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 & n.30 (1987) (denying deference on the same ground). *But see Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991) (reading *Chevron* to hold that a revised interpretation deserves deference and sustaining agency action on this ground).

⁵⁰⁹ 500 U.S. 173 (1991).

⁵¹⁰ *See, e.g., Cynthia R. Farina, The "Chief Executive" and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 185-86 (1997); Greene, *supra* note 369, at 182-84.

⁵¹¹ *See, e.g., Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996) ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.").

cisions refusing to apply *Chevron* in certain contexts have recognized⁵¹² — courts seldom can find affirmative evidence of legislative intent to empower agencies so broadly. The delegation of power to an agency to administer a statute, even when manifested in explicit rule-making and adjudicatory authority, does not necessarily entail a delegation of power to the agency (rather than the courts) to answer any and all interpretive questions to which the statute may give rise. As even Justice Scalia, the most vigorous proponent of the delegation rationale for *Chevron*, has conceded, the *Chevron* rule “represents merely a fictional, presumed intent.”⁵¹³ If, as Justice Scalia and others have suggested, this fictional presumption rests (in part or in whole) on notions of comparative institutional competence and legitimacy,⁵¹⁴ then it fits comfortably with an emphasis on presidential control of agency interpretations.

A second concern about the kind of *Chevron* doctrine I am proposing relates to its inability to provide Congress with a stable background rule of deference against which to legislate. Justice Scalia, in defending the use of a fictional presumption of legislative intent, has given great weight to this function: “Congress now knows that the ambiguities it creates . . . will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known.”⁵¹⁵ A doctrine of variable deference, dependent upon the unpredictable factor of presidential intervention, concededly cannot serve this purpose. But the post-*Chevron* creation of exceptions to the deference rule — including, most notably, the Court’s distinction between legislative and interpretive rules⁵¹⁶ — already has clouded, and for less good reasons, the certainty *Chevron* promised initially. And more important, the behavioral assumption underlying this justification of *Chevron* has precious little to sustain it. Not once since *Chevron*, even given long stretches of divided government, has Congress attempted to override that decision’s default rule of deference. And no evidence of which I am aware suggests that the *Chevron* doctrine has had more subtle effects on legislative delegations. At least until Congress expresses some greater inter-

⁵¹² See *supra* pp. 2374–75.

⁵¹³ Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

⁵¹⁴ See *id.* (stating that “one of [the] major advantages” of the *Chevron* presumption is that it “permit[s] needed flexibility, and appropriate political participation, in the administrative process”); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2086 (1990) (arguing that courts often must assess “which [interpretive] strategy is the most sensible one to attribute to Congress under the circumstances” by making a “frankly value-laden judgment about comparative competence”); see also cases cited *supra* note 496.

⁵¹⁵ Scalia, *supra* note 513, at 517.

⁵¹⁶ See *supra* note 499 and accompanying text.

est in the judicial review of agency interpretations, courts should not hesitate to shape the doctrine in the way they believe most conducive to administrative accountability and effectiveness.

2. *Hard Look Review*. — Courts could adopt a similar approach in reviewing agencies' decisionmaking processes under the hard look doctrine of *State Farm*. The current version of that doctrine subjects all agency decisionmaking, irrespective of provenance or pedigree, to wide-ranging judicial review for errors of process: the courts take a hard look at whether the agencies themselves have taken a hard look at the range of evidence, arguments, and alternatives relevant to an issue, and have made and explained a reasoned policy choice based on these considerations. The doctrine, as earlier noted, reflects an ideal vision of the administrative sphere as driven by experts, although also demanding that they take into account and respond to the contributions of interested parties.⁵¹⁷ A revised doctrine would acknowledge and, indeed, promote an alternative vision centered on the political leadership and accountability provided by the President. This approach, similar to the one I have considered in discussing the *Chevron* doctrine, would relax the rigors of hard look review when demonstrable evidence shows that the President has taken an active role in, and by so doing has accepted responsibility for, the administrative decision in question.⁵¹⁸

The Supreme Court implicitly rejected this approach in *State Farm*, over a partial dissent by then-Justice Rehnquist urging a similar reasoning on his colleagues.⁵¹⁹ The case arose when the National Highway Traffic Safety Administration (NHTSA) rescinded a safety standard requiring automobile manufacturers to equip new vehicles with either airbags or automatic seatbelts. Although the entire Court agreed that NHTSA had acted arbitrarily in failing to give any consideration to the alternatives of retaining an airbag standard alone or modifying the seatbelt standard to require nondetachable belts, the Court split on the legality of NHTSA's abandonment of the then-existing seatbelt requirement. NHTSA had found that manufacturers

⁵¹⁷ See *supra* pp. 2270–71 & note 90.

⁵¹⁸ It is not surprising that parallel approaches to presidential control of administration are appropriate in judicial review of agency action under *Chevron* and *State Farm*. Although the *Chevron* step-two inquiry focuses on the reasonableness of an agency's resolution of statutory ambiguity, and the *State Farm* inquiry focuses on the adequacy of an agency's decisionmaking process, the two overlap when, as is so often the case, matters of legal interpretation and policy choice converge. See *Arent v. Shalala*, 70 F.3d 610, 616 n.6 (D.C. Cir. 1995); *id.* at 620 (Wald, J., concurring); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI-KENT L. REV. 1253, 1276 (1997).

⁵¹⁹ For an excellent discussion of *State Farm*, focusing on Justice Rehnquist's frank acknowledgment of the role of political judgment in administrative decisionmaking, see CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 63–65, 182–84 (1990).

would comply with this requirement by installing readily detachable seatbelts and that these devices would increase seatbelt usage by an amount too slight to justify the cost of installation. The majority held that NHTSA had failed to consider certain factors potentially relevant to whether drivers would use the detachable seatbelts. The dissent disagreed, stating that the agency's explanation, "while by no means a model, is adequate."⁵²⁰ The dissent then continued, in a passage that had no precedent and, if not for the now shelved reasoning of *Chevron*, would have had no progeny:

The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.⁵²¹

Because the rescission emanated from regulatory views held by the President — because it was less a matter of expertise and science than of values and politics — the Court, suggested the dissent, should step back from its aggressive posture of demanding that the agency justify its decision in neutral, expertise-laden terms to the fullest extent possible.

Justice Rehnquist's opinion responded to the role that presidential policy played in NHTSA's action, I think correctly, by easing rather than eliminating the demand for technical proficiency in the decision-making process. On his view, the presidential election of 1980 could not substitute for the agency's consideration of obvious regulatory alternatives; nor presumably could that election have excused the agency's disregard of contrary evidence. The election, however, could explain the choice, even if not fully analyzed, between reasonable constructions of the available evidence, and the decision, even if not clearly justified, to forego additional efforts to resolve technical uncertainties. Otherwise stated, Justice Rehnquist's opinion accepted — indeed, affirmed — the aptness of relying on political judgment as a basis for administrative action within a broad sphere, while still insisting on certain limits. The precise placement of these boundaries, in any given case, will involve judgment and discretion, not easily subject to judicial articulation. (Justice Rehnquist eschewed the endeavor, stat-

⁵²⁰ *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 58 (1983) (Rehnquist, J., concurring in part and dissenting in part).

⁵²¹ *Id.* at 59.

ing only what fell on either side of the division.) But the approach is warranted, given the (currently underrecognized) value of political judgment in administration on the one hand, and the (still significant) place for expert and constituency opinion on the other.⁵²² On this account, presidential leadership constitutes a reason — but sometimes not a sufficient reason — for courts to sustain administrative action.

The Rehnquist opinion, however, set too low a threshold for finding that the President's policy preferences in fact accounted for specific administrative action. The opinion did no more than assume this matter, disclaiming any need for the President to take public responsibility for the action or for the accompanying administrative record to reflect presidential involvement. The assumption, to be sure, had much to support it in *State Farm*: President Reagan took office with a clear (de)regulatory philosophy, appointed numerous like-minded officials, and sent them a strong message to govern in this manner.⁵²³ But if presidential policy is to count as an affirmative reason to sustain administrative action, in the way Justice Rehnquist suggested, then the relevant actors should have to disclose publicly and in advance the contribution of this policy to the action — in the same way and for the same reasons that they must disclose the other bases for an administrative decision to receive judicial credit.⁵²⁴ The issuance of presidential directives could serve this function; so too could discussion in regulatory documents of presidential input. The critical matter is less the form than the fact of candid and public acknowledgment of the presidential role in shaping an administrative decision. In insisting on this assumption of responsibility before applying Justice Rehnquist's analysis, the courts would affirm the kind of presidential control, as argued earlier, that most advances administrative values.

This change in hard look review, unlike the change I proposed in *Chevron* analysis, would reduce the frequency with which courts reverse administrative action. As compared with the current baseline, courts would have an additional reason to defer to administrative decisions in which the President has played a role — rather than, as in the *Chevron* context, a diminished reason to defer in the absence of presidential involvement. For legal scholars who think that aggressive judicial review alone makes palatable the broad delegation of power to

⁵²² For earlier discussion of the continuing need for expert and constituency views to moderate or otherwise limit the President's role in administrative decisionmaking, see sections IV.C.2-3, pp. 2353-63, above.

⁵²³ See *supra* pp. 2277-80. In his 1980 campaign Reagan attacked not only excessive regulation generally, but the very automobile safety standards whose rescission led to the *State Farm* case. See Lou Cannon, *Reagan, Ignoring Bush, Assails Carter's Policies*, WASH. POST, May 20, 1980, at A8.

⁵²⁴ For discussion of the law requiring agencies to disclose all evidence and reasoning on which they wish to rely in court, see p. 2361, above.

agencies,⁵²⁵ this result will count as sufficient reason to reject the proposal. But at least in connection with hard look review, these scholars have become ever harder to locate. The reigning consensus, as earlier noted, casts hard look review as the main, albeit not sole, culprit of administrative ossification; and the most frequent calls for administrative reform urge relaxation or even elimination of this judicial function.⁵²⁶ Viewed in this context, the rediscovery of Justice Rehnquist's approach in *State Farm* seems a modest yet doubly beneficial solution, relieving the administrative state of some of the burdens attached to hard look review as currently practiced, while affirming (by partly substituting) the alternative mechanism of administrative control that the President offers.

CONCLUSION

For too long, administrative law scholars focused on judicial review and other aspects of legal doctrine as if they were the principal determinants of both administrative process and administrative substance. They are not, and the most welcome change in administrative law scholarship over the past decade or so has been its insistence on this point.⁵²⁷ As this new body of scholarship has shown, much of what is important in administration occurs outside the courthouse doors. It occurs as new views emerge of the appropriate goals and optimal strategies of regulatory programs. Less often stressed, it occurs as bureaucratic institutions, the constituencies with which they deal, and the political environment in which they operate change over time.

This Article has discussed one such extrajudicial development — I think the most important development in the last two decades in administrative process, and a development that also has important implications for administrative substance. This development is the presidentialization of administration — the emergence of enhanced methods of presidential control over the regulatory state. President Reagan penned only the first chapter in this story when he put in place a systematized mechanism for review of agency regulations. President Clinton now has completed writing the next. In pursuit of different regulatory goals and in response to intensifying features of contemporary

⁵²⁵ See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487 (1989).

⁵²⁶ *Supra* pp. 2267, 2344; see Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 364–65 (1986); McGarity, *supra* note 75, at 1453; Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 95 (1995).

⁵²⁷ See generally BREYER, *supra* note 52; JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997); MCGARITY, *supra* note 117; SUNSTEIN, *supra* note 322; W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK (1992); Pildes & Sunstein, *supra* note 3.

politics, Clinton introduced new techniques for controlling administration — exercising directive authority (at the front end of the administrative process) and asserting personal ownership (at the back end of the process) over a wide range of agency actions. The use of these methods, taken together, made presidential significant aspects of administration, both in fact and in the view of Congress, the bureaucracy, and the public. By the close of Clinton's Presidency, a fundamental — and, I suspect, lasting — transformation had occurred in the institutional relationship between the administrative agencies and the Executive Office of the President.

I have argued here that this development, within broad but certain limits, both satisfies legal requirements and promotes the values of administrative accountability and effectiveness. Presidential administration as most recently practiced — including, most controversially, the use of directive authority over executive branch agencies — comports with law not because, as some have claimed, the Constitution commands straight-line control of the administrative state, but because, contrary to prevailing wisdom, Congress generally has declined to preclude the President from controlling administration in this manner. Presidential administration in this form advances political accountability by subjecting the bureaucracy to the control mechanism most open to public examination and most responsive to public opinion. And presidential administration furthers regulatory effectiveness by providing not only the centralization necessary to achieve a range of technocratic goals but also the dynamic charge so largely missing today from both the administrative sphere and the surrounding political system.

None of this is to say that the President either does or should have a free hand in controlling the administrative state, exclusive of other actors. I have stressed often in this Article the continuing roles that Congress, bureaucratic experts, and constituency groups play in administrative governance. I also have stressed the need for the continued participation of these actors, in various contexts and for various purposes, even as I have argued in favor of enhanced presidential control of administration. Both the descriptive and the prescriptive aspects of this Article thus present the rise of presidential administration as part of a broader structure — a new and welcome occurrence, but also one intimately related, and properly so, to other groups and institutions engaged in administrative governance.

The proposals made in the last part of this Article to a great extent concern how courts can assist in striking the appropriate balance among these actors. That judges have played no role in bringing about the development I have described need not and should not mean that they continue to ignore it. Courts historically have used their powers of review over agency action to allocate power among the various institutions vying for administrative power. In keeping with this

function, I have urged the modification of certain administrative law doctrines in ways that will promote presidential control of administration in its most attractive, which means its most public, form while still appropriately bounding the presidential role. Future developments in the relationship between the President and the agencies may suggest different judicial responses; the practice of presidential control over administration likely will continue to evolve in ways that raise new issues and cast doubt on old conclusions. Perhaps what matters most — because it is the predicate of any sensible response — is to notice that something significant has occurred: an era of presidential administration has arrived.