

Presidential Administration in the Obama Era

Jud Mathews*

The Supreme Court may not really be “Obama’s Court,” as the title of this conference would have it, but the President can console himself with the thought that he is at least head of the Executive Branch. The Constitution vests “the executive power” in the President¹ and instructs him to “take care that the laws be faithfully executed”;² it gives him power to appoint principal officers of the United States with the Senate’s consent,³ and to demand opinions in writing from the heads of departments.⁴ These textual commitments of power to the President have been understood to carry in their wake implied powers—including the power to remove officers—that Congress may not limit in ways that impede the President’s ability to perform his constitutional duty.⁵

As the executive branch has grown over our history, so has the effective reach of the executive power. Today, the President sits at the head of an administrative apparatus that encompasses hundreds of administrative agencies, mostly organized into 15 Cabinet-level departments. These agencies administer thousands of federal statutes that delegate to them significant discretionary power. But this far-flung empire of agencies, made up of countless principalities and fiefdoms, can be difficult to govern. As

* Assistant Professor, Penn State Law and Affiliate Professor, Penn State School of International Affairs. I thank Casey Millburg and Bethany Parry for research assistance.

A version of this paper was presented in October 2016 at the conference “Obama’s Court: Recent Changes in U.S. Constitutional Law in Transatlantic Perspective,” sponsored by the Law and Society Institute Berlin.

¹ U.S. Const. art. II, § 1, cl. 1.

² U.S. Const. art. II, § 3.

³ U.S. Const. art II, § 2, cl. 2.

⁴ U.S. Const. art II, § 2, cl. 1.

⁵ *See Morrison v. Olson*, 487 U.S. 654, 689-92 (1988).

President Harry Truman lamented in the late 1940s, the President “spends his time flattering, kissing and kicking people to get them to do what they are supposed to do anyway.”⁶ Since then, Presidents have devised a roster of techniques to assert more control over this domain, using their position as “Administrator-in-Chief”⁷ to advance their political programs through agencies.

This has not escaped the attention of scholars. In her famous 2001 article titled “Presidential Administration,”⁸ then-Professor Elena Kagan examined the techniques that the Clinton administration employed to mobilize agency processes in the service of the President’s agenda. Professor Kagan identified legislative gridlock as an important driver of presidential administration: Presidents resort to agencies to maneuver around a sclerotic Congress.⁹ But years earlier, political scientist Terry Moe wrote about how Presidents going back to Franklin Roosevelt had devised institutional innovations to centralize control over agency policymaking in the White House.¹⁰ Moe views these moves as responses not to particular legislative logjams, but to generic governance and political challenges facing all modern Presidents.¹¹

I’m going to talk about what presidential administration looks like in the Obama era, and how the President’s leadership of the executive branch has been received in the Supreme Court. It is important to note at the outset that a good portion of what Presidents can do to shape

⁶ Letter from Harry S. Truman, U.S. President, to Mary Jane Truman, sister (Nov. 14, 1947).

⁷ Ming Hsu Chen, *The Administrator-in-Chief*, 69 ADMIN. L. REV. (forthcoming Spring 2017).

⁸ Elena Kagan, *Presidential Administration*, 114 HARVARD L. REV. 2245 (2001).

⁹ *Id.* at 2344.

¹⁰ Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235-71 (John E. Chubb & Paul E. Peterson eds., 1985).

¹¹ Daniel Galvin and Colleen Shogan have argued that “pre-modern” Presidents engaged in the same pattern of behavior. Daniel Galvin and Colleen Shogan, *Presidential Politicization and Centralization Across the Modern-Traditional Divide*, 69 *Polity* 477-504 (Apr., 2004).

administration evades judicial review. Federal courts can hear constitutional claims and review agency actions, but many aspects of presidential administration fall into neither category. On occasion, the Supreme Court has pushed back directly against President Obama's leadership of the executive branch.

Less dramatically, the Court over the last eight years has developed administrative law doctrines in ways that subtly amplify judicial scrutiny of executive branch decision making. The Court has done this in particular by trimming back on the deference granted to agencies' constructions of statutes, and by becoming more insistent that agencies consider costs before regulating. It's possible to think of all these developments as contributing to a reequilibration of the separation of powers, as the White House seeks to make policy administratively where it may, and the Court works to hold the line on executive branch aggrandizement where it can.

*

By any measure, President Obama's executive branch has been active. To take one measure: the Obama administration has finalized more major rules—that is, those expected to have an impact of \$100 million or more on the economy—than the Clinton or Bush administrations, although not by a vast margin.¹² This administration's rules have consumed more pages in the Federal Register than any administration on record.¹³ And the administration has produced a bumper crop of so-called midnight

¹² *Economically Significant Rules Published Across Administrations, Equivalent Periods*, GEORGE WASHINGTON UNIVERSITY REGULATORY STUDIES CENTER, <https://regulatorystudies.columbian.gwu.edu/reg-stats#Economically%20Significant%20Rules%20Published%20Across%20Administrations,%20Equivalent%20Periods>.

¹³ *Pages in the Federal Register (1936 – 2015)*, GEORGE WASHINGTON UNIVERSITY REGULATORY STUDIES CENTER, <https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Pages.JPG>.

regulations—that is, those appearing in the waning months of the Presidency.¹⁴

What is harder to measure but substantively more important is the character of presidential involvement in agency processes. Several scholars have noted developments on this front. Professor Katherine Watts has described a deepening of presidential administration that began in the second Bush administration and continued under President Obama.¹⁵ Watts writes that “if anything, Obama has elevated White House control over agencies’ regulatory activity to its highest level ever, relying upon a mixed [sic] of covert control and overt command.”¹⁶ Similarly, Abby Gluck, Anne Joseph O’Connell, and Rosa Po have pointed to an embrace of “unorthodox rulemaking” that has gathered speed in the Obama administration, amplifying the President’s role in the administrative process.¹⁷

There are several elements to presidential administration in the Obama era, all of which build on foundations established by previous presidents. The President’s most prominent tool for shaping the work of agencies is the Office of Information and Regulatory Affairs (OIRA), a small but powerful unit inside the White House’s Office of Management and Budget (OMB). OIRA has authority to review major regulations prior to their promulgation and to coordinate agencies’ regulatory agendas.¹⁸

Presidents since Ronald Reagan have used OIRA to align agencies’ output with the President’s agenda and to ensure that the benefits of rules

¹⁴ See Sofie E. Miller & Daniel R. Pérez, *Measuring the Obama Administration’s Historic Midnight Surge*, REG BLOG (Feb. 6, 2017), <http://www.regblog.org/2017/02/06/miller-perez-measuring-obama-administration-historic-midnight-surge/>.

¹⁵ Kathryn A Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683 (2016).

¹⁶ *Id.* at 698.

¹⁷ Abbe R. Gluck, Anne Joseph O’Connell, & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015). The authors argue that “unorthodox rulemaking” finds its complement in “unorthodox lawmaking,” and that each fuels the other.

¹⁸ Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

justify their costs. But some accounts paint the Obama OIRA as especially active. Lisa Heinzerling, a high-ranking attorney in the Environmental Protection Agency (EPA) during Obama's first term, has described a number of the techniques used by OIRA to shift discretionary decision-making authority under environmental statutes away from agency professionals and to White House personnel. According to Heinzerling, OIRA far exceeded its narrow remit to review economically significant rules and those raising new issues or interagency conflicts, reviewing more rules with none of these features.¹⁹ OIRA asserted the power to review not only rules, but also informal agency policy and guidance documents deemed to be significant.²⁰ Under the leadership of its administrator, Cass Sunstein, OIRA pushed EPA to make decisions through cost-benefit analysis any time the law allowed.²¹ First-person accounts and empirical evidence also suggests that OIRA has slow-walked the regulatory review process on occasion to avoid releasing controversial regulations at politically inopportune moments.²²

President Obama has also made much use of a technique President Clinton favored: directing agencies to undertake policy actions in specific areas.²³ This President has publicly instructed agencies to develop policies—often with quite specific features—with respect to fuel economy standards, the regulation of drone aircraft, energy efficiency for appliances, net neutrality, and the management of federal coal programs,²⁴ among others. Many of these directives are memorialized in memos posted to the

¹⁹ 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, 347 (2014).

²⁰ *Id.* at 338-39.

²¹ *Id.*

²² Lisa Heinzerling, *A Pen, A Phone, and the U.S. Code*, 103 *GEO. L.J. ONLINE* 59, 60-61 (2014).

²³ Kagan, *supra* note 5 at 2294.

²⁴ Press release, U.S. Dept. of the Interior, Secretary Jewell Launches Comprehensive Review of Federal Coal Program (Jan. 15, 2016), <https://www.doi.gov/pressreleases/secretary-jewell-launches-comprehensive-review-federal-coal-program>.

White House web site and published in the Federal Register. While President Obama has claimed—correctly—that he has issued fewer executive orders than any two-term President since Ulysses S. Grant,²⁵ he has used memoranda extensively to call the tune for his agencies to dance to.

What’s more, these public pronouncements are often accompanied by behind-the-scenes White House engagement in policy formation. The President’s executive action on immigration reform presents a striking example. In November 2014, the President announced a new “Deferred Action” program that provided protection against removal for millions of persons in the country unlawfully. Nine months before, the administration began working with the Department of Homeland Security (DHS) to develop the plan.²⁶ By one count, the White House and Homeland Security officials together produced more than sixty drafts before the President announced the program.²⁷

President Obama has gone even further than President Clinton to make the work of agencies seem like an extension of the White House, including by using social media and web videos to announce directives and to claim the agency actions as policy achievements of the administration.²⁸ When the President announced the Deferred Action program, the agency seemed to disappear from view entirely: the President did not mention DHS once in his fifteen-minute address.²⁹

²⁵ Tanya Somanader, “*Here’s the Truth*”: *President Obama Busts 4 Myths About the Economy*, U.S. WHITE HOUSE (Jun. 2, 2016, 5:17 PM), <https://www.whitehouse.gov/blog/2016/06/02/heres-truth-president-obama-busts-4-myths-about-economy>.

²⁶ Chen, *supra* note 7, at 25.

²⁷ Chen, *supra* note 7, at 25 n.110; Anna Palmer, *How Obama Got Here*, POLITICO (Nov. 20, 2014, 9:02 PM), <http://www.politico.com/story/2014/11/how-obama-got-here-113077>.

²⁸ Watts, *supra* note 15, at 27-28.

²⁹ Press release, U.S. White House, Remarks of President Barack Obama – State of the Union Address As Delivered (Jan. 13, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/12/remarks-president-barack-obama—prepared-delivery-state-union-address>.

The Deferred Action program is also notable in that it bypassed the notice-and-comment rulemaking process, which requires that agencies announce their plans, solicit public input, and justify their final rule in light of comments received. The notice-and-comment process is mandatory for “legislative rules,” but the line between legislative and non-legislative rules is blurry, and President Obama’s agencies have frequently sought to steer policy through informal means that avoid notice-and-comment, as had agencies under his predecessors. The Deferred Action program takes the form of internal instructions to agency personnel regarding how they should apply prosecutorial discretion. Challengers to the program argued, among other things, that the program changed people’s legal rights, and therefore constituted a legislative rule that should have gone through notice-and-comment. The administration also attracted attention for “Dear Colleague” letters issued by the Department of Education in 2011 and 2016, which laid out the agency’s views on how universities should handle sexual assault claims and the needs of transgender students, respectively. Although the letters were not themselves legally binding, universities wishing to ensure against federal investigation would do well to follow the letters’ far-reaching guidance.³⁰

³⁰ See Jacob Gersen & Jeannie Suk Gersen, *Administering Sex*, 42 ADMIN. & REG. L. NEWS 18 (Fall 2016).

Another significant agency action that bypassed notice and comment came in the final month of the Obama administration. In late December 2016, DHS issued a rule rescinding a post-September 11 special registration program for certain immigrants. Some in the administration were concerned that the program could provide some legal basis for the “Muslim registry” that candidate Trump at one point seemed to endorse. See J. David Goodman & Ron Nixon, *Obama to Eliminate Visitor Registry Not Used Since 2011*, N.Y. TIMES A17 (Dec. 23, 2016). There was no notice-and-comment process, and the regulation was effective immediately. DHS justified bypassing notice and comment on the grounds that (1) the rule was a rule of agency organization, procedure, or practice, and hence exempt under the APA, and (2) notice and comment was unnecessary, because the program was no longer in effect. See *Removal of Regulations Relating to Special Registration Process for Certain Nonimmigrants*, 81 Fed. Reg. 94231 (Dec. 23, 2016).

The President has also used the executive branch to model policies that lacked the support to be enacted by Congress. Five years before the Supreme Court declared a right to same-sex marriage, the President extended benefits to same-sex partners within the executive branch.³¹ In 2014, President Obama issued an executive order to declare a minimum wage for federal contractors of \$10.10 an hour, at a time when the national federal minimum wage was stuck at \$7.25.³² By mobilizing the executive branch as a policy laboratory, the Obama White House has sought to lead by example, showcasing favored policies in action, and perhaps generating spillover effects.

Lastly, the White House has tailored its execution of the law to correspond to administration priorities, choosing not to enforce in non-priority areas. The Deferred Action program is one example of this, but not the only one. For instance, the Justice Department has declined to challenge state laws permitting the use of marijuana and has directed federal prosecutors not to target individual users.³³ Perhaps most dramatically, the administration declined altogether to defend in court the federal Defense of Marriage Act, on the grounds that the administration had concluded it to be unconstitutional.

* *

If that is a snapshot of presidential administration in the Obama era, let's turn now to the Court.

The Supreme Court has occasionally had the opportunity to pass judgment directly on President Obama's leadership of the executive branch.

³¹ *Fact Sheet: Proposed Rulemaking to Implement Executive Order 13658, Establishing a Minimum Wage for Contractors*, U.S. DEPT. OF LABOR (Jun. 2014), <https://www.dol.gov/whd/flsa/nprm-eo13658/factsheet.htm>.

³² *Id.*

³³ Ryan J. Reilly, Ryan Grim, *Eric Holder Says DOJ Will Let Washington, Colorado Marijuana Laws Go Into Effect*, HUFFINGTON POST (Sept. 3, 2013), http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj_n_3837034.html.

For instance, in the *Noel Canning* case from 2014,³⁴ the Court heard a challenge to the constitutionality of the President’s appointments to leadership positions in two federal agencies. The Constitution grants the President the power to appoint federal officers when the Senate is in recess, but in an effort to block the President from doing so, the Senate refused to declare itself in recess, even when it was not really in session. President Obama made appointments anyway, reasoning that the Senate was functionally in recess, and the Supreme Court unanimously disagreed, ruling that the Senate is generally in recess when it says it is.

But many of the techniques the President uses to steer the executive branch—OIRA review of rulemakings, directives to agencies, enforcement decisions—never get directly reviewed by the courts. That said, the Supreme Court does hear several consequential administrative law cases each term. Trends in this jurisprudence can be hard to identify, but I would argue that we have seen an overall decline in the deference agencies receive from the Supreme Court during the Obama years. This decline in deference could be understood as a judicial response, of sorts, to presidential administration: that is, as a reassertion of the courts’ oversight role in an administrative process that it is increasingly driven from the White House.

As I have described above, agencies often address important matters in informal guidance documents, rather than full-dress notice-and-comment regulations.³⁵ This is true not just of President Obama, but of his recent predecessors also. In its 2015 term, the Supreme Court declined an opportunity to restrict the use of informal guidance. But decisions over the past several years have reduced agencies’ incentives to do so, by reducing the deference that some informal agency pronouncements get in practice.

Let me start with the 2015 case, *Perez v. Mortgage Bankers Association*, in which the Supreme Court reviewed a decision of the D.C.

³⁴ 573 U.S. ____ (2014).

³⁵ It should be noted that some agencies do have internal practices in place that provide for some public participation in the formation of significant guidance. See, e.g., 21 C.F.R. § 10.115 (describing the Food and Drug Administration’s “Good guidance practices”).

Circuit Court of Appeals.³⁶ That Court had taken a hard line against agencies' use of informal guidance to interpret regulations. The D.C. Circuit required agencies to go through notice-and-comment rulemaking whenever they sought to change how they interpreted a rule.³⁷ In *Perez*, the Supreme Court unanimously rejected that requirement, because the Administrative Procedure Act exempts interpretive rules from notice-and-comment.

But if the Supreme Court has not stopped agencies from addressing important matters through informal guidance, its handling of the *Auer* doctrine has to some extent reduced agencies' incentives to do so. *Auer* provides that courts will uphold agencies' interpretations of their own regulations unless they are plainly erroneous, on the theory that the agency should know what its own regulation means.³⁸ In recent years, as if suddenly remembering their Montesquieu, Justices have voiced serious misgivings about how *Auer* in effect vests in a single body the powers to make a rule and then to say what that rule means. Justice Scalia, never one for half measures, has gone from the author of *Auer* to its fiercest critic. The Court has not overruled *Auer*, but has found reasons not to apply it in three recent cases,³⁹ and some Justices are clearly itching to eliminate it entirely.

Ending *Auer* would mean that agencies would get less deference for informal interpretations of rules than they receive for those contained in notice-and-comment rulemakings. But in recent years, the Court has found reasons several times to pull back on the deference customarily afforded to notice-and-comment rules. Under the *Chevron* doctrine, famously, courts defer to reasonable agency constructions of ambiguous statutes that they administer. Decided in 1984, *Chevron* recognized that questions of statutory interpretation functionally amount to policy choices in many cases, and reasoned that those choices are better made by politically accountable

³⁶ 575 U.S. ____ (2015).

³⁷ *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F. 3d 579, 586 (1997).

³⁸ *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *Auer* restates the holding of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

³⁹ *Decker v. Northwest Environmental Defense Center*, 568 U.S. ____ (2013); *Christopher v. SmithKline Beecham Corp.*, 567 US ____ (2012); *Gonzales v. Oregon*, 546 U.S. 243 (2006).

executive branch actors than by courts.⁴⁰ The Court later identified notice-and-comment rulemakings as prime candidates for *Chevron* deference, because Congress would expect agencies to use their rulemaking power to say what statutes mean with the force of law.⁴¹

During the Obama presidency however, the Court has seen fit several times to withhold *Chevron*, or to apply it stingily. To give a few, quick examples: in 2012's *Home Concrete* case, Justice Breyer wrote for the Court to strike down a regulation of the Internal Revenue Service (IRS) interpreting a provision of the tax code.⁴² In a portion of the opinion joined by three other Justices, Justice Breyer concluded that the statute unambiguously foreclosed the agency's interpretation, notwithstanding the fact that the Supreme Court, in a pre-*Chevron* case, had said of the same statutory language: "it cannot be said that the language is unambiguous."⁴³

In *Utility Air Regulatory Group*, from 2014, the Supreme Court held that the EPA's interpretation of "air pollutant" in one section of the Clean Air Act to mean what the Supreme Court had held "air pollutant" meant in a different part of the same statute was not reasonable under *Chevron*.⁴⁴ And in *King v. Burwell* from 2015, which concerned agency implementation of a key provision of Obamacare, the Court rejected out of hand the suggestion that the agency's reading of the statute should be evaluated under *Chevron*.⁴⁵ In essence, Chief Justice Roberts took the view that the question at issue, on which the fate of the entire statute hinged, was too important to be decided by the IRS. While there have been some countervailing movements in the Court's *Chevron* jurisprudence,⁴⁶ I read the overall trend

⁴⁰ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984).

⁴¹ *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001).

⁴² *United States v. Home Concrete & Supply, LLC*, 566 U.S. ____ (2012).

⁴³ *Id.* (slip op., at 8)

⁴⁴ *Utility Air Regulatory Group v. EPA*, 573 U.S. ____ (2014) (slip op., at 23-24).

⁴⁵ *King v. Burwell*, 576 U.S. ____ (2015) (slip op. at 8).

⁴⁶ *See, e.g., Scialabba v. Cuellar de Osorio*, 134 S.Ct. 2191 (2014) (granting *Chevron* deference to an agency's choice between two contradictory provisions of the statute it administers); *City of Arlington v. FCC*, 133 S.

to be a contractionary one. It seems that judicial deference to agencies is granted more conditionally, and performed less generously.

Arguably, the Court is also growing less deferential towards agency choices over how costs should be considered in regulatory decisions. Sometimes, Congress intends for agencies to pursue some objective without regard to cost, other times, Congress intends for agencies to take costs into account, and often, it's not clear what Congress wants. Three times during the Obama administration, the Court has heard challenges to agencies' decisions to use or not use cost-benefit analysis.⁴⁷ In these cases, the Court was happy to defer to the agency's choice—so long as the agency chose to consider costs. In the first two, the agency had undertaken cost-benefit analysis, and the Court had upheld its decision to do so as reasonable under *Chevron*.⁴⁸

In the last of the three, *Michigan v. EPA*,⁴⁹ the agency had concluded that regulating emissions from power plants was “appropriate and necessary,” and hence warranted under the Clean Air Act. The agency had reached this decision based on the health effects of the pollution, and had not considered the costs of compliance—although costs would come into consideration when the agency determined *how* to regulate emissions. Writing for a 5-4 majority, Justice Scalia held that the agency's choice was unreasonable, since, he argued, the statutory term “appropriate and necessary” implied some attention to cost. It is interesting to think that both the White House and the Supreme Court may have grown more insistent about the use of cost-benefit analysis in recent years, and that the real winners in the struggles over regulatory policy-making may turn out to be the economists.

* * *

Ct. 1863 (2013) (granting *Chevron* deference to agency's determination of its own jurisdiction).

⁴⁷ See *Michigan v. EPA*, 135 S.Ct. 2699 (2015); *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014); *Entergy Corp. v. Riverkeeper Inc.*, 556 U.S. 208 (2009).

⁴⁸ *Id.*

⁴⁹ 576 U.S. ____ (2015).

President Obama has justified his use of agencies to advance policy goals as a response to the gridlock gripping Congress. As he put it in early 2014, “We’re not just going to be waiting for legislation in order to make sure that we’re providing Americans the kind of help they need. I’ve got a pen and I’ve got a phone.”⁵⁰ Many presidential techniques to shape policy administratively escape judicial review, but I have suggested that we’ve seen some ratcheting up of judicial scrutiny in administrative law during the Obama presidency. Probably the most high-profile of the President’s efforts has been his executive action on immigration. Ironically, the fate of the Deferred Action program in the courts is tied up with the same legislative gridlock that, in the President’s view, justified administrative action in the first place. A federal district court ruled that the Program was unlawful, and granted a nationwide injunction. The ruling was appealed to the circuit court, which upheld it, and then to the U.S. Supreme Court this summer. The Supreme Court split 4-4 over the President’s action, leaving the decision below in place. And the Supreme Court could split 4-4, of course, because the Senate has refused to take up President Obama’s nomination to fill the seat vacated by the death of Justice Scalia.

There are reasons Presidents push to consolidate control over agencies regardless of what’s happening in Congress, but it makes sense that Presidents would shift still more of their efforts towards administrative measures under conditions of legislative gridlock. That condition is likely to persist, and courts will have to continue to work out how judicial review properly meets the challenge of increasingly vigorous presidential administration.

⁵⁰ Bennett, *supra* note 14.