



University of Washington School of Law
Legal Studies Research Paper No. 2015-12

114 MICH. L. REV. (forthcoming 2016)

Controlling Presidential Control

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CONTROLLING PRESIDENTIAL CONTROL

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ABSTRACT

Presidents Ronald Reagan and Bill Clinton laid the foundation for strong presidential control over the administrative state, institutionalizing White House review of agency regulations. Presidential control, however, did not stop there. To the contrary, it has evolved and deepened during the presidencies of George W. Bush and Barack Obama. Indeed, President Obama's efforts to control agency action have dominated the headlines in recent months, touching on everything from immigration to drones to net neutrality.

Despite the entrenchment of presidential control over the modern regulatory state, administrative law has yet to adapt. To date, the most pervasive response both inside and outside the courts has been a reflexive form of "expertise forcing," which simplistically views presidential influence as "bad" and technocratic decision-making as "good." In narrowly focusing on the negative aspects of presidential control, expertise forcing overlooks key benefits that flow from presidential control—namely, political accountability and regulatory coherence. It also ignores the fact that presidential control is here to stay. A more realistic and nuanced response to presidential control is needed. This Article is the first to provide a roadmap for how a wide range of non-constitutional administrative law doctrines can be coordinated to enhance the positive attributes and restrain the negative attributes of presidential control. It identifies three relevant doctrinal categories: statutorily facing rules; transparency-enhancing mechanisms; and process-forcing rules. Doctrinal tools falling into each of these three categories, if used in a coordinated fashion, provide a powerful and much needed framework for responding to the new realities of presidential control and ultimately controlling—without unnecessarily constraining—presidential control.

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INTRODUCTION

In 2001, then-Professor and now Supreme Court Justice Elena Kagan published a foundational article that documented a dramatic rise in presidential control over the regulatory state.¹ Kagan argued that a “distinctive form of administration and administrative control,” which she called “presidential administration,” emerged under Ronald Reagan and surged during Clinton’s Presidency.² Kagan saw the emergence of this strong form of presidential administration as a positive development because, by her account, presidential control promotes political accountability and transparency,³ and it furthers effective and coherent regulatory policy.⁴ Yet, when she published her article in 2001,⁵ Kagan noted that it was unclear whether future developments might raise new problems and challenge old assumptions about presidential administration.⁶

This Article picks up where Kagan left off nearly 14 years ago, demonstrating that presidential control has deepened during the most recent two presidencies and confirming Kagan’s intuition that a reassessment of presidential control would be necessary. As this Article shows, both Republican President George W. Bush and Democratic President Barack Obama have exerted significant control over the regulatory state. Bush often did so by relying upon various forms of covert command. The Bush administration, for example, demonstrated a behind-the-scenes willingness to influence agencies’ scientific findings.⁷ In addition, Bush relied heavily on the Office of Management and Budget (OMB) to engage in aggressive

¹ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

² *Id.* at 2249-50.

³ *Id.* at 2339-2346.

⁴ *Id.* at 2331-2339.

⁵ Kagan’s article was published in June 2001 just six months into George W. Bush’s presidency. As a result, Kagan was able to draw upon only a few preliminary examples from the Bush administration. See *id.* at 2315.

⁶ See *id.* at 2385 (“[T]he practice of presidential control over administration likely will continue to evolve in ways that raise new issues and cast doubt on old conclusions.”).

⁷ See *infra* at Part I.B.1.b (describing the Bush administration’s willingness to involve itself with scientific decisions).

and often veiled White House review of agency rules.⁸ Obama likewise has relied upon the somewhat secretive OMB review process.⁹ However, Obama—taking a cue from Clinton—also has relied heavily on overt command, trying to turn the regulatory state into an extension of his own political agenda by frequently issuing written directives and publicly claiming ownership of regulatory policy.¹⁰ Indeed, many of Obama’s very public efforts to direct the regulatory state have been splashed across the headlines in recent months.¹¹ From net neutrality¹² to drones¹³ to

⁸ The Office of Management and Budget (OMB) is within the Executive Office of the President. See PETER L. STRAUSS ET AL, GELHORN & BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS 213 (11th ed. 2011). Today, White House review of agency regulations is conducted by the Office of Information and Regulatory Affairs (OIRA), which is part of OMB. See *id.* at 214. For one recent account of OIRA’s role that was written by a former Administrator of OIRA, see Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013).

⁹ See *infra* at Part I.B.2 (describing Obama’s influence over the regulatory state).

¹⁰ See *id.*

¹¹ See, e.g., Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES, Nov. 21, 2014, at A1; Gautham Nagash and Brody Mullins, *Net Neutrality: How White House Thwarted FCC Chief*, THE WALL STREET JOURNAL, Feb. 4, 2005; Craig Whitlock, *Business Could Fly Drones Under New FAA, Obama Rules*, WASH. POST, Feb. 15, 2015.

¹² See *Net Neutrality: President Obama’s Plan for a Free and Open Internet*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/net-neutrality> (setting forth Obama’s plan for how the Federal Communications Commission should regulate net neutrality).

¹³ On February 15, 2015, the Federal Aviation Administration (FAA) released details concerning proposed drone regulations. See Overview of Small UAS Notice of Proposed Rulemaking, http://www.faa.gov/regulations_policies/rulemaking/media/021515_sUAS_Summary.pdf. That same day, Obama issued a presidential memorandum in which he called on federal agencies to develop drone-related policies ensuring the protection of privacy and civil liberties. See Memorandum for the Heads of Executive Departments and Agencies, *Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems*, WHITEHOUSE.GOV, Feb. 15, 2015, <http://www.whitehouse.gov/the-press-office/2015/02/15/presidential-memorandum-promoting-economic-competitiveness-while-safegua>.

immigration,¹⁴ Obama has openly and aggressively sought to influence or outright control regulatory policy, frequently harnessing social media to maximize the impact of his efforts.

Both Bush's and Obama's efforts to steer regulatory policy highlight just how complex presidential control has become. Not only does it operate in covert and overt ways, but it is exerted through a variety of different tools. Some of these tools, such as presidential directives and speeches, can help to further key values, including political accountability and regulatory coherence. Yet other tools, including more veiled OMB review and behind-closed-door communications, may undermine transparency and the rule of law, taint agency science and cast doubt on the legitimacy of agencies' decisions.

As of now, administrative law has failed to take the complexity and variety of presidential control into account. Indeed, administrative law doctrine has failed to adapt to presidential control in any meaningful way. This Article aims to move administrative law forward in this area, exploring how a variety of administrative law doctrines below the constitutional level can and should respond to the new status quo.¹⁵ While numerous scholars have weighed in on longstanding debates about the constitutionality of presidential attempts to control the executive branch¹⁶ and whether the

¹⁴ See *The President Speaks on Fixing America's Broken Immigration System*, WHITEHOUSE.GOV, Nov. 11, 2014, <http://www.whitehouse.gov/photos-and-video/video/2014/11/20/president-speaks-fixing-americas-broken-immigration-system> (announcing plan to allow undocumented immigrants to "come out of the shadows and get right with the law").

¹⁵ This Article's focus is on presidential control over the rulemaking process. This Article, accordingly, does not focus on Congressional control. See generally Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006) (studying Congress's role in influencing and controlling agencies). Nor does this Article directly analyze presidential control over agencies' adjudicatory decisions or their enforcement decisions—although both adjudication and enforcement will surface to the degree that they sometimes overlap with agency rulemaking. See *supra* note 162 and accompanying text (discussing the FDA's regulation of Plan B, which involved flavors of both rulemaking and adjudication); see also *supra* note 299 and accompanying text (discussing Obama's involvement in directing DHS's enforcement priorities in the immigration arena).

¹⁶ See, e.g., Robert R. Percival, *Who's In Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487 (2011) (summarizing debate over whether the Constitution requires that the President possess directive authority); Peter L. Strauss, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 759

Constitution demands that the President have authority over all executive actors,¹⁷ little scholarly attention has been given to analyzing how non-constitutional administrative law principles could be used to respond to the new realities of presidential control.¹⁸ This Article represents the first attempt to forth a legal framework for how a variety of non-constitutional administrative law doctrines can be coordinated to enhance the positive *and* restrain the negative aspects of presidential control.¹⁹ It identifies three relevant doctrinal categories: (1) “statutorily facing” rules, which would clarify when, as a matter of statutory construction, the President may either direct or more softly influence agencies’ discretionary decisions; (2)

(2007) (arguing that the President has the constitutional responsibility to oversee agencies but not to directly make decisions for agencies).

¹⁷ Compare STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008) (advocating for the “unitary executive” theory); with Lawrence Lessig & Cass R. Sunstein, *The President and Administration*, 94 COLUM. L. REV. 1 (1994) (arguing against the notion that the framers constitutionalized a unitary vision of the executive).

¹⁸ Outside of the constitutional law context, a few scholars, including the author of this Article, have analyzed how one discrete doctrinal area or another could respond to political control over the regulatory state. See, e.g., Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 1 (2009) (focusing on arbitrary-and-capricious review); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010) (arguing for ex ante disclosure rules); Kagan, *supra* note 1, at 2372-2383 (focusing on *Chevron* deference and hard look review as a means of enhancing presidential administration); Margaret Gilhooley, *Executive Oversight of Administrative Rulemaking: Disclosing the Impact*, 25 IND. L. REV. 299, 301 (1991) (advocating for disclosure rules); CHRISTOPHER EDLEY, *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 169 (1990) (exploring hard look review). These scholars, however, have not considered how disparate doctrines might work together to form a more coordinated response to presidential control—one that elevates the positive and minimizes the negative aspects of presidential control. That is one of the main goals of this Article.

¹⁹ Kagan focused on analyzing how administrative law doctrines—namely, *Chevron* and hard look review—could promote presidential control. See Kagan, *supra* note 1, at 2363 (“courts should attempt, through their articulation of administrative law, to recognize and promote this kind of [presidential] control over agency policymaking.”). She did not focus on how administrative law doctrines might both promote the positive *and* restrain the negative aspects of presidential control, as this Article does.

“transparency-enhancing” mechanisms, which would both incentivize disclosure of presidential control and penalize agencies for hiding presidential influences; and (3) “process-forcing” rules designed to ensure that presidential influence does not undermine the notice-and-comment process. These three doctrinal categories provide a powerful and much needed roadmap for responding to many current controversies swirling around presidential control, including Obama’s recent efforts to influence the FCC’s net neutrality proceeding and his executive action in the immigration arena.

This Article proceeds in four parts. Part I briefly describes how Presidents Ronald Reagan and Bill Clinton played key roles in laying the foundation for strong presidential control over the administrative state.²⁰ Then—drawing on the recent experiences of the George W. Bush and Barack Obama presidencies—Part I shows how presidential control has evolved and deepened over time, turning into an entrenched feature of the regulatory state that transcends party lines.²¹ Part II analyzes three case studies from the Bush and Obama administrations, illustrating how presidential control involves a complex mix of both positive and negative attributes.²² Part III critiques as inadequate the most prevalent reaction both inside and outside of the courts to presidential control—a reflexive kind of “expertise forcing”²³ that simplistically views political influence as “suspect” and expert-driven decision-making as “good.”²⁴ Finally, Part IV sets forth a powerful new roadmap for how different administrative law doctrines can be coordinated to control—but not unnecessarily constrain—presidential control.

²⁰ See *infra* at Part I.A.

²¹ See *infra* at Part I.B.

²² See *infra* at Part II.

²³ In using the term “expertise forcing,” this Article borrows from a phrase originally coined by Jody Freeman and Adrian Vermeule in the context of assessing the Supreme Court’s opinion in *Massachusetts v. EPA*. See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (2007) (describing the Supreme Court’s split 5-4 decision in *Massachusetts* as a specific example of judicial “expertise forcing” whereby courts seek to push for apolitical, expert-driven agency decisions).

²⁴ See *infra* at Part III.

I. THE ENTRENCHMENT OF PRESIDENTIAL CONTROL

Thanks to Elena Kagan and other scholars, the story surrounding presidential control up through the close of Bill Clinton’s presidency is now well known.²⁵ However, much less scholarly attention has been given to what has happened to presidential control during the two most recent presidencies—those of George W. Bush and Barack Obama. This Part begins by briefly recounting the now familiar narrative of how Presidents from Nixon through Clinton laid the foundation for strong presidential control over the regulatory state. Then it tells the next and less familiar chapter of the story, describing how presidential control has evolved post-Clinton during both the Bush and Obama presidencies. As this Part demonstrates, presidential control now constitutes an entrenched feature of the regulatory state, transcending party lines.

A. *Early Presidential Responses to Rulemaking’s Rise*

As rulemaking surged in the 1960s and 1970s and we turned from an age of statutes to an era of regulation,²⁶ Presidents quickly recognized that inherently political policy judgments of great national importance were being made by unelected officials outside of the usual legislative process.²⁷ In response, Presidents began to try to exert more and more influence over

²⁵ See Kagan, *supra* note 1, at 2274-2309 (documenting how Reagan and Clinton played key roles in catapulting presidential administration to prominence); see also Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989) (describing Reagan’s role in establishing presidential management over agency rulemaking).

²⁶ See generally CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 14 (2011) (“The number of statutes [in the 1970s] that established major programs requiring extensive rulemaking was unprecedented.”); Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 755 (1996) (“The period beginning with the election of John F. Kennedy and running through the Nixon-Ford administration marked a tremendous expansion in the ambition of American government and, in particular, in the prominence, use, and development of rulemaking.”); Harold H. Bruff, *Presidential Power Meets Bureaucratic Expertise*, 12 U. PA. J. CONSTIT. L. 461, 470 (2010) (“In the 1970s, Presidents began taking an active role in managing regulation.”).

²⁷ See Strauss, *supra* note 26, at 758 (noting that “the new political importance of rulemaking” led to increased presidential and congressional interest in controlling rulemaking outcomes).

agencies' regulatory decisions through a variety of mechanisms.²⁸ As this section describes, the first major mechanism to take hold was White House review of agency rules—often referred to today as “OMB review” because it is conducted by the Office of Management and Budget. Then during Clinton’s presidency, two additional tools for exerting presidential control gained prominence: presidential directives and presidential attempts to personally claim ownership of agencies’ decisions.

1. White House Review of Agency Rules via OMB

White House review of agency rules is the initial mechanism that Presidents developed to exert control over the rulemaking apparatus.²⁹ Presidents Richard Nixon,³⁰ Gerald Ford³¹ and Jimmy Carter³² all planted early seeds for White House review of agency rules. Yet, in retrospect, it was Ronald Reagan’s inauguration that inaugurated a new era of presidential control.³³ In February 1981, Reagan issued Executive Order 12,291.³⁴ Reagan’s order implemented an ambitious program for White House oversight of regulation that was “unprecedented in its scale,”³⁵ tasking the Director of OMB with taking the lead in overseeing federal

²⁸ This is not to say that Presidents had never previously tried to exert any control over the regulatory state. They had. *See* Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986) (“Since the earliest days of the Republic, presidents have taken the steps they deemed necessary to maintain some control over the activities of the executive branch.”).

²⁹ Bruff, *supra* note 26, at 484.

³⁰ Nixon did so via what was called “Quality of Life” review, a program announced in 1971 that focused almost exclusively on interagency review of proposed EPA regulations. *See* Bruff, *supra* note 25, at 546 & n.80.

³¹ Ford did so via his “Inflation Impact Statement” program, which called on agencies to prepare Inflation Impact Statements for the Executive Office of the President outlining the costs of rules. *See* Bruff, *supra* note 25, at 546-47.

³² *See* Exec. Order No. 12,044, 3 C.F.R. 152 (1978) (revoked by Exec. Order No. 12,291) (requiring agencies to prepare regulatory analyses for significant regulations that might have a major impact on the economy).

³³ *See* Kagan, *supra* note 1, at 2277 (noting that a “sea change” began with Reagan’s inauguration).

³⁴ E.O. 12,291, 3 C.F.R. 127 (1981).

³⁵ Kagan, *supra* note 1, at 2277; *see also* Bruff, *supra* note 25, at 549.

regulation.³⁶ For example, Reagan's order directed executive agencies to evaluate proposed major rules according to regulatory impact analyses—analyses that were to be transmitted to OMB for its review.³⁷ His order also specified certain substantive criteria for agency rulemakings, requiring executive agencies (to the extent permitted by law) to take cost-benefit principles into account when promulgating regulations.³⁸

Despite the fact that Reagan's centralized White House review program stirred up a great deal of controversy,³⁹ Republican President George H.W. Bush retained both of Reagan's executive orders when he entered the White House in 1989.⁴⁰ And when Democratic President Bill Clinton entered the White House in 1993, he too retained many of Reagan's key concepts, such as cost-benefit analysis, when he issued his own order—Executive Order 12,866.⁴¹ Indeed, in issuing Executive Order 12,866, not only did Clinton retain many elements of Reagan's order, but he articulated an even “stronger view than [Reagan] had of the President's authority over the administrative state.”⁴² Clinton's order, for instance, charged both independent and executive agencies with preparing regulatory plans that set forth the agency's “regulatory objectives and priorities and how they relate to the President's priorities.”⁴³ His order also spelled out a process for resolving any conflicts between executive agencies and OMB, expressly giving the President, or the Vice President acting at the request of the

³⁶ See *supra* note 8 and accompanying text (explaining that OMB sits within the Executive Office of the President).

³⁷ E.O. 12,291, 3 C.F.R. 127, at § 3(c) (1981) (“agencies shall prepare Regulatory Impact Analyses of major rules and transmit them, along with all notices of proposed rulemaking and all final rules, to the Director”).

³⁸ *Id.* at §2(b) (“Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society.”).

³⁹ See, e.g., 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 (1981); see also Kagan, *supra* note 1, at 2279 (noting that the Reagan oversight program “provoked sharp criticism, most of which related to perceptions of the scheme's anti-regulatory bias”).

⁴⁰ See *id.* at 2281.

⁴¹ See Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

⁴² Kagan, *supra* note 1, at 2285.

⁴³ *Id.* at § 4(c)(1)(A) (1993) (emphasis added).

President, the ultimate authority to resolve such disagreements.⁴⁴

As Elena Kagan has noted, Clinton’s order said something significant about the changing “nature of the relationship between the agencies and the President.”⁴⁵ Whereas Presidents before Reagan had generally “shunned” direct involvement in agency rulemaking proceedings (and even President Reagan had disclaimed any ability to directly displace the judgment of agency officials), the Clinton order assumed presidential power over “discretionary decisions assigned by Congress to specific executive branch officials.”⁴⁶ Whereas Reagan often tried to “veil his and his staff’s influence over administration,”⁴⁷ Clinton’s order quite openly asserted the authority to make discretionary decisions delegated to agencies,⁴⁸ helping to project the notion that agencies “were [the President’s] and so too were their decisions.”⁴⁹

2. Presidential Directives and Personal Appropriation

Clinton also developed additional means of exerting control. In particular, as Kagan has detailed, Clinton relied heavily upon presidential “directives” and public “appropriation” of agency action to help project the sense that agencies were an extension of the White House.⁵⁰

First, Clinton regularly published formal memoranda—called directives—that publicly directed agencies to propose or adopt rules addressing specific domestic policy issues.⁵¹ Although both Reagan and George H.W. Bush issued some directives during their presidencies,⁵² it was

⁴⁴ Exec. Order No. 12,866, 3 C.F.R. 638, § 7 (1993).

⁴⁵ Kagan, *supra* note 1, at 2289-90.

⁴⁶ *Id.*

⁴⁷ *Id.* at 2333.

⁴⁸ *Id.* at 2289-90.

⁴⁹ *Id.* at 2290.

⁵⁰ *See id.* at 2290-2303 (describing Clinton’s reliance on directives and his frequent appropriation of agency action).

⁵¹ *See id.* at 2290-99.

⁵² *See* Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 996 (2001) (“Presidents Reagan and George H. W. Bush had issued only nine and four presidential directives, respectively, to executive agencies—three of these instructed agencies

Clinton who brought prominence to this practice.⁵³ For example, during a single three-month period in 1999, Clinton, among other things, directed the Secretary of Labor to propose a regulation involving unemployment, directed the promulgation of a rule to “enhance environmental protection of the nation’s waters,” and directed the adoption of “new standards and enforcement policies to enhance the safety of imported foods.”⁵⁴

Second, in addition to relying heavily upon directives, Clinton frequently asserted personal ownership of—or tried to “appropriate”—agency action.⁵⁵ Again, Clinton was not the first president to try to publicly claim credit for certain administrative actions, but, as Kagan has described, Clinton set a “‘new standard’ in communicating directly with the public.”⁵⁶ He did this “event after event, speech after speech” by claiming “ownership of administrative actions, presenting them to the public as his own—the product of his values and decisions.”⁵⁷ One high-profile example involves Clinton’s very public ownership of the FDA’s attempts to curb teen smoking.⁵⁸ Not only did Clinton publicly direct the FDA to promulgate rules on the subject, but he also presided over a Rose Garden ceremony announcing the FDA’s final rules—a ceremony that was widely covered by the press.⁵⁹

to delay or halt the issuance of regulations.”); Kathryn A. Watts, *Regulatory Moratoria*, 61 DUKE L.J. 1833 (2012) (describing moratoria on rulemaking that both Reagan and George H.W. Bush ordered during their presidencies).

⁵³ See Bruff, *supra* note 26, at 470 (“President Clinton brought to prominence a practice that his successors have continued, of direct presidential intervention to spur an agency to take a particular policy initiative.”).

⁵⁴ Kagan, *supra* note 1, at 2295-96.

⁵⁵ See Kagan, *supra* note 1, at 2299-2302.

⁵⁶ *Id.* at 2300 (noting that in the “words of two presidential scholars, ‘Bill Clinton set a new standard’ in communicating directly with the public”).

⁵⁷ *Id.*

⁵⁸ See The President’s News Conference, II Pub. Papers 1237 (Aug. 10, 1995) (announcing Clinton’s efforts to personally “restrict sharply the advertising, promotion, distribution, and marketing of cigarettes to teenagers”); see also Watts, *supra* note 18, at 23 (“Clinton played a very active role in directing” the FDA’s rulemaking).

⁵⁹ See Peter T. Kilborn, *Clinton Approves a Series of Curbs on Cigarette Ads*, N.Y. TIMES, Aug. 24, 1996; see also Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 965-67 (1997) (describing Clinton’s involvement in the

Just as with Clinton’s heavy reliance on directives, Clinton’s frequent attempts to appropriate agency action took place in the public eye, enabling greater public understanding of the President’s role in the regulatory process. Thus, in contrast to the veiled OMB review process that Reagan institutionalized, Clinton’s attempts to control the regulatory state were often transparent, open and, as Kagan put it, “nakedly assertive.”⁶⁰

B. Modern Presidential Control under George W. Bush and Barack Obama

While the story just briefly recounted of the surge in presidential control that occurred up through Clinton is now well known, what has happened during the two most recent presidencies—those of George W. Bush and Barack Obama—is not as familiar. This section picks up there, describing both Bush’s and Obama’s approaches to exerting control over the regulatory state.

As this section demonstrates, Bush—consistent with prior Republican Presidents like Reagan and George H.W. Bush—relied quite heavily on OMB review throughout his presidency, and his administration also demonstrated a willingness to quietly influence agencies’ scientific decisions.⁶¹ Obama too has relied upon OMB review.⁶² In addition, Obama—taking a cue from Clinton—has tried to turn the regulatory state into a very public extension of his own political agenda by relying extensively upon presidential directives and appropriation of regulatory action, often leveraging online media tools to help project the sense that he owns the regulatory state.⁶³

1. George W. Bush

Upon entering the White House, Bush immediately made clear that he planned to exert significant control over the regulatory state. He did this by issuing a memorandum that ordered a temporary moratorium on

tobacco rulemaking).

⁶⁰ Kagan, *supra* note 1, at 2334.

⁶¹ *See infra* at Part I.B.1 (discussing Bush’s efforts to control the regulatory state).

⁶² *See infra* at Part I.B.2 (discussing Obama’s efforts to control the regulatory state).

⁶³ *See id.*

rulemaking “[i]n order to ensure that the President’s appointees ha[d] the opportunity to review any new or pending regulations” from the previous administration.⁶⁴ This memorandum served as an early sign that Bush planned to take a watchful and restrained approach to regulation.

As Bush’s presidency progressed, two primary characteristics of his approach to controlling the regulatory state emerged: (a) extensive reliance on OMB; and (b) a willingness to allow his administration to become involved in agencies’ scientific decisions. As this section describes, much of this control operated behind the scenes. Unlike Clinton, Bush generally did not publicly claim ownership of agency decisions. Instead, Bush’s preferred brand of presidential control mainly involved covert control rather than overt command.

a. A Heavy Reliance on OMB and a Corresponding Lack of Personal Ownership

Perhaps the most notable aspect of Bush’s approach to presidential control involved his heavy reliance on OMB. When he entered the White House in 2001, Bush kept Executive Order 12,866 in place, leaving OMB—and more specifically, the Office of Information and Regulatory Affairs (OIRA) that sits within OMB⁶⁵—with a significant role in overseeing and coordinating the regulatory process. Bush, however, eventually made several major changes to Executive Order 12,866—changes that brought even more regulatory activity within the reach of OMB review and that effectively gave the President more control over the regulatory state.⁶⁶ For example, Bush expanded Executive Order 12,866’s reach to include significant agency guidance documents.⁶⁷ In addition, Bush mandated that each agency designate “one of the agency’s Presidential Appointees to be

⁶⁴ Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702, 7702 (Jan. 24, 2001). All Presidents beginning with Reagan, except George H.W. Bush, have issued short-term regulatory moratoria immediately upon entering office to enable review of their predecessors’ regulations. *See* Watts, *supra* note 52. George H.W. Bush issued a moratorium closer to the end of his presidency, not at the beginning. *See id.*

⁶⁵ *See supra* note 8 (describing how OIRA is part of OMB).

⁶⁶ Exec. Order No. 13,422 §§ 5(b), 7, 3 C.F.R. 191, 191-193 (2008) (revoked 2009).

⁶⁷ *Id.* at § 5(b).

16 *Controlling Presidential Control*, 114 Mich. L. Rev. ____ (Feb. 2016).

its Regulatory Policy Officer.”⁶⁸

Throughout his presidency, Bush relied heavily upon OIRA to actively manage agencies’ rulemakings.⁶⁹ Bush’s OIRA, for instance, developed a “new tool called the ‘prompt letter,’”⁷⁰ which served as a means of “highlight[ing] issues that may warrant the attention of regulators” and “bring[ing] issues to the attention of agencies in a transparent manner that permits public scrutiny and debate.”⁷¹ In the first two out of 15 prompt letters issued by OIRA during the Bush administration,⁷² OIRA prompted the Department of Health and Human Services and the Occupational Safety and Health Administration to give greater priority to two lifesaving issues: One prompt letter urged “acceleration of an ongoing rulemaking concerning the labeling of trans fatty acid content in foods while the other promote[d] use of automated external defibrillators (AEDs) in the workplace.”⁷³ Subsequent prompt letters involved a variety of issues ranging from dietary guidelines to pollution from diesel engines.⁷⁴

⁶⁸ *Id.* at § 7.

⁶⁹ John D. Graham, Paul R. Noe & Elizabeth Branch, *Managing the Regulatory State: The Experience of the Bush Administration*, 33 *FORDHAM URB. L.J.* 953, 971-974 (2006) (describing OIRA’s “more proactive role” under Bush).

⁷⁰ Graham, *supra* note 69, at 972.

⁷¹ Office of Management and Budget News Release, *OMB Encourages Lifesaving Actions by Regulators*, Sept. 18, 2001, <http://www.reginfo.gov/public/prompt/2001-35.html>. OIRA’s statement that prompt letters were designed to enable “public scrutiny” fits with OIRA Administrator John Graham’s overall efforts to strengthen transparency during the Bush administration. See John D. Graham, Memorandum for OIRA Staff (Oct. 18, 2001), http://www.whitehouse.gov/omb/inforeg/oira_disclosure_memo-b.html (stating that “the transparency of the OIRA’s regulatory review process is critical”). However, as Nina Mendelson has pointed out, despite Graham’s emphasis on transparency, OIRA’s record of disclosure was less than stellar during the Bush years. See Mendelson, *supra* note 18, at 1150-51.

⁷² See *OIRA Prompt Letters*, <http://www.reginfo.gov/public/jsp/EO/promptLetters.jsp>.

⁷³ Office of Management and Budget News Release, *OMB Encourages Lifesaving Actions by Regulators*, Sept. 18, 2001, <http://www.reginfo.gov/public/prompt/2001-35.html>.

⁷⁴ See *OIRA Prompt Letters*, *supra* note 72.

OIRA under Bush also issued 27 “return” letters⁷⁵ and 15 “review” letters to agencies.⁷⁶ “Return” letters are letters from OIRA to an agency requesting that the agency reconsider a particular draft rule for a variety of possible reasons, such as OIRA’s determination that the rule is not “consistent with the President’s policies and priorities.”⁷⁷ “Review letters,” in contrast, are letters issued at different stages of the rulemaking process; they might offer OIRA’s advice, urge an agency to consider alternatives, or request that the agency perform additional regulatory analysis.⁷⁸

With few exceptions, the numerous prompt, return and review letters issued by OIRA during the Bush years spoke in highly technical terms and did not connect the President or political influences directly to OIRA’s regulatory review process.⁷⁹ Nor did Bush regularly make speeches or announcements—as Clinton did—claiming personal credit for various regulatory actions. Indeed, Bush’s preferred brand of presidential control involved more covert control than overt command.

As one illustrative example, consider what happened in the wake of the Supreme Court’s 2007 decision on global warming, *Massachusetts v. EPA*.⁸⁰ In *Massachusetts*, the Court held in a politically charged 5-4 decision that the EPA possessed statutory authority under the Clean Air Act to regulate certain emissions from new motor vehicles and that the EPA’s policy-driven reasons for declining to regulate were inadequate.⁸¹ After the Court handed down its decision, the EPA went back to the drawing board, drafting a 300-page document that proposed emission regulations.⁸² When

⁷⁵ See *OIRA Return Letters*, <http://www.reginfo.gov/public/do/eoReturnLetters>.

⁷⁶ See *OIRA Review Letters*, <http://www.reginfo.gov/public/jsp/EO/postReviewLetters.jsp>.

⁷⁷ See *OIRA Return Letters*, *supra* note 75.

⁷⁸ *OIRA Letters*, <http://www.reginfo.gov/public/jsp/EO/letters.jsp>.

⁷⁹ One notable exception exists. See Letter from OIRA Administrator on Advance Notice of Proposed Rulemaking, Regulating Greenhouse Gas Emissions Under the Clean Air Act, July 10, 2008, http://www.reginfo.gov/public/postreview/OIRA_letter_to_EPA_7_10_08.pdf (noting the President’s view that important decisions involving global warming should be made by elected officials, not by unelected bureaucrats).

⁸⁰ 549 U.S. 497 (2007).

⁸¹ *Id.*

⁸² See Heidi Kitrosser, *Accountability and Administrative Structure*, 45

the EPA emailed the draft rule to OIRA for pre-rulemaking review, the EPA was met with resistance: In an attempt to avoid triggering docketing requirements,⁸³ OIRA refused to open the EPA's email and demanded its retraction.⁸⁴ Notably, all of this took place out of the public eye. Indeed, the public learned of OIRA's refusal to open the email message only as a result of a *New York Times* story published six months after the incident.⁸⁵ When Congress caught wind, it sought access to the e-mail and related communications," but the White House balked and "claimed executive privilege."⁸⁶

As another example of the Bush White House's hesitancy to publicly claim credit for agencies' decisions, consider how Bush-era agencies frequently issued significant proposed and final rules right before or after major holidays, such as Thanksgiving and Christmas, when the public's attention was diverted elsewhere.⁸⁷ The Bush administration quietly issued more than 280 proposed and final regulations in the holiday period between December 23, 2002 and January 3, 2003—about 160 to 180 more rules than that administration issued in an average week.⁸⁸ One of these rules—issued on Christmas eve in 2002—"repealed Clinton-era protections against road-building and allowed claimants to use an 1866 mining-related statute to open up new roads in federal protected areas."⁸⁹

WILLAMETTE L. REV. 607, 608 (2008) (describing the Bush administration's response to the Court's decision in *Massachusetts*).

⁸³ See Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 337 (2014) (explaining OIRA's docketing requirements).

⁸⁴ See Kitrosser, *supra* note 82, at 609; see also Felicity Barringer, *White House Refused to Open E-mail on Pollutants*, N.Y. TIMES, June 25, 2008, at A15; Juliet Eilperin, *White House Tried to Silence EPA Proposal on Car Emissions*, WASH. POST, June 26, 2008, at A2.

⁸⁵ See Barringer, *supra* note 84 ("The refusal to open the e-mail has not been made public."); see also Eilperin, *supra* note 84 ("The New York Times reported Wednesday that White House officials never opened EPA's e-mail.").

⁸⁶ Kitrosser, *supra* note 82, at 609.

⁸⁷ Robin Kundis Craig, *The Bush Administration's Use and Abuse of Rulemaking, Part II: Manipulating the Federal Register*, ADMIN. & REG. L. NEWS, Fall 2003, at 6, 15.

⁸⁸ *Id.* at 5-6, 15.

⁸⁹ *Id.*

Clearly, this holiday timing was not designed to enable Bush to take public ownership of the decisions as Clinton frequently did in his Rose Garden speeches and public announcements.⁹⁰

b. A Willingness to Influence Scientific Decisions

A second noteworthy aspect of Bush's approach to controlling the regulatory state was his administration's willingness to play a direct role in scientific decisions.⁹¹ Numerous examples of the Bush administration's alleged involvement in agencies' scientific decisions exist.⁹² For example, in 2003, EPA documents suggested that the Bush White House "attempted to rewrite an EPA report to play down the risks of global warming."⁹³ In 2004, more than 60 prominent scientists, including 20 Nobel laureates, asserted that "the Bush administration [] systematically distorted scientific fact in the service of policy goals on the environment, health, biomedical research and nuclear weaponry."⁹⁴ The group of scientists cited "significant evidence that the scope and scale of the manipulation, suppression and misrepresentation of science by the Bush administration is unprecedented."⁹⁵ Subsequently, in 2005, a NASA official accused the administration of trying to keep him from discussing the effects of global

⁹⁰ See *id.* (arguing that Bush hid controversial regulations "in massive Federal Register publications immediately before and after major holidays, when public attention is diverted.").

⁹¹ See generally STRAUSS, *supra* note 8, at 690 ("The [Bush] administration was plagued with recurring criticism that political appointees interfered with the work of government scientists."); Sidney A. Shapiro, "Political" Science: Regulatory Science After the Bush Administration, 4 DUKE J. CONST. L. & PUB. POL'Y 31, 32 (2009) ("One of the primary ways that the Bush Administration has interfered with agency science has been to change scientific results or to repress them.").

⁹² Michele Estrin Gilman, *The President As Scientist-in-Chief*, 45 WILLAMETTE L. REV. 565, 568 (2009) ("[s]cientists and the media have raised dozens of allegations of scientific interference by the Bush administration.").

⁹³ Jeremy Symons, *How Bush and Co. Obscure the Science*, WASH. POST, July 13, 2003, at B04.

⁹⁴ See James Glanz, *Scientists Say Administration Distorts Facts*, N.Y. TIMES, Feb. 19, 2004, at A18; Guy Gugliotta & Rick Weiss, *President's Science Policy Questioned; Scientists Worry That Any Politics Will Compromise Their Credibility*, WASH. POST, Feb. 19, 2004, at A02.

⁹⁵ Symons, *supra* note 93.

warming.⁹⁶ And an associate FDA commissioner who retired in 2005 asserted that “top Bush administration officials were so reflexively opposed to nearly all regulations that even when consumer groups, industry associations, scientists and drug agency officials all agreed that new rules were needed, top officials rejected them.”⁹⁷

This strong sense of scientific interference—which was widely reported by the news media⁹⁸—was unprecedented; no prior President faced such widespread charges of regular interference with agencies’ scientific decisions. Indeed, after Bush left office, the *New York Times* described Bush’s presidency as representing “eight years of stark tension between science and government.”⁹⁹

The Bush administration disputed charges that it sought to meddle with agencies’ scientific decisions,¹⁰⁰ so it is admittedly difficult to say with certainty the precise degree to which the Bush administration actually engaged in widespread interference with scientific decisions. Nonetheless, even if only some of the allegations are true, they suggest the emergence of yet another mechanism through which presidential control occurs.

2. Barack Obama

When Barack Obama entered the White House in 2009, some predicted that he might loosen the White House’s grip on the regulatory state.¹⁰¹ Indeed, Obama himself suggested as much. In his inaugural address, he promised to “restore science to its rightful place,”¹⁰² and soon

⁹⁶ Juliet Eilperin, *Putting Some Heat on Bush; Scientist Inspires Anger, Awe for Challenges on Global Warming*, WASH. POST, Jan. 19, 2005, at A17.

⁹⁷ Gardiner Harris & William J. Broad, *Scientists Welcome Obama’s Words but Must Wait for Action*, N.Y. TIMES, Jan. 21, 2009, at A23.

⁹⁸ See *supra* notes 93-97 (citing news media coverage); see also Gilman, *supra* note 92, at 604-605.

⁹⁹ Harris, *supra* note 97.

¹⁰⁰ See, e.g., Andrew C. Revkin, *Bush’s Science Aide Rejects Claims of Distorted Facts*, N.Y. TIMES, April 3, 2004.

¹⁰¹ Cf. Heinzerling, *supra* note 83, at 338 (“The assertiveness and opacity of OIRA during the George W. Bush administration led many to hope that when Barack Obama came into office, things would change for the better.”).

¹⁰² *President Barack Obama’s Inaugural Address*, WHITEHOUSE.GOV, Jan. 21, 2009, <http://www.whitehouse.gov/blog/inaugural-address>.

thereafter he issued a memorandum on “Scientific Integrity.”¹⁰³ In addition, he quickly revoked Bush’s Executive Order 13,422, restored Executive Order 12,866 to its earlier form under Clinton,¹⁰⁴ and ordered his OMB Director to undertake an assessment of the regulatory review process with the goal of producing recommendations for a new order on regulatory review.¹⁰⁵

Yet, now that the first six years of Obama’s presidency are behind us, it is clear that Obama has not loosened the White House’s reins over the regulatory state. In fact, if anything, Obama has elevated White House control over agencies’ regulatory activity to its highest level ever, relying upon a mixed of covert control and overt command. Obama has done this by leveraging existing tools for regulatory control like OMB review and presidential directives and developing new tools, including the exploitation of online media and so-called White House “czars.”

a. Assertive OMB Review

When Obama began his presidency by ordering his OMB Director to produce recommendations for a new Executive Order on regulatory review,¹⁰⁶ some hoped that the new order would cut back on strong presidential control. Ultimately, however, that did not prove to be the case. Indeed, when Obama finally issued his new executive order—Executive Order 13,563—in January 2011,¹⁰⁷ he merely supplemented and reaffirmed the principles of Clinton’s Executive Order 12,866.¹⁰⁸ Little that Obama set

¹⁰³ *Scientific Integrity, Memorandum for the Heads of Executive Agencies and Departments*, Mar. 9, 2009, http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/.

¹⁰⁴ Exec. Order. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009).

¹⁰⁵ See Presidential Memorandum of January 30, 2009, 74 Fed. Reg. 5977 (Jan. 30, 2009) (ordering “the Director of OMB, in consultation with representatives of regulatory agencies, as appropriate, to produce within 100 days a set of recommendations for a new Executive Order on Federal regulatory review.”).

¹⁰⁶ See Presidential Memorandum of January 30, 2009, 74 Fed. Reg. 5977 (Jan. 30, 2009).

¹⁰⁷ Exec. Order 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

¹⁰⁸ See *id.* at § 1(b) (“This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993.”).

forth in Executive Order 13,563 was new.¹⁰⁹

Nonetheless, Obama's reliance on OMB review has been even more intense—and even more controversial—than it was during the Clinton years.¹¹⁰ Two aspects of Obama's aggressive approach to OMB review are notable. First, under Obama, OIRA has seized upon delay—delay that often extends far beyond the presumptive 90-day period of review set forth in Executive Order 12,866¹¹¹—as a significant means of aggressively controlling the regulatory state.¹¹² Lisa Heinzerling, who worked for the EPA from January 2009 to December 2010, has described this delay. According to Heinzerling, under the Obama administration, OIRA has thwarted regulatory activity by silently sitting on rules,¹¹³ and, in some cases, delaying initiation of the review process by refusing to accept draft rules from agencies.¹¹⁴ Other Obama officials have reported similar concerns about delay. For example, in 2013, several Obama officials reported to the *Washington Post* that they were instructed to hold off on submitting proposed rules to OMB for review in advance of the 2012 election in order to avoid controversy prior to the election.¹¹⁵ According to

¹⁰⁹ See Heinzerling, *supra* note 83, at 340-41 (“The single most notable fact about the new order, EO 13,563, is how not-new it was.”).

¹¹⁰ *Id.* at 333 (“[I]t is now possible in hindsight to say that the Clinton years “were relatively quiet [and controversy-free] ones for OIRA review”).

¹¹¹ Executive Order 12,866 established a presumptive 90-day period for OMB review, with an extension to 120 days if both the agency and OMB agree. See Exec. Order No. 12,866, §§ 6(b)(2), 3 C.F.R. 638 (1993).

¹¹² See Lisa Heinzerling, *A Pen, A Phone, and the U.S. Code*, 103 GEO. L.J. ONLINE 59, 60-61 (2014) (“A 2013 report published for the Administrative Conference of the United States found that the average from 1994 to 2011 for the length of an OIRA review was 50 days. Yet the average period for such review in 2012 was 79 days, and the average for the first half of 2013 was 140 days. As of February 18, 2014, 114 rules were under review, and 58 (over half) had been there more than 90 days. About one-third of the rules (17 in total) had been there for over six months. One had languished at OIRA since 2010.”).

¹¹³ See Heinzerling, *supra* note 112, at 61 (“we have direct evidence that some rules have been not only delayed, but stopped.”).

¹¹⁴ See Heinzerling, *supra* note 83, at 358-360.

¹¹⁵ Juliet Eilperin, *White House delayed enacting rules ahead of 2012 election to avoid controversy*, WASH. POST, Dec. 13, 2014 (“The White House systematically delayed enacting a series of rules on the environment, worker safety

these Obama officials, the stalled rules included regulations involving “crucial elements of the Affordable Care Act, what bodies of water deserved federal protection, pollution control for industrial boilers and limits on dangerous silica exposure in the workplace.”¹¹⁶

Second, the Obama administration has not followed various transparency requirements set forth in Executive Order 12,866, such as the requirement that documents exchanged between OMB and the agency during review are to be made publicly available at the end of the rulemaking.¹¹⁷ Indeed, Heinzerling’s experiences working for the Obama administration’s EPA have led her to conclude that OMB “does not explain in writing to agencies that items on their regulatory agenda do not fit with the President’s agenda,” and it does not “keep a publicly available log explaining when and by whom disputes between the OMB and the agencies were elevated.”¹¹⁸ Indeed, with one notable exception,¹¹⁹ OMB has not returned rules to agencies with a public explanation of why the rules have not passed OMB review.¹²⁰ Thus, the Obama administration has used OMB review as a form of covert control.

b. Extensive Reliance on Directives

Other aspects of Obama’s approach to controlling the regulatory state have been much more transparent, falling into the category of overt control. In particular, Obama—like Clinton—has relied extensively on presidential directives.¹²¹ Such directives generally have taken the form of written memoranda posted to WhiteHouse.gov and published in the Federal

and health care to prevent them from becoming points of contention before the 2012 election.”).

¹¹⁶ *Id.*

¹¹⁷ See Exec. Order No. 12,866, §§ 6(b)(4)(C), (D), 3 C.F.R. 638 (1993).

¹¹⁸ Lisa Heinzerling, *Who Will Run the EPA?*, 30 YALE J. ON REG. 39 (2013)

¹¹⁹ The exception involves Obama’s withdrawal of the EPA’s ozone standards via a written return letter from OIRA, which is discussed *supra* at Part II.B.

¹²⁰ *Id.*

¹²¹ See Gregory Korte, *Obama issues ‘executive orders’ by another name*, USA TODAY, Dec. 17, 2014, <http://www.usatoday.com/story/news/politics/2014/12/16/obama-presidential-memoranda-executive-orders/20191805/> (reporting that “Obama has made prolific use of memoranda despite his own claims that he’s used his executive power less than other presidents.”).

Register.¹²²

Consider just two illustrative examples—both of which were issued in the first few weeks of Obama’s presidency. First, just days after entering the White House, Obama tackled the issue of fuel efficiency standards for model year 2011 passenger cars and light trucks, requesting that the Department of Transportation (DOT) finalize fuel efficiency standards.¹²³ Obama publicly announced this directive “at the White House while flanked by the head of the DOT, as well as other key members of his energy and environment teams.”¹²⁴ Second, on February 5, 2009, Obama issued a memorandum that “requested” that the Department of Energy (DOE) finalize legally required efficiency standards for a broad class of residential and commercial products.¹²⁵

Obama’s heavy reliance on directives has continued throughout his presidency. In the first seven months of 2014 alone, Obama: gave a public speech about retirement savings while surrounded by steel workers in Pennsylvania and signed a memorandum that directed the Secretary of

¹²² They differ in form from the OIRA prompt, review and return letters that Bush frequently relied upon as a means of proactively steering agency regulation. *See supra* notes 71-78 and accompanying text (discussing the Bush administration’s use of OIRA prompt letters). Indeed, under Obama, OIRA has publicly issued just one review letter and just one return letter. *See Review Letters*, <http://www.reginfo.gov/public/jsp/EO/postReviewLetters.jsp> (listing one Obama-era review letter from 2010); *OIRA Return Letters*, <http://www.reginfo.gov/public/do/eoReturnLetters> (listing one Obama-era return letter from 2011). Obama’s OIRA has not publicly issued any prompt letters to agencies. *See OIRA Prompt Letters*, <http://www.reginfo.gov/public/jsp/EO/promptLetters.jsp>.

¹²³ *See Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011*, 74 Fed. Reg. 14,196 (Mar. 30, 2009).

¹²⁴ Watts, *supra* note 18, at 26-27; *see also* John M. Broder & Peter Baker, *Obama’s Order Likely To Tighten Auto Standards*, N.Y. TIMES, Jan. 26, 2009, at A1; Steven Mufson & Juliet Eilperin, *Obama Issues Orders Toward More Fuel-Efficient Cars*, WASH. POST., Jan. 27, 2009, at A4. Not surprisingly, the National Highway Traffic Safety Administration (NHTSA), which is under DOT, heeded Obama’s directions, promptly issuing final standards for model year 2011 in March 2009. *See Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011*, 74 Fed. Reg. 14,196 (Mar. 30, 2009). Indeed, the agency’s final rule specifically called out the President’s January 2009 memorandum. *See id.*

¹²⁵ *Appliance Efficiency Standards*, 74 Fed. Reg. 6537 (Feb. 5, 2009).

Treasury to create a myRA retirement program;¹²⁶ gave a public speech at a Safeway Distribution Center in Maryland and issued a written report in which he directed the EPA and DOT to issue new fuel efficiency standards for heavy trucks;¹²⁷ delivered a speech at the White House about the importance of raising minimum wages and then issued an Executive Order requiring that the minimum wage for workers on new federal contracts be raised;¹²⁸ directed the Secretary of Labor to update overtime pay

¹²⁶ See Remarks by the President on Retirement, Jan. 29, 2014, <http://www.whitehouse.gov/photos-and-video/video/2014/01/29/remarks-president-retirement-security#transcript> (noting in a speech in Pennsylvania that he was “going to sign a presidential memorandum that directs the U.S. Treasury Secretary, Jack Lew, to create a new way for working Americans to start their own retirement savings”); Presidential Memorandum—Retirement Savings Security, Jan. 28, 2014, <http://www.whitehouse.gov/the-press-office/2014/01/28/presidential-memorandum-retirement-savings-security> (directing Treasury to “finalize the development of a new retirement savings security that can be made available through employers to their employees”). Treasury followed through, ultimately promulgating a final rule in December 2014. See Regulations Governing Retirement Savings Bonds, 79 Fed. Reg. 74023 (Dec. 15, 2014) (noting that the final rules are in response to the President’s directive).

¹²⁷ *President Obama Speaks on Improving Fuel Efficiency for American Trucks*, Feb. 18, 2014, WHITEHOUSE.GOV, <http://www.whitehouse.gov/photos-and-video/video/2014/02/18/president-obama-speaks-improving-fuel-efficiency-american-trucks#transcript> (“Today, I’m directing the Secretary of Transportation ... and ... the Administrator of EPA—two outstanding public servants—[that] their charge, their goal is to develop fuel economy standards for heavy-duty trucks that will take us well into the next decade, just like our cars.”); *Improving the Fuel Efficiency of American Trucks*, WHITEHOUSE.GOV, Feb. 18, 2014, at 7, <http://www.whitehouse.gov/sites/default/files/docs/finaltrucksreport.pdf> (“Today, the President is directing the EPA and ... NHTSA[] to develop and issue the next phase of medium and heavy duty vehicle fuel efficiency and greenhouse gas (GHG) standards by March 2016.”).

¹²⁸ See Executive Order 13658, Minimum Wage for Contractors, 79 Fed. Reg. 9851 (Feb. 20, 2014) (requiring federal contractors to pay their federally funded employees on new contracts a fair wage of at least \$10.10 an hour); see also *President Obama Speaks on Raising the Minimum Wage*, Feb. 12, 2014, <http://www.whitehouse.gov/photos-and-video/video/2014/02/12/president-obama-speaks-raising-minimum-wage#transcript> (delivering speech at the White House about raising the minimum wage). The Department of Labor complied with Obama’s directions, issuing a final rule in October 2014 that establishes a minimum wage for federal contractors. See *Establishing a Minimum Wage for Contractors*, 79 Fed. Reg. 60634 (Oct. 7, 2014) (“In this final rule, the Department of Labor issues final regulations to implement Executive Order 13658,

provisions;¹²⁹ directed various federal agencies via a presidential memorandum to improve the entry process for international arrivals;¹³⁰ gave a speech at the White House about making college more affordable and signed a memorandum directing the Department of Education to change its regulations governing the repayment of student debt;¹³¹ and issued an Executive Order that prohibited discrimination based on gender identity and sexual orientation in federal employment.¹³² These directives illustrate how Obama—taking a cue from Clinton—relied extensively upon positive command to turn the administrative state into an extension of the White House.

Establishing a Minimum Wage for Contractors, which was signed by President Barack Obama”).

¹²⁹ See Memorandum for the Secretary of Labor, *Updating and Modernizing Overtime Regulations*, March 13, 2014, <http://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations> (directing the Secretary of Labor “to propose revisions to modernize and streamline the existing overtime regulations”).

¹³⁰ See Memorandum for the Heads of Executive Departments and Agencies, *Establishing a National Goal and Developing Airport Specific Action Plans to Enhance the Entry Process for International Travelers to the United States*, May 22, 2014, <http://www.whitehouse.gov/the-press-office/2014/05/22/presidential-memorandum-establishing-national-goal-and-developing-airpor> (directing agencies to “remove barriers to traveler entry while continuing to protect our national security, public health, and safety”).

¹³¹ See Presidential Memorandum, *Federal Student Loan Repayments*, June 9, 2014, <http://www.whitehouse.gov/the-press-office/2014/06/09/presidential-memorandum-federal-student-loan-repayments> (directing that within one year, “the Secretary of Education shall propose regulations that will allow” certain students to cap their federal student loan payments at 10 percent of their income); see also *Remarks by the President on Opportunity for All: Making College More Affordable*, June 9, 2014, <http://www.whitehouse.gov/the-press-office/2014/06/09/remarks-president-opportunity-all-making-college-more-affordable> (“I’m directing our Secretary of Education, Arne Duncan, to give more Americans who are already making their loan payments a chance to cap those payments at 10 percent of their income.”).

¹³² See Executive Order 13,672, 79 Fed. Reg. 42971 (July 23, 2014) (issuing order to “prohibit discrimination and take further steps to promote economy and efficiency in Federal Government procurement by prohibiting discrimination based on sexual orientation and gender identity”).

c. *Public Appropriation Using Online Media*

Obama has relied heavily upon yet another tool to exert overt control over the regulatory state: online media tools. Clinton had to rely on the mainstream media to spread his message and to publicly appropriate agency action.¹³³ Obama, however, has leveraged Whitehouse.gov, his own online videos, social media, Tumblr and blog posts to publicly appropriate agency decisions to an unprecedented degree, fueling the notion that agencies are simply a reflection of his own policies and goals.¹³⁴

As just one example, consider a 37-page written report posted to Whitehouse.gov at the end of 2014 titled: “A Year of Action: A Final Progress Report on the Obama Administration’s Actions to Help Create Opportunities for All Americans.”¹³⁵ The report details more than 80 “executive actions” taken by the Obama administration in 2014, and it notes that the actions were designed to “help grow the economy, create jobs, address the threat of climate change, and strengthen the middle class.”¹³⁶ The clear intent of the report is to help Obama project the sense that—despite congressional inaction¹³⁷—he is taking action through the regulatory state. Tellingly, the report sometimes omits the names of the relevant agencies involved, speaking instead of “the Administration” in a generic

¹³³ Cf. Drake Martinet, *Egypt, Al Gore and the .XXX Domain—Bill Clinton Keynotes ICANN in San Francisco*, ALL THINGS DIGITAL, March 17, 2011, <http://allthingsd.com/20110317/egypt-al-gore-and-the-xxx-domain-bill-clinton-keynotes-icann-in-san-francisco/> (noting Clinton’s comment that he became President at the “dawn of the Internet age,” entering the presidency at a time when only 50 websites existed).

¹³⁴ See, e.g., The White House Blog, <http://www.whitehouse.gov/blog> (providing White House blog posts about presidential activity); White House Tumblr, <http://whitehouse.tumblr.com/> (documenting “things going around the White House that we just had to share with you”).

¹³⁵ *A Year of Action: A Final Progress Report on the Obama Administration’s Actions to Help Create Opportunities for All Americans*, <http://www.whitehouse.gov/sites/default/files/docs/yoadec2014.pdf>.

¹³⁶ *Id.*

¹³⁷ Cf. Michael D. Shear, *For Obama, More Audacity and Fulfillment of Languishing Promises*, N.Y. TIMES, Dec. 17, 2014, <http://www.nytimes.com/2014/12/18/us/politics/cuba-action-is-obamas-latest-step-away-from-a-cautious-approach.html> (“Frustrated by congressional inaction and Republican efforts to block legislation, the president has increasingly pushed the limits of his executive authority in domestic and international policy making”).

fashion so as to blur the line between the relevant agency and the Obama administration more generally.¹³⁸

Obama's report was accompanied by an online video showing Obama talking about the executive actions he took during the year and by "shareable graphics and tweets" to make it easy for others "to help spread the word."¹³⁹ This reliance on online media pervades his attempts to claim ownership over the regulatory state. In June 2014, for example, when Obama posted a memorandum to Whitehouse.gov directing the Department of Education to propose regulations that would allow student loan borrowers to cap their student loan payments,¹⁴⁰ his administration simultaneously posted a video of Obama speaking passionately about the issue of student debt on the White House blog. The video depicts Obama standing in front of a crowd of student borrowers and sharing his own student debt experiences, noting that he and his wife Michelle Obama had finished paying off their own student loans "just 10 years ago."¹⁴¹ The blog features a photo of Obama signing the memorandum while flanked by various student loan borrowers.¹⁴² Also prominently posted on the left side of the blog post were various "share buttons," enabling easy sharing of the post via email, Twitter and Facebook.¹⁴³

d. Regulatory Czars

Finally, Obama also has brought prominence to one more tool for

¹³⁸ See, e.g., *A Year of Action*, *supra* note 135 ("President Obama directed the Administration to set new standards to cut fuel use and carbon pollution from median and heavy-duty vehicles"); *id.* (noting that the "President prioritized the allocation of scarce enforcement resources" in the immigration arena but failing to note that the actual enforcement priorities were put into place by a Department of Homeland Security memo, not via any written presidential order).

¹³⁹ *Year of Action*, <http://www.whitehouse.gov/year-of-action>.

¹⁴⁰ See *supra* note 131 and accompanying text (noting the President's memorandum on student loans).

¹⁴¹ *President Obama on Student Loan Debt: "No Hardworking Young Person Should Be Priced Out of a Higher Education,"* <http://www.whitehouse.gov/blog/2014/06/09/president-obama-student-loan-debt-no-hardworking-young-person-should-be-priced-out-h>.

¹⁴² *Id.*

¹⁴³ See *id.* (providing "share buttons" to enable the President's message to spread through social media).

exerting control over the regulatory state: the appointment of so-called “regulatory czars” to White House policy positions. Although czars have “solid roots in earlier administrations,” Obama has relied on regulatory czars more heavily than other Presidents.¹⁴⁴ Obama’s czars, tasked with overseeing policy in particular substantive areas,¹⁴⁵ have included, among many others, an AIDS czar, a Safe Schools czar, a Health czar, an Energy and Environment czar, and an Auto Recovery czar.¹⁴⁶ He also recently appointed an Ebola czar.¹⁴⁷

While the Obama administration has downplayed the significance of so-called “czars,”¹⁴⁸ legal scholars have taken a different stance, arguing that Obama’s czars are “powerful, engaged in policy and not merely in public relations.”¹⁴⁹ Czars are of interest, in other words, because of “the sort of policymaking they do” outside of the usual agency-structure, helping Obama to “advance ambitious policy agendas with respect to health care, climate, urban affairs, and other matters.”¹⁵⁰ Indeed, the White House itself has expressly explained that some officials labeled by the press and others as “czars” play a role in ensuring regulatory coherence, helping to coordinate “the work of agencies on President Obama’s key policy priorities: health insurance reform, energy and green jobs, and building a new foundation for long-lasting economic growth.”¹⁵¹

¹⁴⁴ STRAUSS, *supra* note 8, at 761.

¹⁴⁵ See Aaron J. Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 *FORDHAM L. REV.* 2577, 2582-83 (2011) (noting that Obama’s czars are “at work in the White House Office” and “tasked by the President to oversee policy in a particular substantive area”).

¹⁴⁶ See *List of Obama administration ‘czars,’* Jan. 7, 2011, <http://www.foxnews.com/politics/2011/01/07/list-obama-administration-czars/>.

¹⁴⁷ See Julie Hirshfield Davis, *Before Ebola, New Czar Handled Political Crises*, *N.Y. TIMES*, Oct. 18, 2014, at A12.

¹⁴⁸ Anita Dunn, *The Truth About Czars*, *THE WHITE HOUSE BLOG*, Sept. 16, 2009, <http://www.whitehouse.gov/blog/The-Truth-About-Czars> (“Just to be clear, the job title ‘czar’ doesn’t exist in the Obama Administration. Many of the officials cited [as czars] by conservative commentators have been confirmed by the Senate. Many hold policy jobs that have existed in previous Administrations.”).

¹⁴⁹ Saiger, *supra* note 145, at 2582.

¹⁵⁰ *Id.* at 2582 & 2612.

¹⁵¹ Dunn, *supra* note 148.

As this Part has described, the tools available for presidential control are now numerous and include: assertive even if veiled White House review via OMB; presidential directives; personal ownership of agencies' decisions; and the appointment of policy czars. While Bush and Obama relied upon a different mix of these tools in trying to exert control over the regulatory state, both Presidents sought to exert significant influence over regulatory activity. The experiences of the Bush and Obama administrations, accordingly, help to demonstrate how presidential control has indeed become an embedded feature of the regulatory state—just as Elena Kagan posited some 14 years ago that it would.

The evolution of presidential control that occurred during the Bush and Obama years also demonstrates the accuracy of another prediction Kagan made in 2001—namely, that future developments might necessitate a reassessment of whether or not presidential control in fact represents a positive development for the administrative state.¹⁵² The next part of this Article turns to this question, using three different case studies from the Bush and Obama administrations to demonstrate that not all forms of presidential control are equal. Today's presidential control involves a complex mix of positive and negative attributes.

II. THREE CASE STUDIES FROM THE GEORGE W. BUSH AND BARACK OBAMA ADMINISTRATIONS

This Part analyzes three high-profile case studies from the Bush and Obama administrations—one involving the FDA's regulation of the emergency contraceptive Plan B;¹⁵³ one involving the EPA's regulation of ground-level ozone;¹⁵⁴ and one involving the FCC's regulation of net neutrality.¹⁵⁵ The three case studies help to demonstrate that not all forms of presidential control are equal; some forms of presidential control promote positive values like political accountability and regulatory coherence, while other forms taint agency science, prompt agencies to

¹⁵² *See id.* at 2385 (“[T]he practice of presidential control over administration likely will continue to evolve in ways that raise new issues and cast doubt on old conclusions.”).

¹⁵³ *See infra* at Part II.A.

¹⁵⁴ *See infra* at Part II.B.

¹⁵⁵ *See infra* at Part II.C.

ignore the law and undermine transparency.

A. *The FDA and Plan B: Covert Influence in a Scientific Arena*

The FDA's handling of "Plan B" illustrates how presidential control can operate in a covert manner, casting a shadow on the legitimacy of agency action and interfering with science. Plan B is an emergency contraceptive that, if taken by a woman soon after intercourse, "can be used to reduce the risk of unwanted pregnancy."¹⁵⁶ It works mainly by "stopping the release of an egg from an ovary."¹⁵⁷ Although it may cause some short-term side effects like nausea and abdominal pain, it does not have any known serious or long-term side effects.¹⁵⁸

In 1999, the Clinton administration's FDA approved Plan B for prescription-only use in the United States.¹⁵⁹ Subsequently, in 2001,¹⁶⁰ a Citizen Petition was filed with the Bush administration's FDA that requested that the FDA change Plan B from prescription-only status and make the drug available over-the-counter to women of all ages.¹⁶¹ The FDA considered the Citizen Petition simultaneously with various Supplemental New Drug Applications (SNDAs) filed by the drug's maker seeking non-prescription access to Plan B.¹⁶² Under the relevant statutory framework, the key question confronting the FDA with respect to both the SNDAs and the Citizen Petition was whether Plan B could be deemed "safe

¹⁵⁶ *Tummino v. Torti*, 603 F. Supp. 2d 519, 522 (E.D. N.Y. 2009). For a thorough history of the FDA's handling of Plan B, see Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 927 (2014).

¹⁵⁷ *Tummino*, 603 F. Supp. 2d at 522.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 526 (noting that a Citizen Petition was filed in 2001).

¹⁶¹ *Id.* at 525 (noting that a rulemaking to change a drug from prescription-only to non-prescription status can be initiated by the Commissioner of the FDA or by any interested person who files a Citizen Petition).

¹⁶² *Id.* at 527 (describing the first SNDA filed by the drug's maker). Although the FDA's review of SNDAs clearly involves an adjudicatory rather than a rulemaking process, the FDA took the position that the Citizen Petitions involved rulemaking. See *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 197-98 (E.D.N.Y. 2013) (noting the FDA's argument that rulemaking would be needed prior to action on the Citizen Petition).

and effective” for self-administration.¹⁶³

After years went by without the Bush administration’s FDA taking any action on the Citizen Petition, various individuals and organizations filed suit in the Eastern District of New York. The plaintiffs challenged, among other things, the FDA’s failure to act on the Citizen Petition.¹⁶⁴ In 2006, while the lawsuit was pending, the FDA finally took action on the Citizen Petition, choosing to deny it on the ground that the “petitioners had failed to provide sufficient data or information to meet the statutory and regulatory requirements for an OTC switch for any age group, much less the under 16 age group.”¹⁶⁵ However, just about two months later, the FDA announced that it would grant the drug manufacturer’s application to make Plan B available without a prescription to women over the age of 18.¹⁶⁶

In light of the FDA’s denial of the Citizen Petition and its refusal to allow over-the-counter access to Plan B for women under the age of 18, the plaintiffs shifted their focus to whether the FDA’s decision was the product of reasoned decision-making.¹⁶⁷ In their amended complaint, the plaintiffs alleged that the FDA’s decisions were improperly motivated by political considerations outside the scope of the FDA’s statutory authority and that “the FDA bowed to political pressure from the White House and anti-abortion constituents despite the uniform recommendation of the FDA’s scientific review staff to approve over-the-counter access to Plan B” without age limitation.¹⁶⁸

In *Tummino v. Torti*, which was handed down in March 2009, Judge Edward Korman of the Eastern District of New York sided with the

¹⁶³ *Tummino v. Torti*, 603 F. Supp. 2d 519, 525 (E.D.N.Y. 2009) (“A drug is suitable for OTC use when found to be safe and effective for self-administration and when its labeling clearly provides directions for safe use and warnings regarding unsafe use, side effects, and adverse reactions.”); *see also* 21 U.S.C. § 353(b)(3) (allowing the FDA to remove prescription drugs from prescription status when prescription “requirements are not necessary for the protection of the public health”); 21 C.F.R. § 330.10 (2006) (setting forth regulations for classifying drugs as “safe and effective” for over-the-counter status).

¹⁶⁴ *See Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 216 (E.D.N.Y. 2006).

¹⁶⁵ *Tummino v. Torti*, 603 F. Supp. 2d 519, 536 (E.D.N.Y. 2009).

¹⁶⁶ *Id.* at 535-36.

¹⁶⁷ *Id.* at 538.

¹⁶⁸ *Id.*

plaintiffs. Judge Korman, a Reagan-appointee, ruled that the plaintiffs had “presented un rebutted evidence of the FDA’s lack of good faith” during the Bush administration and that the FDA’s actions were arbitrary and capricious.¹⁶⁹ Judge Korman concluded that “the [FDA] Commissioner did not make the decision on his own, but was pressured by the White House and ‘constituents who would be very unhappy with ... an over-the-counter Plan B.’”¹⁷⁰ Judge Korman also noted testimony indicating that then-FDA Commissioner Dr. Mark McClellan had discussed the pending application for non-prescription status for Plan B with the Deputy Assistant to the President for Domestic Policy at the Bush White House on the very same day that the first application was filed, and then continued to provide “several updates on the Plan B application to relevant policy staff at the White House.”¹⁷¹ In short, Judge Korman found that the FDA’s decision-making process was arbitrary and capricious because the FDA’s scientific findings—which focused on whether Plan B was “safe” and “effective” for self-administration—were trumped by political interference.¹⁷²

As a remedy, Judge Korman ordered the FDA to make Plan B available to 17 year olds without a prescription, finding that further administrative proceedings on that one issue were unnecessary given that the FDA had offered no plausible justification for denying over-the-counter Plan B to 17 year olds.¹⁷³ However, with respect to Plan B’s non-prescription status for those under 17 years of age, Judge Korman chose to vacate the FDA’s denial of the Citizen Petition and to remand the matter to the FDA for its reconsideration.¹⁷⁴

The task of responding to the March 2009 ruling fell to the newly elected Obama administration. Yet the Citizen Petition did not fare much better under Obama’s FDA than it did under Bush’s FDA. The Obama administration’s FDA sat on the Citizen Petition for nearly three years before finally denying it in 2011.¹⁷⁵ And when the FDA did deny the

¹⁶⁹ *Id.* at 544 (emphasis added).

¹⁷⁰ *Id.* at 546.

¹⁷¹ *Id.* at 527.

¹⁷² *Id.* at 545-47.

¹⁷³ *Id.* at 549-550.

¹⁷⁴ *Id.* at 550.

¹⁷⁵ *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 169 (E.D.N.Y. 2013) (“the FDA had sat on the Citizen Petition for three years”).

petition, its denial—much like the FDA’s denial of the Citizen Petition during the Bush years—seemed to have been politically influenced. The FDA’s denial of the Citizen Petition was ultimately driven by the FDA’s rejection of an application filed by the drug’s manufacturer seeking over-the-counter status for Plan B for women of all ages.¹⁷⁶ The FDA rejected that application *not* because the FDA had independently concluded based on the available scientific evidence that the application should be denied but rather because Kathleen Sebelius, the Secretary of Health and Human Services for Obama, swept in and directed the FDA to deny the application.¹⁷⁷ The denial of the Citizen Petition came just five days after Sebelius demanded that the drug application be denied.¹⁷⁸

FDA Commissioner Margaret Hamburg complied with Sebelius’ directive, but not without voicing reluctance. Hamburg posted a response to Sebelius’ directive on the FDA’s website, which stressed the robust scientific findings and significant expertise that had gone into the FDA’s decision-making process.¹⁷⁹ Hamburg, for example, stressed that “[i]t is our responsibility at FDA to approve drugs that are safe and effective for their intended use based on the scientific evidence,” and she explained that experts inside and outside the FDA had “reviewed the totality of the data and agreed that it met the regulatory standard for a nonprescription drug and that Plan B One-Step should be approved for all females of child-bearing potential.”¹⁸⁰

Not surprisingly, controversy quickly erupted over what the media described as Sebelius’ “unprecedented” decision to override the FDA’s science-based findings.¹⁸¹ An article published by the *New York Times* hinted at one possible explanation, reporting that Sebelius’ decision

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

¹⁷⁸ *See id.*

¹⁷⁹ *See Statement from FDA Commissioner Margaret Hamburg, M.D. on Plan B One-Step*, Dec. 7, 2011, <http://www.fda.gov/NewsEvents/Newsroom/ucm282805.htm>.

¹⁸⁰ *Id.* (emphasis added).

¹⁸¹ Jennifer Corbett Dooren, *Obama Health Chief Blocks FDA on ‘Morning After Pill,’* WALL STREET JOURNAL, Dec. 8, 2011, <http://www.wsj.com/articles/SB10001424052970203413304577084560710472558> (describing controversy surrounding Sebelius’ “unprecedented” decision to overrule the FDA).

“avoided what could have been a bruising political battle over parental control and contraception during a presidential election season.”¹⁸²

Notably, Obama did not jump in and take ownership of Sebelius’ decision. To the contrary, despite the fact that Obama and Sebelius had flown together on Air Force One to Kansas the day before Sebelius announced her Plan B decision, the White House claimed that Obama and Sebelius did not discuss the issue at any point.¹⁸³ Indeed, Obama publicly stated that he “did not get involved in the process” and that “[t]his was a decision that was made by” Sebelius, not by him.¹⁸⁴ Nonetheless, Obama publicly endorsed Sebelius’ decision after the fact, explaining at a press conference that “the reason [Sebelius] made this decision was she could not be confident that a 10-year-old or an 11-year-old [who] go[es] into a drugstore, should be able—alongside bubble gum or batteries—... to buy a medication that potentially, if not used properly, could end up having an adverse effect.”¹⁸⁵ He did not elaborate on what those “adverse effects” might be.

Ultimately, the Obama administration’s denial of the Citizen Petition ended up back before Judge Korman.¹⁸⁶ He again ruled that the FDA’s denial of the petition was arbitrary and capricious.¹⁸⁷ In reaching this conclusion, Judge Korman found that Sebelius’ intervention represented a “significant departure from agency practice.”¹⁸⁸ While not

¹⁸² Gardiner Harris, *Plan to Widen Availability of Morning-After Pill Rejected*, N.Y. TIMES, Dec. 8, 2011, at A1 (“For the first time ever, the Health and Human Services secretary publicly overruled the [FDA], refusing Wednesday to allow emergency contraceptives to be sold over the counter, including to young teenagers.”).

¹⁸³ Jackie Calmes & Gardiner Harris, *Obama Endorses Decision to Limit Morning-After Pill*, N.Y. TIMES, Dec. 8, 2011, <http://www.nytimes.com/2011/12/09/us/obama-backs-aides-stance-on-morning-after-pill.html?pagewanted=all>.

¹⁸⁴ Statement by the President, WHITEHOUSE.GOV, Dec. 8, 2011, <http://www.whitehouse.gov/the-press-office/2011/12/08/statement-president>.

¹⁸⁵ *Id.*

¹⁸⁶ *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 170 (E.D.N.Y. 2013), *appeal withdrawn* July 30, 2013.

¹⁸⁷ *Id.* at 197 (“The decisions of the Secretary with respect to Plan B One-Step and that of the FDA with respect to the Citizen Petition ... were arbitrary, capricious, and unreasonable.”).

¹⁸⁸ *Id.* at 170.

directly deciding whether Obama had personally influenced Sebelius' decision, Judge Korman did note in his opinion that the Secretary is a member of the President's cabinet and that "the motivation for the Secretary's action made "during an election-year" was "obviously political."¹⁸⁹

In short, from start to finish, the FDA's handling of Plan B under both the Bush and Obama administrations has been plagued by controversy surrounding the proper line between expert-driven decision-making and political influence. Notably, the White House's influence over the FDA's regulation of Plan B operated in a clandestine manner during both the Bush and the Obama administrations. Neither President issued a presidential directive on the subject, and neither tried to publicly claim credit for the FDA's final decision.¹⁹⁰ Indeed, much of the evidence of the Bush White House's role in the FDA's decision-making process came to light only as a result of discovery that was allowed in the course of the lawsuit filed in Eastern District of New York.¹⁹¹ And Obama's exact involvement in—or lack of involvement in—Sebelius's decision to override the FDA is still unclear.¹⁹²

At a minimum, however, the FDA's handling of Plan B demonstrates how some kinds of presidential control—namely, more secretive and clandestine attempts to influence agency behavior—can play a delegitimizing and corrupting role in the context of a decision that, under the relevant statutory inquiry, involves an assessment of scientific evidence.¹⁹³ By pushing the FDA to disregard scientific findings and to consider factors that were not tied to the relevant statutory inquiry,

¹⁸⁹ *Id.*

¹⁹⁰ *See supra* at note 183 and accompanying text (noting that Obama claimed not to have influenced Sebelius's decision).

¹⁹¹ *See Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 231-32 (E.D.N.Y. 2006) (allowing discovery beyond the administrative record because the court found "that a strong preliminary showing of "bad faith or improper behavior" had been made); *see also Tummino v. Torti*, 603 F. Supp. 2d 519, 527 (E.D.N.Y. 2009) (referring to deposition testimony from Commissioner McClellan).

¹⁹² *See generally* Heinzerling, *supra* note 156, at 961 ("In the latest stages, involving Secretary Sebelius and the Obama administration, we do not have the kind of direct testimony that would allow a conclusion, one way or another, on the fact or level of White House involvement.").

¹⁹³ *See supra* note 163 and accompanying text (discussing the relevant statutory inquiry, which turns on whether the drug is "safe and effective").

presidential control tainted the FDA's decisional process and delegitimized the FDA's actions.¹⁹⁴

B. The EPA and Ozone Standards: Covert and Overt Pressure

As a second case study, consider the EPA's efforts to set air quality standards governing ground-level ozone (sometimes referred to as smog) during both Bush and Obama's presidencies. Unlike the FDA's regulation of Plan B, this case study involves both overt command and covert control.

Ground-level ozone is created when man-made "pollutants emitted by cars, power plants, industrial boilers, refineries, chemical plants, and other sources chemically react in the presence of sunlight."¹⁹⁵ The Clean Air Act requires the EPA to set National Ambient Air Quality Standards (NAAQS) for pollutants, such as ozone, that are considered harmful to public health and welfare.¹⁹⁶ Essentially, NAAQS are "standards that define what EPA considers to be clean air."¹⁹⁷ NAAQS include both primary standards and secondary standards—both of which must be set without taking costs into account.¹⁹⁸ Under the terms of the CAA, both primary and secondary NAAQS must be reviewed and, if appropriate, revised by the EPA every five years.¹⁹⁹

In 2003, various environmental groups filed suit, challenging the Bush administration's failure to update the standards as required by statute.²⁰⁰ Pursuant to a consent decree, the Bush administration issued

¹⁹⁴ See generally Louis J. Virelli III, *Science, Politics, and Administrative Legitimacy*, 78 MO. L. REV. 511, 514 (2013) (pointing to HHS's decision to override the FDA on Plan B as a "clear example of politics operating at the expense of science").

¹⁹⁵ *Frequent Questions*, <http://www.epa.gov/ozonedesignations/faq.htm#where>; see also *Mississippi v. E.P.A.*, 744 F.3d 1334, 1340 (D.C. Cir. 2013).

¹⁹⁶ 42 U.S.C. §§7408-09.

¹⁹⁷ James McCarthy, *Ozone Air Quality Standards: EPA's 2015 Revision*, CONG. RES. SERV. REPORT 7-5700, Oct. 3, 2014.

¹⁹⁸ See *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 486 (2001) ("The EPA may not consider implementation costs in setting primary and secondary NAAQS under § 109(b) of the CAA.").

¹⁹⁹ 42 U.S.C. at § 7409(d)(1).

²⁰⁰ See Christopher D. Ahlers, *Presidential Authority over EPA Rulemaking Under the Clean Air Act*, 44 ENVTL. L. 31, 80 (2014).

final ozone standards in March 2008,²⁰¹ setting a primary standard of 0.075 parts per million and an identical secondary standard.²⁰² This was considerably more lenient than the range that the Clean Air Scientific Advisory Committee (“CASAC”) had recommended after its own scientific review of the standards.²⁰³

Exactly how and why the EPA settled on 0.075 as the standard for both primary and secondary ozone standards remains shrouded in some mystery.²⁰⁴ After the EPA’s final rule issued, evidence emerged showing that the final rule that the EPA had sent to Bush’s OIRA for White House review differed from the final rule ultimately published by the EPA; the EPA’s initial draft of the final rule set differing primary and secondary standards.²⁰⁵ The EPA’s decision to set different primary and secondary standards, however, ultimately was overruled at the eleventh hour: OIRA Administrator Susan Dudley informed the EPA that Bush had concluded that the secondary standard should be identical to the new primary standard.²⁰⁶

As reports of the Bush administration’s last-minute interference surfaced, critics quickly argued that the Bush administration had improperly

²⁰¹ See *Mississippi v. E.P.A.*, 744 F.3d 1334, 1340 (D.C. Cir. 2013) (“Proceeding under a schedule adopted by consent decree, and after receiving significant public comment on proposed changes, EPA issued revised primary and secondary standards on March 27, 2008.”).

²⁰² See *National Ambient Air Quality Standards for Ozone*, 73 Fed. Reg. 16,436 (Mar. 27, 2008).

²⁰³ See *Mississippi*, 744 F.3d at 1341 (noting that the EPA acknowledged CASAC had “recommended a level as low as 0.060 to 0.070 ppm”).

²⁰⁴ See Percival, *supra* note 16, at 2520-21 (discussing the controversy surrounding the Bush EPA’s ozone NAAQS).

²⁰⁵ See Memorandum for Administrator Steve Johnson from Susan Dudley, Secondary Ozone NAAQS, March 6, 2008 (on file with author) (“Under the draft, EPA would establish, for the first time, a secondary standard for ozone (based on ‘public welfare’) that is different from the primary standard that the draft would establish (based on ‘public health’)”).

²⁰⁶ See Letter from Susan E. Dudley to Stephen L. Johnson, March 12, 2008 (on file with author) (“The President has concluded that ... the secondary ozone standard [should be set] identical to the new primary standard”); see also Melanie Marlowe, *The Unitary Executive and Review of Agency Rulemaking*, in *THE UNITARY EXECUTIVE AND THE MODERN PRESIDENCY* 77, 95 (Ryan J. Barilleaux & Christopher S. Kelley eds., 2010).

meddled with the EPA's decision-making domain. For example, a House committee promptly held a hearing to "examine the EPA's rejection of recommendations from its independent science advisors and the role of the White House in the recent setting of ozone air quality standards."²⁰⁷ And the press ran articles alleging that Bush had "meddl[ed]" with science and had "overruled officials" at the EPA in order to weaken the smog standards.²⁰⁸ The *Washington Post*, for example, reported that the EPA "weakened one part of its new limits on smog-forming ozone after an unusual last-minute intervention by President Bush."²⁰⁹

After various petitions challenging the EPA's 2008 standards were filed in federal court,²¹⁰ the EPA, then under the newly elected Obama administration, agreed to reconsider the Bush administration's NAAQS. Based on its reconsideration of the ozone standards, the Obama administration's EPA eventually proposed new ozone standards in 2010. These new proposed standards recommended that the primary standard, which was set at 0.075 ppm in the 2008 final rule, "should instead be set at a lower level within the range of 0.060 to 0.070 parts per million (ppm), to provide increased protection for children and other 'at risk' populations."²¹¹ With regard to the secondary standard, the EPA proposed "a new cumulative, seasonal standard" expressed as a rather complicated annual concentration-weighted index.²¹² After publishing the proposed rule in the Federal Register, holding public hearings, and soliciting public comments, the EPA created a draft of a final rule and transmitted that draft to OIRA for review.²¹³

²⁰⁷ Oversight Committee Hearing on EPA's New Ozone Standards, 2008 WLNR 5070490 (March 14, 2008).

²⁰⁸ Deborah Zabarenko, *Ozone case shows Bush meddling in science-watchdogs*, REUTERS, March 14, 2008.

²⁰⁹ Juliet Eilperin, *Ozone Rules Weakened at Bush's Behest, EPA Scrambles To Justify Action*, WASH. POST, March 14, 2008.

²¹⁰ See *Mississippi*, 744 F.3d at 1342 (noting that petitions for review were filed by several states, the District of Columbia, New York City, and several industry, environmental, and public health groups).

²¹¹ National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938-01 (Jan. 19, 2010).

²¹² *Id.* at 2938.

²¹³ See Letter from Cass Sunstein, Administrator of the Office of Information and Regulatory Affairs, to Lisa Jackson, Sept. 2, 2011,

While the EPA's draft of its final rule was under review by OIRA, various business and environmental lobbyists worked the White House. In August 2011, for example, the head of the American Petroleum Institute brought maps to a meeting at the White House "showing the areas that would be out of compliance with the proposed regulation in a vivid swath of red states across the Midwest and along the East Coast, states that [President] Obama won in 2008."²¹⁴ The same day, public health and environmental groups also gathered at the White House for a meeting, emphasizing the adverse health effects of ozone.²¹⁵ Richard Daley, Obama's Chief of Staff, reportedly asked in response: "What are the health impacts of unemployment?"²¹⁶

Just weeks later, on September 1, 2011, Obama called Lisa Jackson, the head of the EPA at the time, into his office and directed her to withdraw the ozone standards.²¹⁷ He reportedly told her that the EPA would have an opportunity to revisit the standards in 2013 if he was elected to a second term but not right then given that the President was in the midst of a reelection campaign.²¹⁸

Although Obama's private meeting with Jackson took place behind closed doors, the President claimed ownership of the EPA's decision to withdraw the ozone rules, issuing a public statement that explained that he had personally requested that the EPA Administrator "withdraw" the draft ozone NAAQS.²¹⁹ He justified the withdrawal by noting that work was "already underway to update a 2006 review of the science that will result in

http://www.reginfo.gov/public/return/EPA_Return_Letter_9-2-2011.pdf (noting that the EPA had sent its draft final rule to OIRA for review); *see also* http://www.epa.gov/glo/pdfs/201107_OMBdraft-OzoneNAAQSPreamble.pdf (publishing a copy of the rule EPA sent to OIRA for review under Executive Order 12,866).

²¹⁴ John M. Broder, *Re-Election Strategy Is Tied to a Shift on Smog*, N.Y. TIMES, Nov. 16, 2011.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Statement by the President on the Ozone National Ambient Air Quality Standards*, Sept. 2, 2011, <http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards>.

the reconsideration of the ozone standard in 2013.”²²⁰ As he explained, he could not “support asking state and local governments to begin implementing a new standard that will soon be reconsidered.”²²¹

That same day, Cass Sunstein, the administrator of OIRA at the time, issued a formal return letter to the EPA—the only return letter that OIRA has publicly issued to date during the Obama administration. Sunstein stressed, among other things, that finalizing a new standard was not mandatory at that time given that the Act sets out a five-year cycle of review, which would not compel the EPA to revisit the standards again until 2013.²²² Notably, Sunstein’s letter left no doubt that it was the President who had directed the return of the rule to the EPA: “*The President* has instructed me to return this rule to you for reconsideration. He has made it clear that he does not support finalizing the rule at this time.”²²³

The EPA promptly complied with the President’s wishes and withdrew its proposed standard—although allegedly not without Lisa Jackson first considering whether she should resign in protest.²²⁴ The EPA’s withdrawal of the proposed ozone NAAQS was then challenged in federal court. In February 2012, the D.C. Circuit determined that it lacked jurisdiction to hear the challenge because the EPA had merely “postponed” consideration of the ozone standard and there was no “final” agency action to review.²²⁵ Thus, while Obama’s decision was subject to review by the voters through the normal political process,²²⁶ the President’s involvement in the withdrawal was immune from judicial review.

The EPA did not revisit the ozone standards again until November

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ See Josh Margolin, *EPA chief on verge of quitting after Obama rejected pollution proposal*, N.Y. POST, Sept. 19, 2011, <http://nypost.com/2011/09/19/epa-chief-on-verge-of-quitting-after-obama-rejected-pollution-proposal/>.

²²⁵ See *Mississippi v. EPA*, No. 08-1200 (D.C. Cir. Feb. 17, 2012) (“The court lacks jurisdiction over the agency’s non-final decision to defer action on the 2008 voluntary revision of the national ambient air quality standards for ozone.”).

²²⁶ Just a year after ordering withdrawal of the smog rule, Obama was reelected to a second term. See Jeff Zeleny & Jim Rutenberg, *Obama’s Night: Tops Romney for 2nd Term in Bruising Run*, N.Y. TIMES, Nov. 7, 2012, at A1.

2014—right after the midterm election—when it issued new draft ozone standards that proposed to revise the primary standard to a level within the range of 0.065 to 0.070 parts per million (ppm), and to revise the secondary standard to within the range of 0.065 to 0.070 ppm as well.²²⁷ The timing of this announcement led Republicans to charge that the Obama “White House played politics by waiting until after the election to release the rule and by announcing it the day before Thanksgiving.”²²⁸

As this section has demonstrated, however, the EPA’s handling of the ozone NAAQS has involved politics during *both* the Republican Bush administration and the Democratic Obama administration. The main difference between the Bush and Obama administration’s efforts to exert political influence over the EPA’s ozone NAAQS is that Bush operated largely through OMB, consistent with Bush’s general preference for covert control.²²⁹ In contrast, Obama’s decision to order the EPA to withdraw its proposed NAAQS in 2011 was very public; Obama’s own written statement and OIRA’s return letter made it crystal clear that Obama personally decided to pull the plug on new ozone NAAQS at that time. Thus, in the end, Obama’s overt command to the EPA enabled the public to understand the President’s role and to give him credit for—or alternatively to blame him for—the decision. In this sense, Obama’s open involvement enhanced political accountability and transparency, enabling the public to see the President’s fingerprints all over the EPA’s withdrawal.

Obama’s involvement also arguably furthered efficiency and coordination values to the extent that Obama looked broadly at the ideal timing of new ozone NAAQS and the impact that promulgating new NAAQS would have on “state and local governments.”²³⁰ As Obama

²²⁷ National Ambient Air Quality Standards for Ozone, 79 Fed. Reg. 75234 (Dec. 17, 2014).

²²⁸ Ben Wolfgang, *Obama’s latest regulatory power grab aims at ozone*, WASH. TIMES., Nov. 26, 2014, <http://www.washingtontimes.com/news/2014/nov/26/obama-formally-proposes-new-smog-ozone-standards/?page=all>.

²²⁹ See Yuka Umemoto Taylor, *With Great Power Comes Clear Accountability: Presidential Influence over the Ozone NAAQS Reconsideration*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10978, 10980 (2012) (noting that “the George W. Bush Administration covertly influenced NAAQS for both particulate matter (PM) and ozone”).

²³⁰ *Statement by the President on the National Ambient Air Quality Standards*, supra note 219.

explained in his written statement directing withdrawal of the proposed standards, “[w]ork is already underway to update a 2006 review of the science that will result in the reconsideration of the ozone standard in 2013,” and thus, it did not make sense to “support asking state and local governments to begin implementing a new standard that will soon be reconsidered.”²³¹ Furthermore, in deciding that 2011 was not the appropriate time to set new ozone NAAQS, Obama publicly emphasized the need to “reduc[e] regulatory burdens and regulatory uncertainty, particularly as our economy continues to recover.”²³² Hence, Obama put his own views about ensuring regulatory efficiency and reducing regulatory burdens out on the table for all to see and for the public to judge.

In contrast, Bush’s style of covert command hid the President’s involvement from the public eye, raising questions about the legitimacy of the EPA’s decision-making process. This helped to fuel concerns that Bush’s administration was surreptitiously trying to undermine the agency’s scientific findings, or that it was pushing the agency to consider factors, such as costs, that were precluded from consideration by the statutory scheme.²³³

C. *The FCC and Net Neutrality: Leveraging Online Media Tools to Publicly Exert Pressure*

As a third case study, consider Obama’s attempts to influence a high-profile rulemaking proceeding currently being conducted by the Federal Communications Commission (FCC) involving the issue of “net neutrality,” or how best to protect and promote an open Internet.²³⁴ The FCC initiated its net neutrality rulemaking proceeding in May 2014.²³⁵

²³¹ *Id.*

²³² *Id.*

²³³ See *supra* notes 203-204 and accompanying text (describing controversy that erupted over the Bush administration’s involvement in the EPA’s ozone NAAQS).

²³⁴ See *Net Neutrality: President Obama’s Plan for a Free and Open Internet*, *supra* note 12 (detailing Obama’s own plan for net neutrality).

²³⁵ See *FCC Launches Broad Rulemaking to Protect and Promote the Open Internet*, <http://www.fcc.gov/document/fcc-launches-broad-rulemaking-protect-and-promote-open-internet>; see also *Fact Sheet: Protecting and Promoting the Open Internet*, <http://www.fcc.gov/document/fact-sheet-protecting-and-promoting-open-internet>.

During the 4-month comment period, the FCC received nearly 4 million comments with most strongly favoring net neutrality.²³⁶

Even though Obama campaigned on the issue of net neutrality,²³⁷ Obama never filed a comment with the FCC during the comment period.²³⁸ Instead, weeks after the comment period closed, Obama elected to use WhiteHouse.gov as his platform of choice for publicly issuing a written statement and accompanying video that pressured the FCC to “create a new set of rules protecting net neutrality.”²³⁹ In his written statement, Obama outlined in some detail the rules that he believed the FCC should adopt pursuant to Title II of the Communications Act, going so far as to include a bulleted list of four special requests for the rules: no blocking; no throttling; increased transparency; and no paid prioritization.²⁴⁰ The President also called on the public to “share the President’s plan” via Facebook and Twitter buttons prominently featured on Whitehouse.gov.²⁴¹

²³⁶ See Gig B. Sohn and David A. Bray, *Setting the Record Straight on Open Internet Comments*, <http://www.fcc.gov/blog/setting-record-straight-open-internet-comments> (“The total comment count in the Open Internet docket is nearly 4 million.”); Elise Hu, *3.7 Million Comments Later, Here’s Where Net Neutrality Stands*, NPR.org, Sept. 17, 2014, <http://www.npr.org/blogs/alltechconsidered/2014/09/17/349243335/3-7-million-comments-later-heres-where-net-neutrality-stands> (noting that one study of the first 800,000 comments found that fewer than 1 percent were opposed to net neutrality enforcement).

²³⁷ See Alina Selyukh, *Obama pressures FCC for strong net neutrality rules*, REUTERS, Nov. 10, 2014, http://news.yahoo.com/obama-asks-fcc-strong-net-neutrality-laws-white-143712021--finance.html;_ylt=AwrSbhBnMGxUMWA_AkSlx.9w4;_ylu=X3oDMTE0ZXQyZzlwBHNIYwNzcgRwb3MDMQRjb2xvA2d_xMQR2dG1kA01PVVMYMDVfMQ-- (noting that net neutrality was “a platform in [Obama’s] 2008 presidential campaign”).

²³⁸ See Marvin Ammori, *More Than 3 Million Told the FCC What They Think About Net Neutrality. Why Hasn’t Obama?*, SLATE.COM, Sept. 16, 2014, http://www.slate.com/blogs/future_tense/2014/09/16/fcc_net_neutrality_comments_period_why_hasn_t_obama_weighed_in.html (“While President Obama campaigned heavily on net neutrality and recently reiterated his support for it, he hasn’t filed a thing [with] the FCC.”).

²³⁹ *Net Neutrality: President Obama’s Plan for a Free and Open Internet*, *supra* note 12.

²⁴⁰ *Id.*

²⁴¹ See *id.* (“Help spread the word—share his plan with your friends and followers on Facebook or Twitter using the buttons below.”).

In urging the FCC to adopt rules consistent with his own plan, Obama expressly acknowledged that “[t]he FCC is an independent agency, and ultimately this decision is theirs alone.”²⁴² This is notable: Although presidential attempts to influence *executive* agencies like the EPA have become commonplace, presidential efforts to so directly influence *independent* agencies are less common.²⁴³ Thus, critics of the President’s plan quickly asserted that Obama had improperly called into question the FCC’s reputation as an independent agency. One former FCC Commissioner, for example, asserted that Obama’s actions represented an “unwelcome assault on the independence of the FCC” and a “threat to our entire system of government based on the rule of law.”²⁴⁴ Others argued that the President had “injected politics into what should be a nonpartisan agency process.”²⁴⁵ Indeed, one commentator noted that Obama put the Chairman of the FCC in a “very tough” position because, if the FCC follows the President’s recommendation, the FCC’s decision will “reek of politics” and “nobody will get” that smell “off of them.”²⁴⁶

A few months later, when FCC Chairman Tom Wheeler announced in *Wired* that he was proposing strong net neutrality rules that aligned with Obama’s plan,²⁴⁷ Republican-led House and Senate committees launched investigations into Obama’s influence over the FCC’s proceedings, reiterating the refrain of inappropriate political influence.²⁴⁸ The letter that

²⁴² *See id.*

²⁴³ *See, e.g.,* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1815 (2009) (“Independent agencies are sheltered not from politics but from the President”).

²⁴⁴ Harold Furchtgott-Roth, *President Obama Attacks FCC’s Independence*, FORBES.COM, Nov. 11, 2014, <http://www.forbes.com/sites/haroldfurchtgottroth/2014/11/11/president-obama-attacks-fccs-independence/>.

²⁴⁵ Edward Wyatt, *Call for Open Internet Sets Up Fight Over Rules*, N.Y. TIMES, Nov. 12, 2014, at B8.

²⁴⁶ *Id.*

²⁴⁷ Tom Wheeler, *This Is How We Will Ensure Net Neutrality*, WIRED.COM, Feb. 4, 2015, <http://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality/> (“I am proposing that the FCC use its Title II authority to implement and enforce open internet protections.”).

²⁴⁸ *See* Jim Puzanghera, *Congress Probing White House role in FCC Chief’s net-neutrality plan*, L.A. TIMES, Feb. 9, 2015, <http://www.latimes.com/business/la-fi-net-neutrality-fcc-chaffetz-probe-20150209-story.html> (“[T]wo congressional committees have launched investigations into whether the White House improperly

the House Committee on Oversight and Government Reform sent to the FCC, for example, noted concerns that the White House may have had an “improper influence” on the FCC’s ongoing rulemaking proceeding.²⁴⁹

Yet despite all these allegations of “improper” political influence, there is nothing inherently nefarious about the President’s attempts to steer the FCC’s net neutrality rules.²⁵⁰ Obama’s efforts to influence the FCC’s proceedings have been public and transparent. Obama issued his statement and accompanying video via Whitehouse.gov, and he openly encouraged members of the public to share his message using social media tools.²⁵¹ Furthermore, Obama’s public statement demonstrated respect for the FCC’s status as an independent agency, openly acknowledging that the decision ultimately rests in the FCC’s hands alone.²⁵² In this sense, Obama’s overt involvement furthers notions of political accountability and transparency, helping the public to understand that the decision rests in the hands of the FCC²⁵³ but making clear that the President is doing what he can to respond

influenced the net-neutrality proposal released last week by the head of the Federal Communications Commission.”).

²⁴⁹ Letter from Jason Chaffetz, Chair, Committee on Oversight and Government Reform, U.S. House of Representatives, to Tom Wheeler, Feb. 6, 2015, <http://oversight.house.gov/wp-content/uploads/2015/02/2015-02-06-JEC-to-Wheeler-FCC-open-internet.pdf>.

²⁵⁰ See generally Marvin Ammori, *The White House Gave the FCC Advice on Net Neutrality. That’s How It’s Supposed To Work*, SLATE.COM, Feb. 11, 2015 (“[t]his network neutrality proceeding is an example of how the government *should* operate.”) (emphasis in original); cf. Memorandum for the Deputy Counsel to the President from John O. McGinnis of the Office of Legal Counsel, Jan. 14, 1991, *Ex Parte Communications During FCC Rulemaking* (“We believe it is clearly permissible, as a matter of general administrative law, for White House officials ... to contact FCC Commissioners to advocate a position” on an FCC rulemaking).

²⁵¹ See *Net Neutrality: President Obama’s Plan for a Free and Open Internet*, *supra* note 12 (detailing Obama’s own plan for net neutrality and calling on others to share his plan using social media).

²⁵² See *id.*

²⁵³ On February 26, 2015, the FCC voted 3-2 along party lines to regulate broadband Internet service as a public utility under Title II of the Communications Act, thus adopting net neutrality rules aligned with Obama’s own plan. See Rebecca R. Ruiz and Steve Lohr, *In Net Neutrality Victory, F.C.C. Classifies Broadband Internet Service as a Public Utility*, N.Y. TIMES, Feb. 26, 2015, <http://www.nytimes.com/2015/02/27/technology/net-neutrality-fcc-vote-internet->

to broad public sentiment on net neutrality.²⁵⁴

In sum, the three case studies just discussed demonstrate how more overt and transparent forms of presidential control can promote positive values like political accountability, regulatory efficiency, and coherence. In contrast, other more submerged forms of presidential control can taint agency science, push agencies to consider factors that are not relevant under the statutory scheme, and undermine transparency. Yet the most prevalent response to presidential control—that of “expertise forcing”—focuses myopically on the negative attributes of presidential control. The next Part of this Article describes and critiques “expertise forcing,” arguing that it is a misguided reaction to the entrenchment of presidential control.

III. EXPERTISE FORCING: A PERVERSIVE BUT MISGUIDED REACTION

The most common response by courts, Congress, scholars, the media and others when faced with specific instances of presidential control over the regulatory state has been a kind of reactive “expertise forcing.” Rather than using the term “expertise forcing” to describe some kind of concerted legal tool for responding to presidential control, this Article uses the term expertise forcing to refer to generalized efforts—both inside and outside of the courts—to try to force regulators to exercise expert judgment based on apolitical, technocratic reasons. This Part argues that expertise forcing is a misguided. It focuses too myopically on restraining the negative aspects of presidential control, and in doing so, it fails to take account of the beneficial role that political influences might play. Furthermore, it adheres to outmoded notions of agencies as apolitical experts, and it threatens to drive political, policy-laden decisions underground where they are insulated from oversight and scrutiny.

A. *The Push for Expertise*

Jody Freeman and Adrian Vermeule first coined the phrase “expertise forcing” in the context of analyzing the Supreme Court’s

utility.html?_r=0.

²⁵⁴ See *Net Neutrality: President Obama’s Plan for a Free and Open Internet*, *supra* note 12 (“I am asking the [FCC] to answer the call of almost 4 million public comments, and implement the strongest possible rules to protect net neutrality.”).

decision in *Massachusetts v. EPA*.²⁵⁵ In *Massachusetts*, the Court reviewed the EPA’s denial of a rulemaking petition that asked the EPA to regulate certain emissions from new motor vehicles—emissions that lead to global warming.²⁵⁶ Justice Stevens’s opinion for a five-justice majority held that the EPA has the statutory authority to regulate such emissions and that the various policy-driven reasons the EPA offered for declining to regulate, ranging from a desire to avoid piecemeal regulation to a desire to avoid interfering with the President’s foreign policy initiatives, were not sufficient reasons for denying the petition.²⁵⁷ Essentially, the Court told the EPA that it needed to make a scientific determination regarding whether the emissions from new motor vehicles do or do not endanger the public health or welfare within the meaning of the Clean Air Act. According to the Court, policy-driven considerations were to factor into the EPA’s decision to regulate or not to regulate, if at all, only *after* the EPA made an expert judgment.²⁵⁸

In light of *Massachusetts*’s embrace of expert-driven agency decision-making, Freeman and Vermeule have argued that the case stands as an example of an attempt “by courts to ensure that agencies exercise expert judgment free from outside political pressures, even or especially political pressures emanating from the White House or political appointees in the agencies.”²⁵⁹ In Freeman’s and Vermeule’s view, *Massachusetts* illustrates the Supreme Court’s “increasing worries about the politicization of administrative expertise.”²⁶⁰ According to Freeman and Vermeule, the Court is not naïve and does not think that “expert decisions should be completely separated from politics.”²⁶¹ Rather, the Court in *Massachusetts* hinted that the pendulum between politics and expertise had “swung too far ... in the direction of strong presidential administration, and that [the Court]

²⁵⁵ 549 U.S. 497 (2007).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. 1029 (2008).

²⁵⁹ Freeman & Vermeule, *supra* note 23, at 52.

²⁶⁰ Freeman & Vermeule, *supra* note 23, at 52; *see also id.* at 93-94.

²⁶¹ *Id.* at 109-110.

wished to nudge it in the other direction.”²⁶²

In reality, however, expertise forcing extends far beyond the confines of the Supreme Court in cases like *Massachusetts* and even beyond the confines of the federal courts as a whole. Indeed, when conceptualized broadly not as a distinct legal tool used only by the courts but rather as a generalized reaction to the clash between expertise and political influence in agency decision-making, expertise forcing defines how many different actors approach the issue of presidential control. Members of Congress, scholars and the media all frequently turn to expertise forcing as a kind of instinctive, knee-jerk reaction—particularly when they do not agree with the substantive outcome of an agency decision.

First, consider Congress. When faced with specific allegations of presidential influence over agency rulemaking proceedings, Congress often holds oversight hearings or launches congressional investigations that reflect a desire to try to force expert-driven decisions by agencies.²⁶³ This is exactly what happened, for example, in the wake of Obama’s recent efforts to influence the FCC’s ongoing net neutrality rulemaking.²⁶⁴ The Republican chair of the House Committee on Oversight and Government Reform wrote a letter to the FCC, demanding that it preserve documents that might shed light on the White House’s allegedly “improper” influence on the FCC’s proceedings.²⁶⁵ Likewise, the Republican Chair of the Senate’s Committee on Homeland Security and Governmental Affairs launched an investigation into the matter, noting concerns that the White House had exerted “undue outside pressure[]” on the FCC and had tried to “supplant the agency’s decision-making apparatus.”²⁶⁶ These and other

²⁶² *Id.* at 110.

²⁶³ See, e.g., *Science Under Siege: Scientific Integrity at the Environmental Protection Agency, Hearing before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, House of Representatives*, 110th Cong., 2nd Sess., No. 110-149 (2008).

²⁶⁴ See *supra* at Part II.C (discussing Obama’s involvement in net neutrality).

²⁶⁵ See Letter from Jason Chaffetz, Chair, Committee on Oversight and Government Reform, U.S. House of Representatives, to Tom Wheeler, Feb. 6, 2015, <http://oversight.house.gov/wp-content/uploads/2015/02/2015-02-06-JEC-to-Wheeler-FCC-open-internet.pdf>.

²⁶⁶ Letter from Ron Johnson, Chair, Committee on Homeland Security and Governmental Affairs, U.S. Senate, to Tom Wheeler, Feb. 9, 2015, http://www.ronjohnson.senate.gov/public/_cache/files/269a8d03-1eea-4b00-9af2-54d7408f83ab/2015-02-09-johnson-to-wheeler-fcc-re-net-neutrality.pdf.

congressional hearings and investigations reflect a kind of reflexive reaction to presidential influence—one that indiscriminately and simplistically views politics as “bad” and expertise as “good.”

The media too often projects the same sense that agency decision-making should be apolitical and expert driven. For example, in the context of the net neutrality proceedings,²⁶⁷ the *New York Times* ran an article quoting various opponents of Obama’s proposal who “said that [Obama’s actions] injected politics into what should be a nonpartisan agency process.”²⁶⁸ Subsequently, just after FCC Chairman Tom Wheeler announced that he planned to propose net neutrality rules aligned with President Obama’s own views,²⁶⁹ the *Wall Street Journal* published an article casting a shadow over Obama’s involvement. The *Wall Street Journal* asserted that the FCC’s chair had swept “aside more than a decade of light-touch regulation of the Internet” because of various “secret” White House meetings that had led the President to publicly prod the FCC.²⁷⁰ What the mainstream news media did not explain in its coverage of Obama’s involvement in net neutrality was precisely why Obama’s involvement was improper, or why so-called “secret” meetings at the White House were necessarily sinister given that White House meetings, by definition, are private and closed to the general public. Instead, the news media’s coverage of Obama’s reaction rests on the same highly simplistic view that politics are “bad” and expertise is “good” when it comes to agency decision-making.

Third, while scholars often justify the legitimacy of the administrative state by relying upon the President’s ability to hold agencies accountable,²⁷¹ scholars also frequently advocate in favor of expertise

²⁶⁷ See *supra* at Part II.C (discussing Obama’s efforts to influence the FCC’s net neutrality rulemaking).

²⁶⁸ Edward Wyatt, *Obama’s Call for Net Neutrality Sets Up Fight Over Rules*, N.Y. TIMES, Nov. 11, 2014.

²⁶⁹ See *supra* note 247 and accompanying text (outlining Wheeler’s proposal).

²⁷⁰ Gautham Nagash and Brody Mullins, *Net Neutrality: How White House Thwarted FCC Chief*, THE WALL STREET JOURNAL, Feb. 4, 2005.

²⁷¹ See, e.g., Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-98 (1985) (arguing that accountability concerns tip in favor of broad delegations to agencies); Matthew Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 60 (2008) (asserting that “[s]cholars with diverse ideological and methodological commitments” have asserted that bureaucratic policy should track majoritarian

forcing in one form or another, arguing against the politicization of agency action or advancing arguments that would necessarily narrow the space for presidential judgments. Justice Stephen Breyer, who has co-authored a leading administrative law casebook, is among these scholars. Breyer's casebook stresses the benefits of depoliticized decision-making by elite, professional experts and argues in favor of the virtues of rationalization, expertise and insulation from politics.²⁷²

Other scholarly work echoes this same sense that agency decision-making should be driven by expertise, not political influence. One scholar, for example, recently argued for the abolition of OIRA review, arguing that White House review has “evolved into a relentless gauntlet for public health, worker safety, and environmental protection initiatives, subjecting the agencies’ efforts to implement their demanding statutory mandates to withering rule-by-rule review.”²⁷³ Others have argued that White House review of agency rules conducted by OIRA is something to be “constrained.”²⁷⁴ In addition, some have argued against the notion that courts should take political influences into account when determining whether agencies have adequately justified their policy determinations.²⁷⁵ These are just some illustrative examples of how scholars—much like courts, Congress and the news media—often argue in favor of narrowing the reach of presidential control and promoting more expert-driven decision-making.

B. *The Inadequacy of Expertise Forcing*

values and that this goal is best advanced by giving decision-making authority to the most politically accountable officials, which implies “the need for presidential control over bureaucratic policymaking”).

²⁷² See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY*, at xxxvii (6th ed. 2006).

²⁷³ Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. OF ENVTL. & ADMINISTRATIVE LAW 209 (2012).

²⁷⁴ Sidney Shapiro & Richard Murphy, *Constraining White House Political Control of Agency Rulemaking Through the Duty of Reasoned Explanation*, — U.C. DAVIS L. REV. — (forthcoming).

²⁷⁵ See, e.g., Enrique Armijo, *Politics, Rulemaking, and Judicial Review: A Response to Professor Watts*, 62 ADMIN. L. REV. 573, 573-74 (2010) (arguing that rulemaking has “to be a facts-driven process”); *but see* Watts, *supra* note 18 (arguing in favor of giving politics an accepted place in arbitrary and capricious review).

On its surface, the emergence of expertise forcing as a reaction to increasing presidential control is understandable. After all, at its core, expertise forcing responds to the negative and corrupting aspects of presidential control, including concerns that presidential control can be used to undermine transparency, to subvert science and to trample on the rule of law. Nonetheless, despite its superficial appeal, expertise forcing is a misguided and potentially damaging response to the entrenchment of presidential control.

First, it is futile to try to sanitize agency rulemaking of political influences. As the ozone NAAQS case study discussed earlier demonstrates, even an administration that openly commits itself to protecting science and expertise—as Obama did upon entering office—cannot completely eradicate the uneasy tension between expertise and politics in rulemaking.²⁷⁶ Today, rulemaking effectively operates as lawmaking by another name, and it regularly touches on difficult policy questions that are at the heart of political discourse in our country.²⁷⁷ Notably, these important value-based policy judgments often must be made in the face of statutory and scientific uncertainty. Where science and expertise alone cannot answer questions concerning how or when best to regulate, competing value-laden policy preferences necessarily and inevitably will come into play.²⁷⁸

Second, even if politics could be excised from rulemaking as a practical matter, it would be undesirable to do so as a normative matter. Agencies make decisions about key policy matters touching on everything from the environment to public health in the face of scientific uncertainty and with only the most skeletal directions from Congress.²⁷⁹ Scholars routinely justify agencies' power to make these important policy decisions

²⁷⁶ See *supra* at Part II.B (discussing the ozone NAAQS case study).

²⁷⁷ See Kathryn A. Watts, *Rulemaking as Legislating*, ____ GEO. L.J. ____ (forthcoming 2015).

²⁷⁸ See generally Kagan, *supra* note 1, at 2356-57 (arguing that a strong presidential role is appropriate where agencies “confront the question, which science alone cannot answer, of how to make determinate judgments regarding the protection of health and safety in the face of both scientific uncertainty and competing public interests”).

²⁷⁹ Cf. MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS: JUDICIAL CONTROL OF ADMINISTRATION 171 (1988) (agencies “make a good deal of law within broad congressional constraints and in the face of considerable uncertainty about facts and diverse and changing political sentiments”).

by emphasizing that agencies are accountable to Congress and to the President through the appointment and removal process and through many other political control mechanisms.²⁸⁰ In other words, we justify the existence and the legitimacy of what would otherwise be a “headless fourth branch” by coming back to the fact that the political branches can and do exert control over agency heads. Justice John Paul Stevens recognized as much in 1984 in his now famous *Chevron* opinion in which he stated that although agencies are not directly accountable to the people, “the Chief Executive is,” and it is therefore entirely appropriate for agencies rely upon “the incumbent administration’s views of wise policy” when making policy judgments.²⁸¹ Thus, as *Chevron* points out, presidential control can help to further positive values—namely, political accountability and regulatory coherence in agency decision-making. In its efforts to push politics out of the rulemaking calculus, expertise forcing fails to take these positive values into account.

Third, by demanding that agencies justify their decisions in expert-driven terms, expertise forcing threatens to drive political influences underground where such influences will be protected from public scrutiny, accountability and oversight.²⁸² Put another way, expertise forcing may well undermine transparency,²⁸³ causing agencies to sweep policy choices

²⁸⁰ Cf. Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 23 (2011) (“administrative law’s main primary purpose has been to develop various legal structures and mechanisms—such as political oversight, judicial review, public participation, and reason-giving requirements—that help to legitimate and control agency action”).

²⁸¹ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (noting that “agencies are not directly accountable to the people”); *see also* *Motor Vehicle Manufacturers Ass’n of the U.S., Inc. v. State Farm Mutual Auto Insur. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (noting that the NHTSA’s changed views seemed “to be related to the election of a new President,” which are “a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”).

²⁸² Cf. Watts, *supra* note 18, at 40 (noting that our current focus on technocratic decision-making incentivizes agencies “to dress up their decisions in technocratic terms and to hide political influences”).

²⁸³ Cf. Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEX. L. REV. 1601, 1629 (2008) (arguing that agency personnel should be “explicit about places where the actor believes the governing law leaves room for the agency to make policy choices, and openly acknowledging the choices made”).

under the rug. One scholar—Martin Shapiro—made a similar argument almost three decades ago just as presidential control was just beginning to rise, stating: “By requiring the agencies to present [their] decisions as if they were rationalist, technical, and synoptic, the courts drive the very prudential decisions that ought to be out front and subject to public scrutiny” under a “smoke screen.”²⁸⁴ As a result, “what we get is secret prudence unguarded by anyone.”²⁸⁵

Finally, expertise forcing may have unintended consequences for agencies’ science. Because political influences lack an accepted place of their own in an expertise forcing world, agency decision makers may well be tempted to bend facts or subvert science in order to reach preferred policy outcomes.²⁸⁶ Or they might hide policy choices that inform their scientific decisions. As Emily Meazell has explained, science—even “good” science—often involves and integrates policy choices.²⁸⁷ Scientists conducting experiments, for instance, may have to make decisions about what to “include or exclude in an experiment, what parameters to set for a model, the choice of measurement techniques, or intentional or even unknowing assumptions”—without there being any one choice that is clearly “right” as a matter of scientific method. According to Meazell, good scientific practices would simply call for the scientists to document and disclose any policy choices that have been made.²⁸⁸ An expertise-forcing model might undermine these good scientific practices, incentivizing agencies to sweep policy-laden choices under the rug.

In sum, although expertise forcing represents an understandable effort to push back against many of the negative aspects of presidential control, expertise forcing focuses too narrowly on the “bad” side of political influences and fails to accommodate the “good” aspects of presidential control, such as its potential to further political accountability and

²⁸⁴ SHAPIRO, *supra* note 279, at 156, 171.

²⁸⁵ *Id.*

²⁸⁶ *Cf.* Watts, *supra* note 18, at 40 (noting that in a world in which agencies are expected to act in a technocratic manner, agencies may well “be tempted to align facts and science with political choices rather than giving science its own rightful place that is separated from political or value-laden considerations”).

²⁸⁷ Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 740 (2011).

²⁸⁸ *Id.* at 746.

regulatory coherence. Furthermore, expertise forcing might actually cause affirmative harm by, for example, pushing policy-laden choices underground where they cannot be subjected to scrutiny and oversight. Given that presidential control is here to stay, administrative law must respond with a more realistic and effective response. The next Part of this Article takes up that question, arguing that a variety of non-constitutional administrative law doctrines can and should be coordinated to enhance the positive *and* minimize the negative aspects of presidential control.

IV. CONTROLLING PRESIDENTIAL CONTROL THROUGH A COORDINATED DOCTRINAL RESPONSE

As this Article has demonstrated, presidential control over the regulatory state is here to stay. It has become woven into the fabric of the regulatory state, and it occurs regardless of the political party in the White House.²⁸⁹ Furthermore, presidential control is complex and nuanced; it can further positive values, such as political accountability and regulatory coherence, but it can also raise concerns about agency legitimacy, non-transparent decisions and the weakening of science.²⁹⁰ Thus, given its complexity, presidential control is not susceptible to a one-size-fits-all response. Nor can the complex nature of presidential control be effectively managed by simply tweaking just one isolated administrative law doctrine or another.²⁹¹ Rather, as this Part demonstrates, a more coordinated, interlocking doctrinal response is needed.

This Part lays the foundation for such a response, identifying and categorizing a range of different doctrines that should be coordinated to minimize the negative *and* enhance the positive attributes of presidential control. Specifically, this Part sketches out three relevant categories of doctrinal mechanisms: (1) statutorily facing rules; (2) transparency-enhancing mechanisms; and (3) process-forcing rules. It situates a variety of different administrative law doctrines within each of these three categories and explains how the different doctrines and categories should

²⁸⁹ See *supra* at Part I (describing the entrenchment of presidential control over the regulatory state).

²⁹⁰ See *supra* at Part II (analyzing three different case studies that illustrate how presidential control involves a complex mix of positive and negative attributes).

²⁹¹ See *supra* at note 8 (citing scholars who have argued that one discrete set of doctrines or another can be used to respond to political influence over agency decisions).

interact, thus providing a powerful legal framework for controlling presidential control moving forward. Given the tension that has erupted between politics and expertise in the regulatory arena during both the recent Bush and Obama administrations, it is past time for such reform.

A. *Statutorily Facing Rules*

It is a bedrock principle of administrative law that agencies derive their power from Congress and that agencies' exercises of delegated lawmaking power are subject to any limitations that Congress might choose to impose.²⁹² Yet, despite widespread acceptance of the notion that agencies are creatures of statutes, there is a lack of clarity concerning both: (1) when statutes delegating discretionary powers to agencies allow agencies to act pursuant to presidential *directions*; and (2) when statutes delegating discretionary powers to agencies allow agencies to take mere presidential *suggestions* into account.²⁹³ Both of these questions—which are referred to here as “statutorily facing” questions—involve looking to the relevant statute and interpreting Congress's intent, asking whether Congress intended to allow the President to outright direct, or sometimes to merely influence, an agency decision made under a particular statutory scheme. The lack of clarity in this area is due to Congress' silence on the matter: Rarely do statutes delegating discretionary power to agencies expressly speak to whether an agency head may consult with the President or may be forced to take certain action at the President's direction.²⁹⁴

Notably, these statutorily facing questions—*i.e.*, questions that involve determining the statutorily permissible space for presidential directions and suggestions—must be answered first before considering how

²⁹² See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (“[T]he exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.”).

²⁹³ See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider”).

²⁹⁴ Cf. JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 292 (5th ed. 2003) (“[v]irtually all statutes conveying rulemaking power to executive (as well as ‘independent’) agencies are silent on such questions as whether the agency head may consult with the President or his agents and, if so, on what basis.”).

other legal doctrines might be used to control presidential control. After all, it would be futile to try to craft legal doctrines aimed at doing things like increasing transparency and cutting back on veiled presidential influence if Congress foreclosed presidential control from operating in the first place.

1. The Statutorily Allowable Space for Presidential Directions

The first statutorily facing issue that needs resolution is the question of how to determine whether, as a matter of statutory interpretation, Congress intends the President to be allowed to direct—or to dictate—the outcome of a discretionary action vested by Congress in a particular administrative agency. Put another way, when can the President step into the shoes of the agency and make a decision that has been delegated by Congress to a specified agency official?

To date, the courts have yet to resolve this question.²⁹⁵ One explanation for why may be that some discretionary agency actions directed by the President, such as the EPA's 2011 withdrawal of its proposed ozone standards, do not constitute agency final agency action and thus may not be judicially reviewable.²⁹⁶

In addition, if a presidential directive is not made public but rather is merely communicated orally to an agency, would-be challengers might not have any affirmative directive coming from the President to challenge in court. This is exactly what happened recently in the context of Obama's executive action on immigration. Obama gave a prime-time, nationally televised speech in November 2014 in which he laid out his plan for deferring action—that is, using prosecutorial discretion to defer removal actions—with respect to millions of undocumented children and parents.²⁹⁷ Although the media mistakenly reported that Obama had personally issued

²⁹⁵ See generally Kagan, *supra* note 1, at (noting that the “view that the President lacks directive authority over administrative officials” has never been adjudicated); see also *id.* at 2321 (noting the lack of Supreme Court cases on whether the President himself may step into an agency's shoes when Congress delegates discretionary power to an agency official); see generally Percival, *supra* note 16, at 2487-88 (describing ongoing “debate” about whether the President does or does not have directive authority).

²⁹⁶ See *supra* at note 225 and accompanying text (discussing how the D.C. Circuit determined that it lacked jurisdiction to review the EPA's withdrawal of its ozone standards at President Obama's direction).

²⁹⁷ See *supra* at note 14 and accompanying text (discussing Obama's televised address).

an “Executive Order” directing deferred action for millions,²⁹⁸ the reality is that Obama never issued any such written directive or order. Rather, on the same day that Obama delivered his speech to the nation, the Department of Homeland Security (DHS) issued a memorandum setting forth guidelines for deferring prosecutorial action with respect to certain undocumented childhood and parental arrivals.²⁹⁹ As a result, when a lawsuit was filed by more than half of the States challenging the deferred action program, the suit by necessity challenged the written directive issued by DHS, not any directive issued by Obama.³⁰⁰ Indeed, the judge in the case noted that there “were no executive orders or other presidential proclamations or other communique” to challenge.³⁰¹

Faced with a dearth of case law on the subject, scholars have actively debated this question and have proposed dueling interpretive approaches.³⁰² This scholarly debate has created a cloud of legal uncertainty around presidential directives—a cloud that likely has helped to fuel “expertise forcing,” which, as discussed earlier, reflexively treats presidential influence as inherently “suspect.”³⁰³

At one end of the scholarly debate, Elena Kagan argued almost 15 years ago that delegations of discretionary authority running to an *executive* agency official (who is subject to “at will” removal by the President) should

²⁹⁸ See, e.g., *Is Obama’s Immigration Executive Order Legal?*, U.S. NEWS & WORLD REPORT, <http://www.usnews.com/debate-club/is-obamas-immigration-executive-order-legal> (referring to Obama’s “executive order”).

²⁹⁹ See Memorandum from Jeh Charles Johnson, Secretary of the Department of Homeland Security (DHS), *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents are U.S. Citizens or Permanent Residents*, Nov. 20, 2014, http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

³⁰⁰ See *Texas v. United States*, 2015 WL 648579, at *3 (S.D. Tex. Feb. 16, 2015).

³⁰¹ *Id.*

³⁰² See, e.g., Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006) (arguing that “the President has statutory authority to direct the administration of the laws only under statutes that grant to the President in name”); Kagan, *supra* note 1, at 2326-27 (arguing that when a statute delegates power to an executive branch official, that delegation is “still subject to the ultimate control of the President”).

³⁰³ See *supra* at Part III.A (discussing the phenomenon of expertise forcing).

be presumed to grant the President ultimate control over the decision.³⁰⁴ In contrast, where a statute grants discretionary authority to an *independent* agency that is insulated from the President's unfettered removal power, Kagan took the position that Congress should be presumed to have barred the President from directing the outcome of the discretionary action.³⁰⁵

At the other end, Kevin Stack has argued for a reverse statutory presumption. According to Stack, as a matter of statutory construction, "the President has directive authority—that is, the power to act directly under the statute or to bind the discretion of lower level officials—only when the statute expressly grants power to the President in name."³⁰⁶ To support his rule of statutory construction, Stack points to examples of what he calls "mixed agency-President delegations"—meaning statutes that condition delegations of power to agencies upon the "approval of the President" or the "direction of the President," or words to similar effect.³⁰⁷ He relies upon these examples to argue, by negative implication, that statutes that lack such references to presidential involvement necessarily preclude presidential directive authority.³⁰⁸

Despite the fact that scholars continue to engage in the Stack-Kagan debate,³⁰⁹ the practical, on-the-ground winner of this debate is clear: Kagan has won. Presidential directive authority with respect to executive agencies is alive and well. Consider, for example, Obama's frequent use of published presidential directives. As was discussed earlier, Obama has

³⁰⁴ See Kagan, *supra* note 1, at 2326-28 (arguing that the availability of presidential directive authority "usually will turn on the selection of an interpretive principle—really, a presumption—with which to approach a statutory delegation to an administrative official").

³⁰⁵ See *id.* at 2327 ("In establishing [an independent agency], Congress has acted self-consciously, by means of limiting the President's appointment and removal power, to insulate agency decision-making.").

³⁰⁶ Stack, *supra* note 302, at 267.

³⁰⁷ *Id.* at 268, 278-283.

³⁰⁸ *Id.* at 268 (arguing that "mixed agency-President delegations" provide "strong support for the conclusion that statutory grants of authority to agency officials alone, absent such conditions, do not authorize the President to act or to bind the discretion of lower-level officials").

³⁰⁹ See, e.g., Percival, *supra* note 16, at 2994-95 (discussing debate concerning the legality of presidential directives and noting both the Kagan and the Stack views).

relied extensively on directives to executive agencies throughout his presidency, directing agencies to issue regulations on everything ranging from retirement savings to student debt.³¹⁰ In contrast, when it comes to independent agencies, Obama has—consistent with Kagan’s interpretive principle that distinguishes between executive and independent agencies—taken care to merely make “suggestions” to independent agencies.³¹¹ For example, in the context of the FCC’s net neutrality proceeding, Obama carefully noted that the FCC is an independent agency and that the ultimate decision was the FCC’s alone to make.³¹²

Kagan’s interpretive approach—which presumes that grants of discretionary authority to executive agency officials give the President ultimate control over the decision—makes sense as a policy matter. As was discussed earlier, we justify agencies’ role in our tripartite system largely by emphasizing that agency heads—even though not elected by the people—are accountable to Congress and to the President through the appointment and removal process and through many other political control mechanisms.³¹³ By affirmatively directing the outcome of agency action, presidential directives help to further both political accountability in the administrative state and legitimacy surrounding agency action—action that without presidential involvement might otherwise be seen as coming from a headless and unaccountable fourth branch.

2. The Statutorily Allowable Space for Presidential Suggestions

The Kagan-Stack debate only gets us so far. In particular, Kagan

³¹⁰ See *supra* notes 101-131 and accompanying text (discussing examples of Obama’s reliance on presidential directives).

³¹¹ See, e.g., *Net Neutrality: President Obama’s Plan for a Free and Open Internet*, *supra* note 12 (“I respectfully ask [the FCC] to adopt the policies I have outlined here, to preserve this technology’s promise for today, and future generations to come.”); *Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems*, *supra* note 13, at § 4(d) (calling for the creation of privacy policies involving the use of drones and noting that “[i]ndependent agencies are strongly encouraged to comply with this memorandum.”).

³¹² See *supra* at Part II.C (discussing Obama’s attempts to influence the FCC’s proceedings).

³¹³ See *supra* at notes 280-281 and accompanying text (discussing how agencies’ legitimacy hinges on the notion that they are accountable to the political branches).

and Stack focus on whether or not the President is legally authorized to *direct* the outcome of a discretionary agency action by effectively stepping into the agency's shoes.³¹⁴ The Kagan-Stack debate does not speak to how to handle a separate but even more critical question: regardless of whether the President can *direct* agencies to reach a particular policy outcome, may agencies rely upon presidential *suggestions* as relevant decisional factors without violating Congress' intent?³¹⁵ For example, may the FCC take President Obama's views concerning net neutrality into account?³¹⁶ Or may the Federal Aviation Administration consider the White House's views on how best to regulate drones?³¹⁷ Congress is almost always silent on these matters.³¹⁸

As of now, we lack a coherent theory for dealing with statutory silence on the question of when an agency may consider suggestions coming from the White House. Legal scholars have focused on assessing the legality of presidential *directives*, glossing over the issue of mere presidential *suggestions*.³¹⁹ Furthermore, the courts have sent conflicting

³¹⁴ See Stack, *supra* note 302, at 267 (focusing on presidential directive authority—meaning the President's “power to act directly under the statute or to bind the discretion of lower level officials”); Kagan, *supra* note 1, at 2319 (focusing on the question of presidential assertions of “directive authority over administration,” not on presidential assertions of “general supervisory” authority).

³¹⁵ See generally Strauss, *supra* note 16, at 698 (noting that the difference between “oversight” and “performance”—or between “overseeing” and “deciding”—often goes unnoticed in administrative law discussions).

³¹⁶ See *supra* at Part II.C (discussing Obama's efforts to influence the FCC's net neutrality proceeding).

³¹⁷ See *supra* at note 13 (discussing the White House's involvement in setting policies for drone regulation).

³¹⁸ See MASHAW, *supra* note 294, at 292 (noting Congressional silence in this arena).

³¹⁹ Kagan likely focused on the legality of presidential *direction*—and glossed over the distinct issue of mere presidential *suggestion*—because resolving directive authority in the President's favor would necessarily mean that anything short of an outright directive must also be permissible. While this may be true with respect to executive agencies (who, under Kagan's theory, can be directed by the President), it is not true with respect to independent agencies. Furthermore, if Stack's contrary interpretive approach to presidential *directions* were to gain traction, it would still be critical to clarify when agencies may take presidential *suggestions* into account. Indeed, if Stack's interpretive approach were to prevail, Presidents would likely turn with increasing frequency to softer mechanisms for exerting

messages on the subject. Indeed, even outside of the context of presidential control, the courts have not been clear about what factors an agency “must, can, and cannot consider in making a decision,” such as when or whether agencies may take costs into account when setting regulatory policy.³²⁰

At one end of the spectrum, *Massachusetts v. EPA* provides an example of a case in which the Supreme Court was unwilling to allow presidential influence to sway the EPA’s decision even though the statute was silent on the matter.³²¹ At the other end of the spectrum, consider foundational administrative law cases like *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*³²² and *Sierra Club v. Costle*.³²³ Both these cases openly embrace the notion that that Presidential power can and should play a role when agencies set policy via rulemaking. For example, in *Sierra Club*, the D.C. Circuit noted that rulemaking was not intended to be a “rarified technocratic process, unaffected by political considerations or the presence of Presidential power.”³²⁴

In the end, this lack of doctrinal clarity should not be resolved through reflexive application of “expertise forcing” as occurred in *Massachusetts v. EPA*.³²⁵ Nor should it be resolved through a lackadaisical, anything-goes approach that would allow any and all influences emanating from the White House to be considered regardless of whether those influences relate to the statutory scheme. Rather, the solution must lie in a more nuanced, statutorily facing rule—one that asks whether the presidential influences are connected to the overall statutory scheme. If Congress is silent about whether an agency may consider suggestions

influence, making it even more critical to clarify the allowable space in which presidential suggestions can operate.

³²⁰ Cf. Richard J. Pierce, *What Factors Can An Agency Consider in Making A Decision?*, 2009 MICH. ST. L. REV. 67 (2009) (noting tension in the case law concerning what decisional factors an agency is allowed to consider).

³²¹ See *Control of Emissions From New Highway Vehicles and Engines*, 68 Fed. Reg. 52922-02 (Sept. 8, 2003).

³²² 467 U.S. 837, 865 (1984).

³²³ 657 F.2d 298 (D.C. Cir. 1981).

³²⁴ *Id.*

³²⁵ 549 U.S. 497, 532-33 (2007); see also Freeman & Vermeule, *supra* note 23 (describing *Massachusetts* as an example of “expertise-forcing”).

coming from the White House,³²⁶ then Congress should be presumed to have intended to allow the agency to consider any factors that are rationally and logically related to the statutory inquiry—regardless of whether they emanate from the White House. Put another way, the distinguishing factor between permissible and impermissible considerations should not be the *source* of the influences, but rather the *substance* of the influences. So long as the substance of suggestions emanating from the White House relate to policy choices and public values falling within the general rubric of the relevant statutory regime, then there should be no bar to an agency considering them.³²⁷

Three examples illustrate how the statutorily facing rule that I propose here would operate in practice. First, reconsider the FDA’s handling of the Citizen Petition that sought over-the-counter status for Plan B, which was discussed earlier.³²⁸ With respect to the petition seeking over-the-counter status for Plan B, the crux of the statutory inquiry facing the FDA was whether Plan B could be deemed “safe and effective” for self-administration.³²⁹ Given the defined nature of this statutory inquiry, there was no room for the FDA to deny the Citizen Petition due to concerns that granting over-the-counter-status to Plan B could be politically damaging to the President during an election year.³³⁰ Nor was there room for generalized judgments about the morality of teen sex or the ethics of birth control. Instead, the relevant statutory inquiry focused on ensuring that the protection of “public health” by making sure the drug was “safe and effective” for self-administration. Thus, the statutorily facing rule proposed

³²⁶ Cf. MASHAW, *supra* note 294, at 292 (noting statutory silence in this area).

³²⁷ See Watts, *supra* note 18, at 52, 54 (arguing that we can presume that “Congress would view political considerations tied to policy choices or public values falling within the general rubric of the statutory scheme as logically relevant considerations”); *D.C. Federation of Civil Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971) (holding that an agency decision should be overturned due to political pressure only if the pressure caused the agency to decide the matter on factors that were not made relevant by Congress).

³²⁸ See *supra* at Part II.A (discussing the FDA’s handling of Plan B).

³²⁹ *Tummino v. Torti*, 603 F. Supp. 2d 519, 525 (E.D.N.Y. 2009); see also *supra* at Part II.A.

³³⁰ Cf. *supra* note 182 and accompanying text (noting *New York Times* article that suggested that Sebelius’ decision on Plan B “avoided what could have been a bruising political battle over parental control and contraception during a presidential election season”).

here would confirm Judge Korman’s determination that the FDA acted arbitrarily and capriciously in allowing political influences to trump its scientific determinations.³³¹

Second, reconsider Obama’s decision to direct the EPA to withdraw its proposed ozone standards.³³² The Clean Air Act did not legally obligate the EPA to promulgate new standards at that specific point in time; the next mandatory revision of the ozone standard was not required by the statute to occur until 2013. Indeed, as Obama expressly noted in directing the EPA to pull the proposed 2011 standards, work was already underway to update the science that would result in the mandatory reconsideration of the standards in 2013.³³³ Revising the standards in 2011, as Obama noted, would burden “state and local governments” by asking them “to begin implementing a new standard that w[ould] soon be reconsidered.”³³⁴ Given that the statute did not mandate a revision of the ozone standards in 2011, it was perfectly consistent with the statutory regime for Obama—taking national priorities and regulatory efficiency into account—to determine that the EPA should hold off on voluntarily revising the standards at that particular point in time. Thus, according to the statutorily facing rule proposed here, it was perfectly appropriate for the EPA to consider the President’s views about matters like regulatory uncertainty and regulatory burdens when withdrawing the voluntary revision of the ozone standards.³³⁵

Third, reconsider Obama’s efforts to influence the FCC’s net neutrality proceeding.³³⁶ In launching its rulemaking proceeding, the FCC noted that it proposed “to rely on section 706 of the Telecommunications

³³¹ See *supra* at Part II.A (describing Judge Korman’s rulings in the Plan B context).

³³² See *supra* at Part II.B (describing Obama’s decision to direct the EPA to pull its proposed ozone standards).

³³³ *Statement by the President on the National Ambient Air Quality Standards*, *supra* note 219.

³³⁴ *Id.*

³³⁵ Cf. Comment, Matthew R. Bowles, *Speak Now or Forever Be Overruled: Deferring to Political “Judgment” in EPA Rulemakings*, 20 GEO. MASON L. REV. 591, 629 (2013) (arguing that under the Clean Air Act “science remains the foundation of EPA rulemakings, but the Administrator’s authority also includes discretion to consider presidential influence.”).

³³⁶ See *supra* at Part II.C (describing Obama’s efforts to influence the net neutrality debate).

Act of 1996” as its regulatory hook for ensuring that the Internet remains open, but it also stated that it would “seriously consider the use of Title II of the Communications Act as the basis for legal authority.”³³⁷ It invited “comment on the benefits of both section 706 and Title II, including the benefits of one approach over the other,” and it sought comments on “the best ways to define, prevent and punish the practices that threaten an open Internet.”³³⁸ Thus, when President Obama weighed in on the subject in November 2014 and recommended that the FCC use Title II to promulgate strong rules protecting the Internet, Obama did not push the FCC to consider any factors that were irrelevant under the relevant statutory schemes. Indeed, Obama spoke directly to questions on which the FCC had invited public comment, such as whether a “no-blocking” rule should be adopted.³³⁹ The mere fact that Obama’s views came from the President—rather than from some ordinary member of the public or from an industry group—should not take his views out of the range of permissible and relevant considerations. Although Congress did give the FCC a certain level of independence when it insulated the Commissioners from at-will removal by the President, Congress did not prohibit the FCC from considering the President’s views on matters directly relevant to the FCC’s rulemaking proceeding simply because those views come from the President rather than from an average member of the public.³⁴⁰ Thus, according to the statutorily facing rule proposed here, the FCC may permissibly consider the President’s views and suggestions on how to best regulate net neutrality.

As these three examples illustrate, allowing agencies to consider suggestions coming from the President would not mean that agencies could

³³⁷ Protecting and Promoting the Open Internet, 79 Fed. Reg. 37448-01, 37448 (July 1, 2014).

³³⁸ *Id.*

³³⁹ See *supra* at note 12 (describing Obama’s plan for protecting the Internet, which includes a “no-blocking” rule).

³⁴⁰ See RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 7.9, pp. 500-01 (2002) (stating that the President can exert control over policymaking by independent agencies through informal means, such as by simply calling or having a subordinate call “the critical decisionmakers at the agency to express the President’s views”); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 498 (2008) (“there is good reason to think that independent agencies will adhere to presidential preferences once a majority of commissioners are from the President’s party”).

consider any and all Presidential influences. Rather, as a matter of statutory interpretation, the key question would be whether the substance of the presidential suggestion was tethered to or divorced from the relevant statutory inquiry. The end result would mean that crass political horse trading and raw political partisanship divorced from the relevant statutory scheme would fall outside of the realm of permissible considerations; however, a wide range of other more policy-driven presidential suggestions that could be said to be tied to public values or policy choices under the statutory scheme would be deemed permissible decisional factors. Adoption of this statutorily facing rule would go a long way toward clarifying that agencies may consider many influences emanating from the White House, clearing up the cloud that currently hangs over the permissibility of presidential control. This, in turn, might help to bring more presidential influences out of the shadows and into the open where they could be subject to oversight and scrutiny by the public. The next section turns to consider other mechanisms that could be used to bring presidential control out into the open.

B. Transparency-Enhancing Mechanisms

Another doctrinal category that should play a significant role in controlling presidential control involves transparency-enhancing mechanisms. As this Article has demonstrated, when exerted through overt mechanisms like published presidential directives and public speeches, presidential control can help to promote political accountability and bolster the perceived legitimacy of policy decisions made by unelected agency officials. In contrast, when presidential control is exerted through more covert means, such as OMB review and behind-closed-door mechanisms, presidential control can undermine the transparency of an agency's decision-making process and shield the President's involvement from scrutiny. This lack of transparency, in turn, can lead to questions about whether presidential involvement pushed an agency to ignore its own scientific findings or to consider factors that are not relevant under the applicable statutory regime. Thus, in managing the negative *and* the positive attributes of presidential control, there is a need for legal mechanisms designed to *compel* agencies to be more transparent about presidential involvement, as well as mechanisms designed to *incentivize* agencies to openly acknowledge presidential influences. When coupled together, these different kinds of transparency-enhancing mechanisms would create a formidable "carrot" and "stick" approach.

1. Forcing Transparency via Disclosure Rules

One approach to achieving greater transparency would be to compel agencies to disclose the nature and content of presidential attempts to influence rulemaking proceedings. This idea has ample support.³⁴¹ Nina Mendelson, for example, has argued in favor of procedural rules that would require “significant agency decision[s] to include at least a summary of the substance of executive supervision.”³⁴² According to Mendelson, a disclosure requirement could be imposed on agencies by Congress, or perhaps by the President or by agencies themselves.³⁴³ Similarly, Margaret Gilhooley recommended more than 20 years ago that “an agency disclose, as part of the rulemaking record, when an agency has adopted an administration policy in the oversight process and the agency’s reasons for doing so.”³⁴⁴ These kinds of transparency-focused proposals set forth very promising means of controlling presidential control: Requiring agencies to disclose the substance of significant executive supervision would enable greater oversight and monitoring of presidential involvement, thereby enhancing the positive political accountability values associated with presidential control while minimizing the opaque and sometimes corrupting nature of presidential control.³⁴⁵

Nonetheless, disclosure-forcing rules could not possibly operate in any meaningful way in isolation.³⁴⁶ This is because increased disclosure of presidential supervision would necessarily lead to a variety of unresolved

³⁴¹ See, e.g., Jaclyn Falk, *The Behind Closed Door Policy: Executive Influence in the Environmental Protection Agency’s Informal Rulemaking*, 47 UNIV. SAN FRAN. L. REV. 593 (2013); see also Lisa Heinzerling, *Who Will Run the EPA?*, 30 YALE J. ON REG. 39 (2013) (arguing that if “OMB decides not to allow a rule to issue, it should return the rule to the relevant agency with a written (and public) explanation as to why it is doing so.”).

³⁴² Mendelson, *supra* note 18, at 1130.

³⁴³ See *id.* at 1164 (noting that the preferred route would be for Congress to legislate a disclosure requirement).

³⁴⁴ Gilhooley, *supra* note 18, at 301.

³⁴⁵ Cf. Mendelson, *supra* note 18, at 1130 (“Requiring greater transparency in the agency decision-making process may not only increase accountability for agency action, but also help to deter inappropriate presidential influence and prompt Congress to refine statutory requirements if appropriate.”).

³⁴⁶ Mendelson acknowledges this. See *id.* at 1166 (noting that a disclosure requirement would mean that “the judiciary would be presented with a stream of administrative review cases posing questions regarding the treatment of political reasons”).

questions that touch on other aspects of administrative law. Among these questions would be: When can agencies consider presidential suggestions or comply with presidential directions without running afoul of their statutory mandates? Can an agency's basis of "statement and purpose" accompanying a final rule be deemed adequate if it only discloses presidential influence in a boilerplate or highly perfunctory fashion, or if it doesn't mention the President's influence at all?³⁴⁷ How should courts treat presidential influences when reviewing agency action? What kinds of discovery tools should courts make available to litigants when it appears that an agency affirmatively tried to hide the substance of presidential supervision?³⁴⁸ As these questions illustrate, the effectiveness of disclosure rules ultimately would turn on broader administrative law questions.

Furthermore, the practical impact of any disclosure rules—whether enacted by Congress,³⁴⁹ by the President or by agencies themselves—would turn heavily on how courts ultimately treated presidential influences in reviewing agencies' rules. If, for example, a disclosure requirement were put into place and courts responded by reflexively engaging in the kind of expertise forcing seen in *Massachusetts v. EPA*,³⁵⁰ then the disclosure

³⁴⁷ See 5 U.S.C. § 553(c) (requiring that a final rule incorporate "a concise general statement of [the rule's] basis and purpose").

³⁴⁸ Discovery beyond the administrative record potentially could be used to smoke out undisclosed political influences, but discovery is currently quite difficult to obtain. See Heinzerling, *supra* note 156, at 977 (explaining that while discovery beyond the administrative record is available in theory, it is quite difficult to obtain in practice); *but see* Tummino v. von Eschenbach, 427 F. Supp.2d 212, 231-34 (E.D.N.Y. 2006) (allowing discovery with respect to the FDA's refusal to switch Plan B to over-the-counter status because the plaintiffs made a strong showing that the FDA acted in bad faith). If more hidden presidential influences are to be brought out into the open, then perhaps, as Heinzerling has suggested, the "strong presumption against probing decision makers' minds should be softened." Heinzerling, *supra* note 156, at 981.

³⁴⁹ If Congress took action, it would have to take care to avoid tripping over Executive Privilege issues. See generally PIERCE, ADMINISTRATIVE LAW TREATISE, *supra* note 340, at § 7.9, p.502 (noting that Congress has "considered passage of a statute that would require public disclosure of all communications between OMB and the agencies it 'regulates'" but that "Congress' ability to requires such disclosure may be limited to some uncertain extent by the doctrine of Executive Privilege.").

³⁵⁰ See *supra* at Part III.A (describing how *Massachusetts* represents a case of expertise-forcing); Freeman & Vermeule, *supra* note 23, at 93-94 (arguing that the Court's decision in *Massachusetts* represents an example of expertise forcing by

requirement would do little to enhance the positive political accountability values that can be associated with presidential control. Indeed, judicial hostility to presidential influences disclosed by agencies would create perverse incentives for agencies to push presidential influence further underground where they would be free from public and Congressional oversight. Thus, in order to effectively enhance the positive *and* restrain the negative aspects of presidential control, any disclosure rules would necessarily require a corresponding shift in judicial treatment of presidential influences—one that would *incentivize* agencies to disclose significant presidential influences. The next section turns to consider how judicial review doctrines might be moved in this direction.

2. Rewarding Transparency via Judicial Review

Two different judicial review doctrines could be used to help incentivize agencies to disclose significant presidential influences. The first is arbitrary and capricious review, which enables courts to ensure that agencies justify their decisions with adequate reasons.³⁵¹ The second is *Chevron* deference, which involves courts giving deference to an agency's reasonable interpretation of statutory ambiguity.³⁵²

With respect to arbitrary and capricious review, I have previously explained elsewhere that courts currently apply arbitrary and capricious review through an expert-driven lens, demanding that agencies explain their decisions “in technocratic, statutory, or scientifically driven terms, *not* political terms.”³⁵³ Furthermore, I have argued that expanding arbitrary and capricious review's narrow, technocratic definition of what counts as a valid explanation to also include political influences tied to the relevant statutory scheme would incentivize agencies to disclose political influences that they relied upon.³⁵⁴ However, simply reconceptualizing arbitrary and capricious review in isolation would not do much to bring many of the hidden and

the judiciary).

³⁵¹ See 5 U.S.C. § 706(2)(A) (2000).

³⁵² See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

³⁵³ Watts, *supra* note 18, at 5 (emphasis in original).

³⁵⁴ *Id.* at 8 (“The heart of the argument set forth here is that what count as ‘valid’ reasons under arbitrary and capricious review should be expanded to include certain political influences ... so long as the political influences are openly and transparently disclosed.”).

sometimes corrupting aspects of presidential control out of the shadows.³⁵⁵ If anything is to be learned from the lessons of the Bush and Obama administrations' efforts to control the regulatory state, it is that presidential control is extremely complex and nuanced; some instances of presidential control further positive values like political accountability and regulatory coherence, while other instances of presidential control act to taint the legitimacy of an agency's decision.³⁵⁶ Thus, reconceptualization of arbitrary and capricious review should be coupled with an affirmative disclosure requirement and also with a statutorily facing interpretive rule, like the one proposed here, that would clarify that agencies can consider influences emanating from the White House so long as they are substantively tied to relevant considerations under the statutory scheme.³⁵⁷ These doctrinal changes, if used in concert with one another, would help to both *compel* and to *incentivize* agencies to disclose presidential influences, thus bringing more instances of presidential control out into the open and furthering notions of political accountability and oversight.

Chevron deference, which is granted to agencies' reasonable interpretations of ambiguities in the statutes that they administer,³⁵⁸ stands as another key judicial review doctrine that should be used to incentivize agencies to disclose presidential influences. *Chevron* itself recognized that agencies may permissibly change their views concerning the meaning of statutory ambiguity, even if those changed views are due to a change in administration.³⁵⁹ However, *Chevron* does nothing to incentivize agencies

³⁵⁵ See Watts, *supra* note 18, at 5-8 (focusing on arbitrary and capricious review and arguing that courts should treat political influences, including influences coming from the president, as an additional possible reason for deferring to agencies); *id.* at 76 (noting that the proposed "carrot"—i.e., granting deference when agencies openly and transparently rely upon political influences—might need to be balanced by a "stick," such as a statutory mechanism that forces disclosure of political influences).

³⁵⁶ See *supra* at Part II (using three case studies from the Bush and Obama administrations to illustrate the complex nature of presidential control).

³⁵⁷ See *supra* at Part IV.A (discussing statutorily facing rules); see also *supra* at Part IV.B.1 (discussing disclosure rules).

³⁵⁸ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

³⁵⁹ See *Chevron*, 467 U.S. at 863-64 ("An initial agency interpretation is not instantly carved in stone."); see also *id.* at 857 (noting that the EPA adopted a new interpretation in 1981 after the Reagan administration "took office and initiated a 'Government-wide reexamination of regulatory burdens and complexities.'").

to disclose the impact of presidential influences on their legal conclusions. As of now, presidential influence is irrelevant to the “reasonableness” inquiry at Step Two of *Chevron*.³⁶⁰

This shortcoming could be redressed if Step Two of *Chevron*, which focuses on the reasonableness of the agency’s statutory interpretation, were conceptualized in tandem with arbitrary and capricious review to incentivize agencies to reference any presidential influences in explaining *why* they picked one reasonable interpretation of statutory ambiguity over another or *why* their chosen interpretation is reasonable.³⁶¹ This, for example, might help the FCC to justify under a Step Two analysis why it is reasonable for it to conclude—consistent with the President’s own clearly stated views—that the Internet should now be regulated using Title II of the Communications Act.³⁶² Under this reading of *Chevron*, the FCC would still need to explain why its reading of the statute represents a reasonable fit with the statute, but in doing so, the FCC could point to how the President’s views helped to persuade it to resolve statutory ambiguity in the Communications Act as it did.

An approach along these lines would differ from what Kagan proposed with respect to *Chevron*. In her 2001 article, Kagan suggested that *Chevron* deference should be directly linked to—indeed, limited to—agency interpretations influenced by “presidential involvement.”³⁶³ Under this version of *Chevron*, Kagan argued that courts should award greater deference to executive than independent agencies since the President cannot

³⁶⁰ *Id.* at 843 (framing the Step Two inquiry in terms of statutory fit and looking at “whether the agency’s answer is based on a permissible construction of the statute”).

³⁶¹ There is growing support—outside of the context of presidential control—for the notion that Step Two of *Chevron* merges with arbitrary and capricious review. *See, e.g.*, *Judulang v. Holder*, 132 S. Ct. 476, 484, n.7 (2011) (noting that “under *Chevron* step two, we ask whether an agency interpretation is “arbitrary or capricious in substance.””); *see also* Nat’l Ass’n of Regulatory Util. Comm’rs v. ICC, 41 F.3d 721, 726 (D.C. Cir. 1994); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997).

³⁶² *Cf.* *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) (holding the Communications Act to be ambiguous on the question of whether broadband Internet service providers “offer” “telecommunications service” and thus deferring to the FCC’s “reasonable” views on the matter).

³⁶³ Kagan, *supra* note 1, at 2376.

direct independent agencies.³⁶⁴ Furthermore, she argued that *Chevron* should apply *only* when “presidential involvement rises to the level of substantiality, as manifested in executive orders and directives, rulemaking records, and other objective indicia of decision-making processes.”³⁶⁵

Unlike Kagan, I do not believe that *Chevron* deference should be limited to instances in which presidential involvement impacts an agency’s interpretation of statutory ambiguity. This would represent a dramatic curtailment of *Chevron* deference since many run-of-the-mill agency rules (particularly rules that fall below the “significance” threshold used to trigger OMB review) never involve much, if any, presidential or White House involvement.³⁶⁶ Agencies promulgating these kinds of run-of-the-mill rules should not lose the benefit of *Chevron* deference simply because the President was not involved in the rulemaking proceeding. Instead, presidential involvement—where it exists—should be an *additional* factor (not the sole factor) that agencies can point to in demonstrating the reasonableness of their interpretation of statutory ambiguity.

Nor would I limit *Chevron* deference to executive agencies, as Kagan has suggested. Rather, in order to induce transparent disclosure of presidential involvement from both executive and independent agencies, Step Two’s reasonableness inquiry should take into account any presidential involvement that is transparently and openly disclosed in the agency’s rulemaking record—regardless of whether the agency is an independent agency or an executive agency.³⁶⁷ Despite their protection from removal by the President, independent agencies, such as the FCC, should still reasonably be able to choose to rely upon the current administration’s views of wise policy in picking one statutory interpretation over another and in helping to justify to a court why a given interpretation is reasonable at Step Two of *Chevron*. The agency’s task at Step Two of *Chevron* would still be to explain why its chosen construction represents a reasonable fit with the statute, but in doing so, the agency—whether independent or executive—

³⁶⁴ *Id.* at 2376-77.

³⁶⁵ *Id.* at 2377.

³⁶⁶ See Exec. Order No. 12,866, § 3(f), 3 C.F.R. 638 (1993) (defining “significant regulatory action” as including action having “an annual effect on the economy of \$100 million”).

³⁶⁷ Cf. FEDERAL REGULATION: ROADS TO REFORM, AMERICAN BAR ASSOCIATION at 83 (1979) (both independent and executive agencies “issue regulations reflecting basic economic and social policy decisions for which elected officials should be held responsible and accountable”).

could bolster the reasonableness of its construction by revealing how the President's views led it to resolve the statutory ambiguity as it did.

C. Process-Forcing Rules

Finally, in considering how best to enhance the positive and restrain the negative aspects of presidential control, a variety of "process-forcing" rules also warrant consideration. The term "process-forcing" rules is used here to describe rules that operate to protect the integrity of the notice-and-comment process set forth in the Administrative Procedure Act (APA).³⁶⁸ Under the judiciary's reading of Section 553 of the APA, agencies must include sufficient information in their notices of proposed rulemaking so as to inform interested parties of the relevant issues and to ensure "meaningful" public participation.³⁶⁹ Similarly, when issuing a final rule, the courts have required agencies' statements of basis and purpose to respond to any "significant" comments received.³⁷⁰ This statement of basis and purpose then serves as the "primary document judges turn to in deciding the validity of challenged rules."³⁷¹

The APA does not forbid "off-the-record" communications between agencies and the President, his staff or other members of the Executive branch in informal notice-and-comment rulemaking proceedings.³⁷² Nonetheless, when the President injects himself into an agency's rulemaking proceeding, concerns can arise that the President's involvement undermines the notice-and-comment process and erodes opportunities for public participation. These concerns could arise in at least three different scenarios.

³⁶⁸ See 5 U.S.C. § 553 (setting forth notice and comment process for informal rulemaking).

³⁶⁹ *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980).

³⁷⁰ *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1151 (9th Cir. 2002) (quoting *Am. Mining Congress v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992)) ("significant" comments are "those which raise 'relevant points, and which, if adopted, would require a change in the agency's proposed rule'").

³⁷¹ Jeffrey S. Lubbers, *A GUIDE TO FEDERAL AGENCY RULEMAKING* at 376 (2006) ("The notice-and-comment procedures of the APA are intended to encourage public participation in the administrative process, to help educate the agency, and, thus, to produce more informed agency decisionmaking.").

³⁷² See *Sierra Club v. Costle*, 657 F.2d 298, 404-08 (D.C. Cir. 1981) (allowing undocketed, post-comment communication between the President and EPA on policy issues).

Undisclosed presidential involvement: First, where presidential control is exerted through non-transparent aspects of the OMB review process or through undocketed, private communications between the White House and agencies, the public may never learn of the President's views, let alone be given an opportunity to comment on or to scrutinize them. This undermines the integrity of the notice-and-comment process by allowing the President to inject factors into the rulemaking process that the public never has an opportunity to judge.³⁷³

Transparent and public presidential involvement that remains unacknowledged in the agency's rulemaking record: Second, even where the President does make his views about a pending rulemaking proceeding very clear to the public, he might do so outside of the confines of the notice-and-comment process, such as via a public speech or a memorandum that never makes its way into the agency's rulemaking record. This is exactly what happened recently in the FCC's net neutrality rulemaking when Obama issued his written statement and video via Whitehouse.gov outside of the window that the FCC had set for public comments.³⁷⁴ The public was made fully aware of the President's views, enabling the public to judge the President's involvement. Yet the format and the timing of the President's involvement effectively created two very different proceedings: First there was the FCC's conventional notice-and-comment proceeding replete with its formalized procedures and deadlines regarding the submission of comments and *ex parte* contacts. Next emerged a different, more real-world proceeding—one that is replete with the President's written statement, his online video and ongoing public dialogue on the subject that is spilling out onto the pages of *Wired* and other major publications.³⁷⁵

On February 26, 2015, the FCC voted 3-2 along party lines to regulate broadband Internet service as a public utility under Title II of the Communications Act, thus voting for net neutrality rules aligned with

³⁷³ See Thomas McGarity, *Presidential Control of Regulatory Agency Decision Making*, 36 AM. U. L. REV. 443, 457 (1987) (arguing that because agencies do not disclose *ex parte* influences from the President, “[t]he public cannot judge the President’s reasons or motivations in deciding how to vote in the next election because the public is never even aware of the intervention, must less of its content.”).

³⁷⁴ See *supra* at Part II.C (discussing Obama’s written statement and video).

³⁷⁵ See *supra* note 247 and accompanying text (discussing how the FCC’s chair used *Wired* to release an outline of a proposed rule that he was presenting to the FCC).

Obama's own plan.³⁷⁶ What now remains to be seen is how the FCC will explain Obama's influence when it subsequently issues a statement of basis and purpose accompanying the actual text of its final rules. The best—and most transparent—route would be for the FCC to discuss the President's involvement in the statement of basis and purpose that accompanies the final rule. However, unfortunately, the FCC may instead choose to leave the notice-and-comment proceeding and the political proceeding separate from each other by issuing a statement of basis and purpose that ultimately fails to explain the President's role. If the latter approach is taken, then the notice-and-comment process begins to look like no more than a smokescreen. This unfortunately is currently the norm in agency proceedings. Likely due to the judiciary's tendency to view political influence as a "corrupting" influence, agencies rarely acknowledge presidential influences when issuing final rules—even when the President has played an open and public role in steering the rulemaking proceeding.³⁷⁷

Presidential control over enforcement priorities that are set outside of the notice and comment process: Third, Presidents might push agencies to use their broad enforcement powers as a back-door mechanism for setting substantive policies, raising concerns about the evasion of notice-and-comment procedures.³⁷⁸ In other words, the President might encourage agencies to effectively create "legislative" rules—which generally must go through the notice-and-comment process—under the guise of merely setting forth "statements of policy."³⁷⁹ Policy statements merely "advise the public prospectively of the manner in which the agency proposes to exercise a

³⁷⁶ See Ruiz, *supra* note 253.

³⁷⁷ See Watts, *supra* note 18, at 23-29 ("Given that courts generally apply arbitrary and capricious review in a way that calls on agencies to justify their decisions in technocratic terms, it should come as no surprise that agencies today generally couch their decisions in technocratic, statutory, or scientific language, either failing to disclose or affirmatively hiding political influences.").

³⁷⁸ Cf. Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157 (1996) (arguing that because agency non-enforcement decisions have been presumptively exempted from judicial review, administrative agencies "shield policy decisions of great public significance from judicial review by creating a situation in which agencies are able to hide what are at bottom legislative and judicial judgments behind the facade of executive discretion").

³⁷⁹ See 5 U.S.C. § 553(b) (exempting "interpretative rules" and "general statements of policy" from notice and comment).

discretionary power,”³⁸⁰ and—because they do not carry the force and effect of law—they are exempt from notice and comment.³⁸¹

Obama’s recent efforts to defer prosecutorial action in the immigration arena provide an excellent example of this kind of scenario. DHS implemented Obama’s plan for fixing our immigration system via a written memorandum, which set forth criteria to guide DHS’s discretion in deciding whether to defer prosecutorial action with respect to certain undocumented childhood and parental arrivals.³⁸² Soon after DHS issued its memo, Obama stated in a speech in Chicago that he had taken action “to change the law.”³⁸³ Texas and 25 other then states challenged the legality of DHS’s memo, claiming, among other things, that the memo was not merely a policy statement but rather was a legislative rule that needed to go through notice and comment.³⁸⁴ In February 2015, a federal district court judge agreed with the states, ruling that DHS had written a legislative rule under the guise of exercising its enforcement discretion and thus had failed to comply with the APA’s notice-and-comment requirements.³⁸⁵ That ruling is currently being appealed by the Obama administration.

As each of these three scenarios suggests, the extent to which presidential control might undermine the APA’s rulemaking process cannot be resolved using a one-sized-fits-all solution. Instead, different process-forcing responses to each of the three scenarios described above are warranted. The first scenario discussed above—the problem of covert, undisclosed presidential influence—would best be addressed by drawing upon both judicial review doctrines and disclosure rules to both force and incentivize more disclosure of presidential influences.³⁸⁶ In particular, a

³⁸⁰ *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

³⁸¹ *Id.* at 1108-09.

³⁸² *See supra* note 299 and accompanying text (noting DHS’s directive).

³⁸³ *See* <https://www.youtube.com/watch?v=YAJZupYbT0c> (providing a video of Obama’s speech in Chicago where Obama stated that he took action to “change the law” in the immigration arena).

³⁸⁴ *Texas v. United States*, 2015 WL 648579, at *3 (S.D. Tex. Feb. 16, 2015) (noting that “Texas and twenty-five other states” filed suit).

³⁸⁵ *Id.* at *50 (“The DHS Secretary is not just rewriting the laws; he is creating them from scratch.”).

³⁸⁶ *See supra* at Part IV.B (discussing judicial review doctrines and disclosure rules as transparency-enhancing mechanisms).

new statutory requirement calling for more disclosure around White House involvement should merge transparency-enhancing principles with process-forcing principles by requiring that presidential involvement in the initial formulation of a proposed rule be disclosed in the agency's notice of proposed rulemaking and that any presidential influence over the content of final rules be disclosed in the statement of basis and purpose accompanying the final rule. Alternatively, in the absence of a new statutory requirement along these lines, courts could become more willing to allow discovery as a transparency-forcing tool, enabling plaintiffs to try to uncover political influences that agencies failed to disclose in the rulemaking record. This is what happened in the context of the lawsuit that was filed challenging the FDA's handling of Plan B; the district court allowed discovery into the agency's decision making process, which unearthed evidence of improper political motivations that were untethered from the relevant statutory inquiry.³⁸⁷

The second scenario discussed above—that of a rulemaking proceeding in which the agency's rulemaking record fails to acknowledge publicly-visible presidential involvement—could most effectively be dealt with by pushing agencies to flag any significant presidential influence at key steps of the rulemaking process, including in the notice of a proposed rulemaking as well as in a final rule's statement of basis and purpose. A statutory amendment to section 553 of the APA would lead most quickly to this result, folding disclosure requirements into the notice-and-comment process.³⁸⁸ Alternatively, in the absence of an amendment to the APA, courts can use judicial review doctrines to *incentivize* agencies to disclose presidential influences in their rulemaking documents,³⁸⁹ and they also can *penalize* agencies for failing to provide the whole story. This may have been what was afoot in *Motor Vehicle Manufacturers v. State Farm*.³⁹⁰ There, the Reagan administration's National Highway Traffic Safety Administration failed to acknowledge political influences that likely impacted the agency's decision to rescind a Carter administration rule

³⁸⁷ See *supra* at notes 191 and accompanying text (discussing how discovery was allowed in the *Tummino* case).

³⁸⁸ See 5 U.S.C. § 553 (setting forth the requisite procedures for notice and comment rulemaking).

³⁸⁹ See *supra* at notes 361-367 and accompanying text (discussing how courts should reshape deference doctrines to incentivize agencies to disclose presidential influences).

³⁹⁰ 463 U.S. 29 (1983).

requiring certain cars to be equipped with either air bags or automatic belts. The Supreme Court’s opinion, which found the agency’s decision to be arbitrary and capricious, could be read as saying that the “agency had not provided the full story” and that the agency should be forced to “reveal the political basis for its decision” so that it also would consider “the opposing political position.”³⁹¹

Finally, the third scenario described above—that of Presidents encouraging agencies to set policy outside of the notice-and-comment process by relying upon their enforcement discretion—would best be dealt through judicial clarification of the line between legislative rules, which are subject to notice and comment, and nonlegislative rules, such as interpretive rules and policy statements, which are exempt from such procedures.³⁹² Currently, the line between legislative rules and nonlegislative rules is “enshrouded in considerable smog.”³⁹³ While it is beyond the scope of this Article to propose a clearer and more effective test, greater clarity around this distinction would help to avoid battles—like the one that recently erupted in the wake of Obama’s executive action in the immigration arena—over the President’s ability to direct agencies’ enforcement priorities. If the Texas case challenging DHS’s directives in the immigration realm ultimately reaches the Supreme Court, the Court should view the case as an opportunity to provide much needed clarity in this nebulous but important area of the law. Indeed, if future Presidents find themselves as frustrated by congressional inaction as Obama has,³⁹⁴ then Presidents may increasingly try to effect legal change through back-door routes that undermine opportunities for public participation, highlighting the importance of bringing doctrinal clarity to this area of the law.

In sum, all three scenarios just discussed suggest the need to ensure that presidential control does not undermine the notice-and-comment process or the public’s right to participate in that process in a meaningful

³⁹¹ Lisa Schultz Bressman, *Procedures as Politics*, 107 COLUM. L. REV. 1749, 1783 (2007).

³⁹² In distinguishing policy statements from legislative rules, the D.C. Circuit has focused on whether the agency retained discretion or whether it bound itself. *See* U.S. Tel. Ass’n v. F.C.C., 28 F.3d 1232, 1234 (D.C. Cir. 1994) (“we have said repeatedly that [the line between legislative rules and policy statements] turns on an agency’s intention to bind itself to a particular legal policy position”).

³⁹³ *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984).

³⁹⁴ *See supra* note 137 and accompanying text (noting that Obama has been particularly frustrated by “congressional inaction”).

way. Various process-forcing rules, including rules designed to avoid the evasion of notice-and-comment procedures and rules designed to ensure that presidential influences are fully and openly disclosed in agencies' rulemaking documents, must be part of any coordinated response to rising presidential control.

CONCLUSION

George W. Bush's and Barack Obama's efforts to steer the regulatory state demonstrate that presidential control involves a complicated mix of positive and negative attributes. Yet administrative law has failed to adapt to the entrenchment of presidential control, let alone respond to its complexity. In an attempt to move administrative law forward, this Article has mapped out how a wide variety of sub-constitutional administrative law doctrines could be coordinated to provide a more nuanced and proactive response to presidential control—a combination that would enhance the positive and restrain the negative attributes of presidential control. In particular, this Article has identified three relevant categories of administrative law doctrines: statutorily facing rules; transparency-enhancing mechanisms; and process-forcing rules. These three doctrinal categories provide a powerful and much needed roadmap for responding to many current controversies swirling around presidential control, including Obama's recent efforts to influence the FCC's net neutrality proceeding and his executive action in the immigration arena.