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## Controlling Presidential Control

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# CONTROLLING PRESIDENTIAL CONTROL

Kathryn A. Watts\*

*Presidents Reagan and 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 decisionmaking 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. After examining three different case studies and discussing the inadequacies of expertise forcing, this Article provides a roadmap for how a wide range of nonconstitutional administrative law doctrines could be coordinated to enhance the positive attributes and restrain the negative attributes of presidential control. The Article gives attention to doctrinal tools, such as judicial review doctrines and notice-and-comment procedures, falling into three general categories: statutorily facing rules; transparency-enhancing mechanisms; and process-forcing rules. If used in a coordinated fashion, doctrinal tools falling into each of these three categories 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.<sup>1</sup> Kagan argued that a “distinctive form of administration and administrative control,” which she called “presidential administration,” emerged under Ronald Reagan and surged during Bill Clinton’s presidency.<sup>2</sup> 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,<sup>3</sup> and it furthers effective and coherent regulatory policy.<sup>4</sup> Yet, when

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

2. *Id.* at 2250.

3. *Id.* at 2331–39.

4. *Id.* at 2339–46.

she published her article in 2001,<sup>5</sup> Kagan noted that it was unclear whether future developments might raise new problems and challenge old assumptions about presidential administration.<sup>6</sup>

This Article picks up where Kagan left off nearly fifteen 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 on various forms of covert command. The Bush administration, for example, demonstrated a behind-the-scenes willingness to influence agencies' scientific findings.<sup>7</sup> In addition, Bush relied heavily on the Office of Management and Budget (OMB), which reviews executive agencies' proposed and final regulations as well as their regulatory plans, to exert aggressive and often-veiled White House control over agency rules.<sup>8</sup> Obama likewise has relied on the somewhat secretive OMB review process.<sup>9</sup> Obama, however—taking a cue from Clinton—has also 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.<sup>10</sup> Indeed, many of Obama's very public efforts to direct the regulatory state have been splashed across the headlines in recent months.<sup>11</sup> From net neutrality<sup>12</sup> to drones<sup>13</sup> to immigration,<sup>14</sup> Obama

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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 on only a few preliminary examples from the Bush administration. *Id.* at 2315, 2318–19.

6. *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* Section I.B.1.b (describing the Bush administration's willingness to involve itself with scientific decisions).

8. The Office of Management and Budget (OMB) is within the Executive Office of the President. See PETER L. STRAUSS ET AL., GELLHORN AND 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* Section I.B.2 (describing President Obama's influence over the regulatory state).

10. See *infra* Section I.B.2.

11. See, e.g., Gautham Nagesh & Brody Mullins, *Blindsided: How White House Thwarted FCC Chief on Net Rules*, WALL ST. J., Feb. 5, 2015, at A1; Michael D. Shear, *Obama Moves Ahead on Immigration: Asserting Power While Daring the G.O.P.*, N.Y. TIMES, Nov. 21, 2014, at A1; Craig Whitlock, *Rules on Use of Drones Unveiled*, WASH. POST, Feb. 16, 2015, at A1.

12. *Net Neutrality: President Obama's Plan for a Free and Open Internet*, WHITE HOUSE, <https://www.whitehouse.gov/net-neutrality> [<http://perma.cc/2LCN-RT4Z>] (setting forth Obama's plan for how the Federal Communications Commission should regulate net neutrality).

has openly and aggressively sought to influence or outright control regulatory policy, frequently harnessing social media to maximize the impact of his efforts.<sup>15</sup>

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 made readily available via social media, 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 not adapted to presidential control in any meaningful way. This Article aims to move administrative law forward in this area, exploring how a variety of nonconstitutional administrative law doctrines can and should respond to the new status quo.<sup>16</sup> While numerous scholars have weighed in on long-standing debates about the constitutionality of presidential attempts to control the executive branch<sup>17</sup> and whether the Constitution demands that

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13. On February 15, 2015, the Federal Aviation Administration (FAA) released details concerning proposed drone regulations. Overview of Small UAS Notice of Proposed Rulemaking (proposed Feb. 15, 2015), [http://www.faa.gov/regulations\\_policies/rulemaking/media/021515\\_sUAS\\_Summary.pdf](http://www.faa.gov/regulations_policies/rulemaking/media/021515_sUAS_Summary.pdf) [<http://perma.cc/V9RM-2WGS>]. 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. Presidential Memorandum: Promoting Econ. Competitiveness While Safeguarding Privacy, Civil Rights, & Civil Liberties in Domestic Use of Unmanned Aircraft Sys., 2015 DAILY COMP. PRES. DOC. (Feb. 15, 2015), <https://www.whitehouse.gov/the-press-office/2015/02/15/presidential-memorandum-promoting-economic-competitiveness-while-safegua> [<http://perma.cc/MY4Y-56RK>].

14. *The President Speaks on Fixing America's Broken Immigration System*, WHITE HOUSE (Nov. 20, 2014), <https://www.whitehouse.gov/photos-and-video/video/2014/11/20/president-speaks-fixing-americas-broken-immigration-system> [<http://perma.cc/X3G6-6FGK>] (announcing a plan to allow certain groups of undocumented immigrants to stay temporarily without the risk of deportation).

15. See *infra* Section I.B.2.c.

16. This Article's focus is on presidential control over the rulemaking process, and accordingly, it 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 *infra* Section II.A (discussing the FDA's regulation of Plan B, which involved flavors of both rulemaking and adjudication); see also *infra* notes 393–397 and accompanying text (discussing Obama's involvement in directing DHS's enforcement priorities in the immigration arena).

17. See, e.g., Robert V. 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.

the President have authority over all executive actors,<sup>18</sup> scholars have given little attention to analyzing how nonconstitutional administrative law principles could be used to respond to the new realities of presidential control.<sup>19</sup> This Article represents the first attempt to set forth a legal framework for how a variety of nonconstitutional administrative law doctrines can be coordinated to enhance the positive *and* restrain the negative aspects of presidential control.<sup>20</sup> 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) “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 rules and his executive action in the immigration arena.

This Article proceeds in four parts. Part I briefly describes how Presidents Reagan and Clinton played key roles in laying the foundation for strong presidential control over the administrative state. 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

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WASH. L. REV. 696, 759–60 (2007) (arguing that the President has the constitutional responsibility to oversee agencies but not to directly make decisions for agencies).

18. 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 the Administration*, 94 COLUM. L. REV. 1 (1994) (arguing against the notion that the framers constitutionalized a unitary vision of the executive).

19. 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., CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 169–202 (1990) (exploring hard-look review); Margaret Gilhooley, *Executive Oversight of Administrative Rulemaking: Disclosing the Impact*, 25 IND. L. REV. 299, 301 (1991) (advocating for disclosure rules); Kagan, *supra* note 1, at 2372–83 (focusing on *Chevron* deference and hard-look review as a means of enhancing presidential administration); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010) (arguing for ex ante disclosure rules); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009) (focusing on arbitrary-and-capricious 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, which is one of the main goals of this Article.

20. Kagan focuses on analyzing how administrative law doctrines—namely, *Chevron* and hard-look review—could promote presidential control. See Kagan, *supra* note 1, at 2363, 2372–83 (“[C]ourts should attempt, through their articulation of administrative law, to recognize and promote this kind of [presidential] control over agency policymaking.”). She does not focus on how administrative law doctrines might both promote the positive *and* restrain the negative aspects of presidential control, as this Article does.

over time, turning into an entrenched feature of the regulatory state that transcends party lines. 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. 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”<sup>21</sup> that simplistically views political influence as “suspect” and expert-driven decisionmaking as “good.” 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.

### I. THE ENTRENCHMENT OF PRESIDENTIAL CONTROL

As a result of important work by Kagan and other scholars, the story surrounding presidential control through the end of Clinton’s presidency is now well known.<sup>22</sup> But legal scholars have yet to give much attention 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 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,<sup>23</sup> Presidents quickly recognized that

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21. In using the term “expertise forcing,” this Article borrows from a phrase originally coined by Professors Freeman and Vermeule in the context of assessing the Supreme Court’s opinion in *Massachusetts v. EPA*. Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (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).

22. See Kagan, *supra* note 1, at 2274–309 (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).

23. See CORNELIUS M. KERWIN & SCOTT R. FURLONG, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 14 (4th ed. 2011) (“The number of statutes [in the 1970s] that established major programs requiring extensive rulemaking was unprecedented.”); Harold H. Bruff, *Presidential Power Meets Bureaucratic Expertise*, 12 U. PA. J. CONST. L. 461, 469 (2010) (“In the 1970s, Presidents began taking an active role in managing regulation.”); 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.”).

unelected officials were making inherently political policy judgments of great national importance outside of the usual legislative process.<sup>24</sup> In response, Presidents began to try to exert more and more influence over agencies' regulatory decisions through a variety of mechanisms.<sup>25</sup> 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. Two additional tools for exerting presidential control gained prominence during the Clinton presidency: 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.<sup>26</sup> Presidents Nixon,<sup>27</sup> Ford,<sup>28</sup> and Carter<sup>29</sup> all planted early seeds for White House review of agency rules. Yet, in retrospect, it was Reagan's inauguration that brought about a new era of presidential control.<sup>30</sup> In February 1981, Reagan issued Executive Order 12,291.<sup>31</sup> Reagan's order implemented an ambitious program for White House oversight of regulation that was unprecedented in its scale,<sup>32</sup> tasking the director of OMB with taking the lead in overseeing federal regulation.<sup>33</sup> For example, Reagan's order directed executive agencies to evaluate proposed major rules according to regulatory impact analyses—

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24. Strauss, *supra* note 23, at 758 (“[T]he new political importance of rulemaking . . . generat[ed] increased presidential and congressional interest in controlling [rulemaking] outcomes.”).

25. This is not to say that Presidents had never previously tried to exert any control over the regulatory state. They had. Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 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 . . .”).

26. Bruff, *supra* note 23, at 484.

27. Nixon did so through 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 22, at 546–47, 546 n.80.

28. 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 *id.* at 547.

29. See Exec. Order No. 12,044, § 3, 3 C.F.R. 152, 154 (1979) (requiring agencies to prepare regulatory analyses for significant regulations that might have a major impact on the economy).

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

31. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

32. Bruff, *supra* note 22, at 549; see Kagan, *supra* note 1, at 2277.

33. See Bruff, *supra* note 22, at 550; *supra* note 8 and accompanying text (explaining that OMB sits within the Executive Office of the President).



analyses that were to be transmitted to OMB for its review.<sup>34</sup> His order also specified certain substantive criteria for agency rulemakings, requiring executive agencies (to the extent permitted by law) to consider cost-benefit principles when promulgating regulations.<sup>35</sup> Four years after issuing Executive Order 12,291, Reagan issued Executive Order 12,498, which required agencies to submit annual regulatory plans listing proposed actions to OMB for its review, thereby expanding OMB's reach to the pre-rulemaking process.<sup>36</sup>

Although Reagan's centralized White House review program stirred up a great deal of controversy,<sup>37</sup> Republican President George H.W. Bush retained both of Reagan's executive orders when he entered the White House in 1989.<sup>38</sup> And when Democratic President Clinton entered the White House in 1993, he too retained many of Reagan's key concepts, such as cost-benefit analyses and regulatory planning, when he issued his own order—Executive Order 12,866.<sup>39</sup> 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.”<sup>40</sup> 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.”<sup>41</sup> 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 President, the ultimate authority to resolve such disagreements.<sup>42</sup>

As Kagan notes, Clinton's order said something significant about the changing “nature of the relationship between the agencies and the President.”<sup>43</sup> Whereas Presidents before Reagan had generally “shunned” direct involvement in agency rulemaking proceedings (and even Reagan had disclaimed any ability to directly displace the judgment of agency officials), the

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34. 3 C.F.R. at 128 (1982) (“[A]gencies 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 . . .”).

35. *E.g., id.* (“Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society . . .”).

36. Exec. Order No. 12,498, § 1(a), 3 C.F.R. 323, 323 (1986).

37. *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, 1200 (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”).

38. Kagan, *supra* note 1, at 2281.

39. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 app. at 76 (1994).

40. Kagan, *supra* note 1, at 2285.

41. 3 C.F.R. at 642 (1994).

42. *Id.* at 648.

43. Kagan, *supra* note 1, at 2289–90.

Clinton order assumed presidential power over “discretionary decisions assigned by Congress to specified executive branch officials.”<sup>44</sup> Whereas Reagan often tried “to veil his and his staff’s influence over administration,”<sup>45</sup> Clinton’s order quite openly asserted the authority to make discretionary decisions delegated to agencies,<sup>46</sup> helping to project the notion that agencies “were [the President’s] and so too were their decisions.”<sup>47</sup>

## 2. Presidential Directives and Personal Appropriation

Clinton also developed additional means of exerting control. In particular, as Kagan details, Clinton relied heavily on presidential “directives” and public “appropriation” of agency action to help project the sense that agencies were an extension of the White House.<sup>48</sup>

First, Clinton regularly published formal memoranda—called directives—that publicly directed agencies to propose or adopt rules addressing specific domestic policy issues.<sup>49</sup> Although both Reagan and George H.W. Bush issued some directives during their presidencies,<sup>50</sup> it was Clinton who brought prominence to this practice.<sup>51</sup> 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.”<sup>52</sup>

Second, in addition to relying heavily on directives, Clinton frequently asserted personal ownership of—or tried to “appropriate”—agency action.<sup>53</sup> Again, Clinton was not the first President to try to publicly claim credit for certain administrative actions, but, as Kagan describes, “Clinton set a new

44. *Id.*

45. *Id.* at 2333.

46. *Id.* at 2289–90.

47. *Id.* at 2290.

48. *See id.* at 2290–303 (describing Clinton’s reliance on directives and his frequent appropriation of agency action).

49. *Id.* at 2290.

50. 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 to delay or halt the issuance of regulations.”); *see also* Kathryn A. Watts, *Regulatory Moratoria*, 61 *DUKE L.J.* 1883, 1890–97 (2012) (describing moratoria on rulemaking that both Reagan and George H.W. Bush ordered during their presidencies).

51. Bruff, *supra* note 23, 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.”).

52. Kagan, *supra* note 1, at 2295.

53. *Id.* at 2299–300.

standard' in communicating directly with the public."<sup>54</sup> He did this "event after event, speech after speech" by claiming "ownership of administrative actions, presenting them to the public as his own—as the product of his values and decisions."<sup>55</sup> One high-profile example involves Clinton's very public ownership of the FDA's attempts to curb teen smoking.<sup>56</sup> 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 the press widely covered.<sup>57</sup>

Just as with Clinton's heavy reliance on directives, Clinton's frequent, "nakedly assertive,"<sup>58</sup> and political attempts to appropriate agency action took place in the public eye. This enabled Clinton to further his political agenda and public image and to develop greater public understanding of the President's role in the regulatory process, contrasting markedly with the more veiled OMB review process that Reagan institutionalized.

#### B. *Modern Presidential Control Under George W. Bush and Barack Obama*

While 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 Bush and 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.<sup>59</sup> Obama too has relied on OMB review.<sup>60</sup> 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. He has extensively used presidential directives and appropriation of regulatory action, often leveraging online media tools to help project the sense that he owns the regulatory state.<sup>61</sup>

54. *Id.* at 2300 (quoting Lawrence R. Jacobs & Robert Y. Shapiro, *The Politicization of Public Opinion: The Fight for the Pulpit*, in *THE SOCIAL DIVIDE: POLITICAL PARTIES AND THE FUTURE OF ACTIVIST GOVERNMENT* 83, 96 (Margaret Weir ed., 1998)).

55. *Id.*

56. See The President's News Conference, 2 *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 19, at 23 (noting that "Clinton played a very active role in directing" the FDA's rulemaking).

57. See, e.g., Peter T. Kilborn, *Clinton Approves a Series of Curbs on Cigarette Ads*, *N.Y. TIMES*, Aug. 24, 1996, at 1.

58. Kagan, *supra* note 1, at 2333.

59. See *infra* Section I.B.1 (discussing Bush's efforts to control the regulatory state).

60. See *infra* Section I.B.2 (discussing Obama's efforts to control the regulatory state).

61. See *infra* Section I.B.2.

### 1. George W. Bush

Upon entering the White House, Bush immediately made clear that he planned to exert significant control over the regulatory state. Like Reagan and Clinton did during their presidencies, Bush issued a memorandum ordering a temporary moratorium on 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.<sup>62</sup> This memorandum served as an early sign that Bush planned to take a watchful and restrained approach to regulation, and it helped to solidify a place for regulatory moratoria in the presidential toolbox.<sup>63</sup>

As Bush’s presidency progressed, two primary characteristics of his approach to controlling the regulatory state emerged: (1) extensive reliance on OMB; and (2) 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 OMB<sup>64</sup>—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 thus within the reach of the White House since OMB sits within the Executive Office of the President.<sup>65</sup> For example, Bush expanded Executive Order 12,866’s reach to include significant agency guidance documents.<sup>66</sup> In addition, Bush mandated that each agency designate “one of the agency’s Presidential Appointees to be

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62. Memorandum for the Heads and Acting Heads of Exec. Dep’ts & Agencies, 66 Fed. Reg. 7702, 7702 (Jan. 24, 2001) [hereinafter Regulatory Review Plan]. 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 50, at 1885–86. George H.W. Bush issued a moratorium closer to the end of his presidency, not at the beginning.

63. *See* Regulatory Review Plan, *supra* note 62.

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

65. Exec. Order No. 13,422, §§ 5(b), 7, 3 C.F.R. 191, 193 (2008); *see also supra* note 8 and accompanying text.

66. *Id.* § 7.

its Regulatory Policy Officer.”<sup>67</sup> Among other things, an agency’s Regulatory Policy Officer had to approve all agency rulemaking before it commenced,<sup>68</sup> leading to the further politicization of the rulemaking process.

Throughout his presidency, Bush relied heavily on OIRA to actively manage agencies’ rulemakings.<sup>69</sup> Bush’s OIRA, for instance, developed a “new tool called the ‘prompt’ letter,”<sup>70</sup> which served as a means of “high-light[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.”<sup>71</sup> In the first two out of fifteen publicly posted prompt letters issued by OIRA during the Bush administration,<sup>72</sup> OIRA prompted the Department of Health and Human Services and the Occupational Safety and Health Administration to give greater priority to two lifesaving issues: “the labeling of trans fatty acid content in foods [and the] use of automated external defibrillators (AEDs) in the workplace.”<sup>73</sup> Subsequent prompt letters involved a variety of issues, ranging from dietary guidelines to pollution from diesel engines.<sup>74</sup>

OIRA under Bush also issued twenty-seven “return” letters<sup>75</sup> and fifteen “review” letters to agencies.<sup>76</sup> “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

67. *Id.* § 5(b).

68. *Id.* § 4(b).

69. John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 *FORDHAM URB. L.J.* 953, 971–74 (2006) (describing OIRA’s “more proactive role” under Bush).

70. *Id.* at 972.

71. Press Release, Office of Mgmt. & Budget, OMB Encourages Lifesaving Actions by Regulators (Sept. 18, 2001), <http://www.reginfo.gov/public/prompt/2001-35.html> [<http://perma.cc/56ES-4GXU>]. 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 Memorandum from John D. Graham, Adm’r, Office of Info. & Regulatory Affairs, to OIRA Staff (Oct. 18, 2001), [http://www.whitehouse.gov/omb/inforeg/oira\\_disclosure\\_memo-b.html](http://www.whitehouse.gov/omb/inforeg/oira_disclosure_memo-b.html) [<https://perma.cc/UP78-C32L>] (“[T]he transparency of OIRA’s regulatory review process is critical to our ability to improve the nation’s regulatory system.”). But as Professor Mendelson points out, despite Graham’s emphasis on transparency, OIRA’s record of disclosure was less than stellar during the Bush years. See Mendelson, *supra* note 19, at 1150–51. Mendelson, for example, describes how “review” and “return” letters released by the Bush administration did not speak to a large “portion of the ‘economically significant’ rules reviewed and changed during the OIRA review process.” *Id.*

72. See *OIRA Prompt Letters*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/jsp/EO/PromptLetters.jsp> [<http://perma.cc/MU5U-43SL>].

73. Press Release, Office of Mgmt. & Budget, *supra* note 71.

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

75. See *OIRA Return Letters*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/do/eoReturnLetters> [<http://perma.cc/5YQR-FRPX>].

76. See *Review Letters*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/jsp/EO/postReviewLetters.jsp> [<http://perma.cc/MHP4-9XGY>].

“consistent . . . with the President’s policies and priorities.”<sup>77</sup> “Review” letters, in contrast, are letters OIRA issued at different stages of the rulemaking process; they might offer advice, urge an agency to consider alternatives, or request that the agency perform additional regulatory analysis.<sup>78</sup>

Despite these attempts at transparency, with few exceptions the 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.<sup>79</sup> The letters also “concern[ed] only a small portion of the ‘economically significant’ rules reviewed and changed during the OIRA review process, and an even smaller portion of all such rules reviewed by OIRA” during the Bush administration.<sup>80</sup> Furthermore, Bush did not regularly make speeches or announcements—as Clinton did—claiming personal credit for various regulatory actions. Thus, 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*.<sup>81</sup> 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.<sup>82</sup> After the Court handed down its decision, the EPA went back to the drawing board, drafting a 300-page document that proposed emission regulations.<sup>83</sup> When the EPA emailed the draft rule to OIRA for pre-rulemaking review, the EPA met resistance: in an attempt to avoid triggering docketing requirements,<sup>84</sup> OIRA refused to

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77. *OIRA Letters*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/jsp/EO/letters.jsp> [<http://perma.cc/692R-ANFA>].

78. *Id.*

79. One notable exception exists. See Letter from Adm’r, Office of Info. & Regulatory Affairs, to Env’tl. Prot. Agency, 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](http://www.reginfo.gov/public/postreview/OIRA_letter_to_EPA_7_10_08.pdf) [<http://perma.cc/BTT5-LHHN>] (noting the President’s view that important decisions involving global warming should be made by elected officials, not by unelected bureaucrats).

80. Mendelson, *supra* note 19, at 1150–51 (“[D]espite the several hundred economically significant rules that were modified during the review process, the Bush Administration OMB posted only *forty-two* review and return letters that explain its problems with the agency rule under review.”).

81. 549 U.S. 497 (2007).

82. See *Massachusetts*, 549 U.S. at 497.

83. Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 608 (2009) (describing the Bush administration’s response to the Court’s *Massachusetts* decision).

84. 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, 332 (2014) (explaining OIRA’s docketing requirements).

open the EPA's email and demanded its retraction.<sup>85</sup> Notably, all of this took place out of the public eye. Indeed, the public learned of OIRA's refusal to open the email message through a *New York Times* story published six months after the incident.<sup>86</sup> When Congress caught wind, it sought access to "the e-mail and related communications," but the White House balked and "claimed executive privilege."<sup>87</sup>

As another example of the Bush White House's hesitancy to publicly claim credit for agencies' decisions, consider how Bush-era agencies 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.<sup>88</sup> In particular, 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 120 to 160 more rules than the Bush administration issued in an average week. This total significantly exceeded "the Clinton Administration's last minute attempts in December 2000 through January 2001 to force federal regulations through the publishing process."<sup>89</sup> One of these Bush-era 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."<sup>90</sup> As Robin Kundis Craig suggests, this holiday timing seems to have been purposefully designed to help the Bush administration "avoid public scrutiny of and debate over its regulatory policies."<sup>91</sup>

#### 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.<sup>92</sup> For instance, in 2003, EPA documents suggested that the

85. 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; Agency Was Responding to Ruling About Clean Air Act*, WASH. POST, June 26, 2008, at A2; Kitrosser, *supra* note 83, at 608–09.

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

87. Kitrosser, *supra* note 83, at 609.

88. 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 5, 6, 15.

89. *Id.* at 6.

90. *Id.*

91. *Id.* at 15 ("[The Bush administration's] controversial regulations are hidden in massive Federal Register publications immediately before and after major holidays, when public attention is diverted.")

92. See STRAUSS ET AL., *supra* note 8, at 690 ("[T]he [George W. 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

Bush White House “attempted to rewrite an EPA report to play down the risks of global warming.”<sup>93</sup> In 2004, more than sixty prominent scientists, including twenty 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.”<sup>94</sup> 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.”<sup>95</sup> Subsequently, in 2005, a NASA official accused the administration of trying to keep him from discussing the effects of global warming.<sup>96</sup> Furthermore, 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.”<sup>97</sup>

This scientific interference—which was widely reported by the news media<sup>98</sup>—was unprecedented; no prior President faced such widespread charges of regular interference with agencies’ scientific decisions.<sup>99</sup> Indeed, after Bush left office, the *New York Times* described Bush’s presidency as representing “eight years of stark tension between science and government.”<sup>100</sup>

The Bush administration disputed charges that it sought to meddle with agencies’ scientific decisions,<sup>101</sup> so it is admittedly difficult to say with certainty the precise degree to which the Bush administration actually engaged

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scientific results or to repress them.”); see also Michele Estrin Gilman, *The President as Scientist-in-Chief*, 45 WILLAMETTE L. REV. 565, 569 (2009) (“Scientists and the media have raised dozens of allegations of scientific interference by the Bush Administration.”).

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

94. James Glanz, *Scientists Say Administration Distorts Facts*, N.Y. TIMES, Feb. 19, 2004, at A18; see also 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. UNION OF CONCERNED SCIENTISTS, SCIENTIFIC INTEGRITY IN POLICYMAKING: AN INVESTIGATION INTO THE BUSH ADMINISTRATION’S MISUSE OF SCIENCE 2 (2004), [http://www.ucsusa.org/sites/default/files/legacy/assets/documents/scientific\\_integrity/rsi\\_final\\_fullreport\\_1.pdf](http://www.ucsusa.org/sites/default/files/legacy/assets/documents/scientific_integrity/rsi_final_fullreport_1.pdf) [<http://perma.cc/2EYB-5AZ3>].

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 Administration’s Words but Must Wait for Action*, N.Y. TIMES, Jan. 22, 2009, at A23.

98. See *supra* notes 93–97 and accompanying text; see also Gilman, *supra* note 92, at 604–05 (“[T]he media took an active interest in the Bush Administration’s politicization of science.”).

99. Cf. Gilman, *supra* note 92, at 565 (noting the Union of Concerned Scientists’ view that the Bush administration engaged in scientific interference more systematically and widely than any other administration).

100. Harris & Broad, *supra* note 97.

101. E.g., Andrew C. Revkin, *Bush’s Science Aide Rejects Claims of Distorted Facts*, N.Y. TIMES, Apr. 3, 2004, at A9.



in widespread interference with scientific decisions. Nonetheless, it seems clear that the White House's willingness to meddle with at least some scientific decisions served as yet another mechanism through which presidential control occurred during the Bush administration.

## 2. Barack Obama

When Barack Obama entered the White House in 2009, he responded to the widespread charges of scientific interference that had been levied against the Bush administration by promising in his inaugural address to "restore science to its rightful place."<sup>102</sup> Soon thereafter he issued a memorandum on "Scientific Integrity."<sup>103</sup> In addition, he quickly revoked Bush's Executive Order 13,422, restored Executive Order 12,866 to its earlier form under Clinton,<sup>104</sup> 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.<sup>105</sup> Thus, many hoped that Obama's administration would approach the regulatory state with a softer touch than the Bush administration did.<sup>106</sup>

Yet, now that the first seven years of Obama's presidency are behind us, it is clear that—although Obama has not faced the same kinds of widespread charges of scientific interference that Bush did—Obama has exerted significant control over the regulatory state through other mechanisms. Indeed, if anything, Obama has elevated White House control over agencies' regulatory activity to its highest level ever, relying on a mix 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. *Heavy Reliance on OMB Review*

When Obama began his presidency by ordering his OMB director to produce recommendations for a new Executive Order on regulatory

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102. Inaugural Address, 1 Pub. Papers 2 (Jan. 21, 2009), <http://www.whitehouse.gov/blog/inaugural-address> [<http://perma.cc/2FTQ-DMDZ>].

103. Memorandum from Office of the Press Sec'y for the Heads of Exec. Dep'ts and Agencies (Mar. 9, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/) [<http://perma.cc/L8CG-9VBM>].

104. Exec. Order No. 13,497, 3 C.F.R. 218 (2010).

105. Memorandum for the Heads of Exec. Dep'ts and Agencies, 74 Fed. Reg. 5977, 5977 (Feb. 3, 2009) ("I therefore direct 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. Cf. Heinzerling, *supra* note 84, 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.").

review,<sup>107</sup> some hoped that the new order would cut back on strong presidential control. That did not prove to be the case. Indeed, when Obama finally issued Executive Order 13,563 in January 2011,<sup>108</sup> he merely supplemented and reaffirmed the principles of Clinton's Executive Order 12,866.<sup>109</sup> Little that Obama set forth in Executive Order 13,563 was new.<sup>110</sup> Nonetheless, Obama—much like Bush—has heavily depended on OMB review. Indeed, Obama has relied on OMB even more intensely—and even more controversially—than Clinton did.<sup>111</sup>

Two aspects of Obama's aggressive approach to OMB review are notable. First, under Obama, OIRA has seized on delay as a significant means of aggressively controlling the regulatory state<sup>112</sup>—delay that often extends far beyond the presumptive ninety-day period of review set forth in Executive Order 12,866.<sup>113</sup> According to Lisa Heinzerling, who worked for the EPA from January 2009 to December 2010, under the Obama administration, OIRA has thwarted regulatory activity by silently sitting on rules,<sup>114</sup> and, in some cases, delaying initiation of the review process by refusing to accept draft rules from agencies.<sup>115</sup> 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 to avoid controversy prior to the 2012 election.<sup>116</sup> According to these Obama officials, the stalled rules included regulations involving “crucial elements of the Affordable Care Act, what

107. Memorandum for the Heads of Exec. Dep'ts and Agencies, 74 Fed. Reg. at 5977.

108. Exec. Order 13,563, 3 C.F.R. 215 (2011), *reprinted in* 5 U.S.C. § 601 app. at 103–04 (2013).

109. *Id.* § 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.”).

110. Heinzerling, *supra* note 84, at 340–41 (“The single most notable fact about the new order, EO 13,563, is how not-new it was . . .”).

111. *Id.* at 333 (“[I]t seems fair to say—certainly in retrospect—that the Clinton years were relatively quiet [and controversy-free] ones for OIRA review.”).

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.” (footnotes omitted)).

113. Executive Order 12,866 established a presumptive ninety-day period for OMB review, with an extension to 120 days if both the agency and OMB agree. Exec. Order No. 12,866, § 6(b)(2), 3 C.F.R. 638, 647 (1994), *reprinted in* 5 U.S.C. § 601 app. at 76 (1994).

114. Heinzerling, *supra* note 112, at 61 (“[W]e have direct evidence that some rules have been not only delayed, but stopped.”).

115. Heinzerling, *supra* note 84, at 359.

116. Juliet Eilperin, *White House Delayed Enacting Rules Ahead of 2012 Election to Avoid Controversy*, WASH. POST (Dec. 15, 2013), [http://www.washingtonpost.com/politics/white-house-delayed-enacting-rules-ahead-of-2012-election-to-avoid-controversy/2013/12/14/7885a494-561a-11e3-ba82-16ed03681809\\_story.html](http://www.washingtonpost.com/politics/white-house-delayed-enacting-rules-ahead-of-2012-election-to-avoid-controversy/2013/12/14/7885a494-561a-11e3-ba82-16ed03681809_story.html) [<http://perma.cc/XRE2-LG2G>] (“The White

bodies of water deserved federal protection, pollution control for industrial boilers and limits on dangerous silica exposure in the workplace.”<sup>117</sup> Statistics support these officials’ anecdotal descriptions of delay: According to a detailed study performed by Curtis Copeland for the Administrative Conference of the United States, “[f]rom 1994 through 2011, the average amount of time it took to complete a review was 50 days, and the highest average review time in any year was 62 days.”<sup>118</sup> Yet “in 2012, the average time for OIRA to complete reviews increased to 79 days, and in the first half of 2013, the average review time was 140 days – nearly three times the average for the period from 1994 through 2011.”<sup>119</sup>

Second, much like the Bush administration,<sup>120</sup> 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.<sup>121</sup> 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.”<sup>122</sup> Indeed, with one notable exception, OMB has not returned rules to agencies with a public explanation of why the rules have not passed OMB review.<sup>123</sup> 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.<sup>124</sup> Such directives generally have taken the form of written

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House systematically delayed enacting a series of rules on the environment, worker safety and health care to prevent them from becoming points of contention before the 2012 election.”).

117. *Id.*

118. Curtis W. Copeland, Length of Rule Reviews by the Office of Information and Regulatory Affairs 4 (Dec. 2, 2013) (unpublished report), <https://www.acus.gov/sites/default/files/documents/Revised%20OIRA%20Report%20Re-posted%202-21-14.pdf> [<https://perma.cc/7WKL-AZ68>].

119. *Id.*

120. *See supra* notes 79–85 and accompanying text.

121. *See* Exec. Order No. 12,866, §§ 6(b)(4)(C)–(D), 3 C.F.R. 638, 647–48 (1994).

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

123. The exception involves Obama’s withdrawal of the EPA’s ozone standards via a written return letter from OIRA. *See infra* Section II.B.

124. *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/> [<http://perma.cc/ZDB7-PS8M>] (“Obama has made prolific use of memoranda despite his own claims that he’s used his executive power less than other presidents.”).

memoranda posted to WhiteHouse.gov and published in the Federal Register.<sup>125</sup>

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.<sup>126</sup> 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.”<sup>127</sup> 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.<sup>128</sup>

Obama’s heavy use of directives has continued throughout his presidency. In the first seven months of 2014 alone, Obama did as follows: gave a public speech about retirement savings while surrounded by steel workers in Pennsylvania and signed a memorandum that directed the Secretary of Treasury to create a myRA retirement program;<sup>129</sup> gave a public speech at a Safeway Distribution Center in Maryland and issued a written report directing the EPA and DOT to issue new fuel efficiency standards for heavy

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125. They differ in form from the OIRA prompt, review, and return letters that Bush frequently relied on as a means of proactively steering agency regulation. *See supra* text accompanying notes 69–78. Indeed, under Obama, OIRA has publicly issued just one review letter and just one return letter. *See Review Letters, supra* note 76 (listing one Obama-era review letter from 2010); *OIRA Return Letters, supra* note 75 (listing one Obama-era return letter from 2011). Obama’s OIRA has not publicly issued any prompt letters to agencies. *See OIRA Prompt Letters, supra* note 72 (listing zero Obama-era prompt letters).

126. *See Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011*, 74 Fed. Reg. 14,196 (Mar. 30, 2009) (to be codified at 49 C.F.R. pts. 523, 531, 533, 534, 536, 537).

127. Watts, *supra* note 19, at 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) heeded Obama’s directions, promptly issuing final standards for model year 2011 in March 2009 and even citing his January 2009 memorandum. *See Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011*, 74 Fed. Reg. at 14,196.

128. Appliance Efficiency Standards, 74 Fed. Reg. 6537 (Feb. 9, 2009).

129. Presidential Memorandum on Retirement Sav. Sec. to Sec’y of the Treasury, 2014 DAILY COMP. PRES. DOC. 1 (Jan. 29, 2014), <http://www.whitehouse.gov/the-press-office/2014/01/28/presidential-memorandum-retirement-savings-security> [https://perma.cc/TSB4-MUU6] (directing Treasury to “finalize the development of a new retirement savings security that can be made available through employers to their employees”); *Remarks by the President on Retirement*, WHITE HOUSE (Jan. 29, 2014), <http://www.whitehouse.gov/photos-and-video/video/2014/01/29/remarks-president-retirement-security#> [https://perma.cc/3SXZ-DR7C]. Treasury followed through, ultimately promulgating a final rule in December 2014. Regulations Governing Retirement Savings Bonds, 79 Fed. Reg. 74,023 (Dec. 15, 2014) (noting that the final rules are in response to the President’s directive).

trucks;<sup>130</sup> 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;<sup>131</sup> directed the Secretary of Labor to update overtime pay provisions;<sup>132</sup> directed various federal agencies to improve the entry process for international arrivals via a presidential memorandum;<sup>133</sup> 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;<sup>134</sup> and issued an Executive Order that prohibited discrimination based on gender identity and sexual orientation in federal employment.<sup>135</sup> These directives illustrate how Obama—taking a cue from

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130. *Improving the Fuel Efficiency of American Trucks*, WHITE HOUSE 7 (Feb. 2014), <http://www.whitehouse.gov/sites/default/files/docs/finaltrucksreport.pdf> [<http://perma.cc/6AG3-9J9H>]; *President Obama Speaks on Improving Fuel Efficiency for American Trucks*, WHITE HOUSE (Feb. 18, 2014), <http://www.whitehouse.gov/photos-and-video/video/2014/02/18/president-obama-speaks-improving-fuel-efficiency-american-trucks#transcript> [<https://perma.cc/9N79-RG2J>].

131. Exec. Order 13,658, 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); *President Obama Speaks on Raising the Minimum Wage*, WHITE HOUSE (Feb. 12, 2014), <http://www.whitehouse.gov/photos-and-video/video/2014/02/12/president-obama-speaks-raising-minimum-wage#transcript> [<http://perma.cc/96X9-VHKP>] (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. *Establishing a Minimum Wage for Contractors*, 79 Fed. Reg. 60,634 (Oct. 7, 2014).

132. Presidential Memorandum on Updating and Modernizing Overtime, 2014 DAILY COMP. PRES. DOC. (Mar. 13, 2014), <http://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations> [<https://perma.cc/Q9HX-TCPF>].

133. Presidential Memorandum on Establishing a Nat'l Goal and Developing Airport Specific Action Plans to Enhance the Entry Process for Int'l Travelers to the U.S., 2014 DAILY COMP. PRES. DOC. 1 (May 22, 2014), <http://www.whitehouse.gov/the-press-office/2014/05/22/presidential-memorandum-establishing-national-goal-and-developing-airpor> [<http://perma.cc/6JBP-Q3PS>] (directing agencies to “remove barriers to traveler entry while continuing to protect our national security, public health, and safety”).

134. Remarks on Signing a Memorandum on Helping Struggling Federal Student Loan Borrowers Manage Their Debt, 2014 DAILY COMP. PRES. DOC. 4 (June 9, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/09/remarks-president-opportunity-all-making-college-more-affordable> [<http://perma.cc/KJU2-TF3L>] (“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.”); Memorandum on Helping Struggling Federal Student Loan Borrowers Manage Their Debt, 2014 DAILY COMP. PRES. DOC. 1 (June 9, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/09/presidential-memorandum-federal-student-loan-repayments> [<http://perma.cc/5MUN-CKU2>] (“Within 1 year . . . the Secretary of Education shall propose regulations that will allow additional students who borrowed Federal Direct Loans to cap their Federal student loan payments at 10 percent of their income.”).

135. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (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”).

Clinton—relied extensively on positive command to turn the administrative state into an extension of the White House.

c. *Public Appropriation Using Online Media*

Obama has heavily used yet another tool to exert overt control over the regulatory state: online media. Clinton had to rely on the mainstream media to spread his message and to publicly appropriate agency action.<sup>136</sup> 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, demonstrating that executive agencies are simply a reflection of his own policies and goals.<sup>137</sup>

As just one example, consider a thirty-seven-page written report posted to WhiteHouse.gov at the end of 2014 titled: “Year of Action: A Final Progress Report on the Obama Administration’s Actions to Help Create Opportunity for All Americans.”<sup>138</sup> The report details more than eighty “executive actions” the Obama administration took 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.”<sup>139</sup> The clear intent of the report is to help Obama project the sense that—despite congressional inaction<sup>140</sup>—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 fashion so as to blur the line between the relevant agency and the Obama administration more generally.<sup>141</sup>

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136. Cf. Drake Martinet, *Egypt, Al Gore and the .XXX Domain—Bill Clinton Keynotes ICANN in San Francisco*, ALL THINGS DIGITAL (March 17, 2011, 1:34 AM), <http://allthingsd.com/20110317/egypt-al-gore-and-the-xxx-domain-bill-clinton-keynotes-icann-in-san-francisco/> [<http://perma.cc/7Q87-PFGX>] (noting Clinton’s comment that he became President at the “dawn of the Internet age,” entering the presidency at a time when only fifty websites existed).

137. See, e.g., *The Official White House Tumblr*, TUMBLR, <http://whitehouse.tumblr.com/> [<http://perma.cc/AH5Z-JMPU>] (“Things going around the White House that we just had to share with you.”); *The White House Blog*, WHITE HOUSE, <http://www.whitehouse.gov/blog> [<http://perma.cc/8535-8XXX>] (providing White House blog posts about presidential activity).

138. WHITE HOUSE, YEAR OF ACTION: A FINAL PROGRESS REPORT ON THE OBAMA ADMINISTRATION’S ACTIONS TO HELP CREATE OPPORTUNITY FOR ALL AMERICANS (Dec. 2014), <http://www.whitehouse.gov/sites/default/files/docs/yoadec2014.pdf> [<http://perma.cc/HC3M-5KPD>].

139. *Id.*

140. 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> [<http://perma.cc/4LAG-TLNB>] (“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 . . .”).

141. See, e.g., WHITE HOUSE, *supra* note 138 (“President Obama directed the Administration to set new standards to cut fuel use and carbon pollution from medium and heavy-duty

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."<sup>142</sup> This reliance on online media pervades his attempts to claim ownership over the regulatory state and to project the sense that even though Congress failed to get things done, he was moving the ball forward through his executive actions. 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,<sup>143</sup> his administration simultaneously posted a video of Obama speaking passionately about the issue of student debt on the White House blog.<sup>144</sup> 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.<sup>145</sup>

#### d. *Regulatory Czars*

Finally, Obama also has brought prominence to one more tool for exerting control over the regulatory state: the appointment of "regulatory czars" to White House policy positions. What czars do and exactly who czars are is difficult to state with precision because the actual title of "czar" does not technically exist.<sup>146</sup> Rather, the term is used loosely (often by the media and by presidential critics) to refer to a diverse groups of presidential advisors—many of whom do not go through the Senate confirmation process. Although czars have "solid roots in earlier administrations," Obama has used regulatory czars more heavily than other Presidents.<sup>147</sup> Obama's czars, tasked with overseeing policy in particular substantive areas,<sup>148</sup> have included,

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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).

142. *Year of Action*, WHITE HOUSE, <http://www.whitehouse.gov/year-of-action> [https://perma.cc/9QUL-2GTW].

143. See *supra* note 134 and accompanying text (noting the President's memorandum on student loans).

144. David Hudson, *President Obama on Student Loan Debt: "No Hardworking Young Person Should Be Priced Out of a Higher Education"*, WHITE HOUSE (June 9, 2014, 6:59 PM), <http://www.whitehouse.gov/blog/2014/06/09/president-obama-student-loan-debt-no-hardworking-young-person-should-be-priced-out-h> [https://perma.cc/TU2C-EHR6].

145. *Id.* (providing "share buttons" to enable the President's message to spread through social media).

146. Anita Dunn, *The Truth About "Czars"*, WHITE HOUSE (Sept. 16, 2009, 3:21 PM), <http://www.whitehouse.gov/blog/The-Truth-About-Czars> [http://perma.cc/2EH9-EWCB].

147. See STRAUSS ET AL., *supra* note 8, at 761.

148. 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, tasked by the President to oversee policy in a particular substantive area").

among many others, an AIDS czar, a Safe Schools czar, a Health czar, an Energy and Environment czar, and an Auto Recovery czar.<sup>149</sup> He also recently appointed an Ebola czar.<sup>150</sup>

The Obama administration has downplayed the significance of “czars;”<sup>151</sup> however, legal scholars have taken a different stance, arguing that Obama’s czars are “powerful, engaged in policy and not merely in public relations.”<sup>152</sup> Obama’s czars are of interest, in other words, because of “the sort of policymaking they do” outside of the usual agency structure,<sup>153</sup> helping Obama to “advance ambitious policy agendas with respect to health care, climate, urban affairs, and other matters.”<sup>154</sup> 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.”<sup>155</sup> In this sense, Obama’s czars seem to serve as a structural solution to the compartmentalization of the President’s cabinet organization, helping to provide interagency coordination and coherency in areas that require expertise across areas.

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The tools available for presidential control are now numerous and include: White House review via OMB; presidential directives; personal ownership of agencies’ decisions; and the appointment of policy czars. While Bush and Obama relied on 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 Kagan posited some fifteen 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

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149. *List of Obama Administration “Czars”*, FOX NEWS (Jan. 7, 2011), <http://www.foxnews.com/politics/2011/01/07/list-obama-administration-czars/> [<http://perma.cc/9JW3-KV2D>].

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

151. Dunn, *supra* note 146 (“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.”).

152. Saiger, *supra* note 148, at 2582.

153. *Id.* at 2582.

154. *Id.* at 2612.

155. Dunn, *supra* note 146.



made in 2001—namely, that future developments might necessitate a reassessment of whether presidential control in fact represents a positive development for the administrative state.<sup>156</sup> 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;<sup>157</sup> one involving the EPA’s regulation of ground-level ozone;<sup>158</sup> and one involving the FCC’s regulation of net neutrality.<sup>159</sup> 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 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.”<sup>160</sup> It works mainly by “stopping the release of an egg from an ovary.”<sup>161</sup> 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.<sup>162</sup>

In 1999, the Clinton administration’s FDA approved Plan B for prescription-only use in the United States.<sup>163</sup> Subsequently, in 2001, a citizen petition was filed with the Bush administration’s FDA requesting that it

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156. See Kagan, *supra* note 1, at 2385.

157. See *infra* Section II.A.

158. See *infra* Section II.B.

159. See *infra* Section II.C.

160. *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).

161. *Torti*, 603 F. Supp. 2d at 522.

162. *Id.*

163. *Id.*

make the drug available over the counter to women of all ages.<sup>164</sup> The FDA considered the citizen petition simultaneously with various Supplemental New Drug Applications (SNDAs) filed by the drug's maker seeking nonprescription access to Plan B.<sup>165</sup> 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 and effective" for self-administration.<sup>166</sup>

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 U.S. District Court for the Eastern District of New York. The plaintiffs challenged, among other things, the FDA's failure to act on the citizen petition.<sup>167</sup> In 2006, while the lawsuit was pending, the FDA finally took action, choosing to deny the citizen petition on the ground that the "petitioners had failed to provide sufficient data or information to meet the statutory and regulatory requirements for an OTC [over-the-counter] switch for any age group, much less the under 16 age group."<sup>168</sup> Just about two months later, however, 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 eighteen.<sup>169</sup>

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 eighteen, the plaintiffs shifted their focus to whether the FDA's decision was the product of reasoned decisionmaking.<sup>170</sup> 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.<sup>171</sup>

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164. *Id.* at 526 (noting that a citizen petition was filed in 2001); *id.* at 525 (noting that a rulemaking to change a drug from prescription-only to nonprescription status can be initiated by the Commissioner of the FDA or by any interested person who files a citizen petition).

165. *Id.* at 526–27 (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).

166. *Torti*, 603 F. Supp. 2d at 524–25; *see also* 21 U.S.C. § 353(b)(3) (2006) (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).

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

168. *Torti*, 603 F. Supp. 2d at 536.

169. *Id.* at 535–36.

170. *See id.* at 538.

171. *Id.*

In March 2009, Judge Edward Korman sided with the plaintiffs. 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.<sup>172</sup> 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.’”<sup>173</sup> Korman also noted testimony indicating that then-FDA Commissioner Dr. Mark McClellan had discussed the pending application for nonprescription 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.”<sup>174</sup> In short, Korman found that the FDA’s decisionmaking 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.<sup>175</sup>

As a remedy, Korman ordered the FDA to make Plan B available to women seventeen and older 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 seventeen year olds.<sup>176</sup> But with respect to Plan B’s nonprescription status for those under seventeen, Korman chose to vacate the FDA’s denial of the citizen petition and to remand the matter to the FDA for its reconsideration.<sup>177</sup>

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.<sup>178</sup> And when the FDA did deny the petition, its denial—much like the FDA’s denial of it 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.<sup>179</sup> The FDA rejected that application *not* because the FDA had independently concluded

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172. *Id.* at 523, 544.

173. *Id.* at 546 (quoting Kweder Deposition at 56:21–22, *in* Plaintiffs’ Exhibit D-2).

174. *Id.* at 527.

175. *See id.* at 545–47.

176. *Id.* at 549–50.

177. *Id.* at 550.

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

179. *Id.*

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.<sup>180</sup> The denial of the Citizen Petition came just five days after Sebelius demanded that the drug application be denied.<sup>181</sup>

FDA Commissioner Margaret Hamburg complied with Sebelius's directive, but not without voicing reluctance. Hamburg posted a response to Sebelius's directive on the FDA's website, which stressed the robust scientific findings and significant expertise that had gone into the FDA's decisionmaking process.<sup>182</sup> 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."<sup>183</sup>

Not surprisingly, controversy quickly erupted over what the media described as Sebelius's "unprecedented" decision to override the FDA's science-based findings.<sup>184</sup> A *New York Times* article hinted at one possible explanation, reporting that Sebelius's decision "avoided what could have been a bruising political battle over parental control and contraception during a presidential election season."<sup>185</sup>

Notably, Obama did not jump in and take ownership of Sebelius's decision. To the contrary, although Obama and Sebelius had flown together on Air Force One 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.<sup>186</sup> Indeed, Obama publicly stated that he "did not get involved in the process" and that "[t]his was a decision that was made by Kathleen

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180. *Id.* at 167.

181. *Id.* at 169.

182. *Statement from FDA Commissioner Margaret Hamburg, M.D. on Plan B One-Step*, FDA (Dec. 7, 2011), <http://www.fda.gov/NewsEvents/Newsroom/ucm282805.htm> [<http://perma.cc/X4YL-NAKE>].

183. *Id.*

184. See Jennifer Corbett Dooren, *Obama Health Chief Blocks FDA on "Morning After" Pill*, WALL ST. J. (Dec. 8, 2011), <http://www.wsj.com/articles/SB10001424052970203413304577084560710472558> [<http://perma.cc/Z6UU-9MMN>] (describing controversy surrounding Sebelius's "unprecedented" decision to overrule the FDA).

185. Gardiner Harris, *F.D.A. Overruled on Availability of After-Sex Pill*, 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.").

186. 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> [<https://perma.cc/W8JB-K8BA>].

Sebelius,” not by him.<sup>187</sup> Nonetheless, Obama publicly endorsed Sebelius’s 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—be able to buy a medication that potentially, if not used properly, could end up having an adverse effect.”<sup>188</sup> 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.<sup>189</sup> He again ruled that the FDA’s denial of the petition was arbitrary and capricious.<sup>190</sup> While not directly deciding whether Obama had personally influenced Sebelius’s decision, 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.”<sup>191</sup>

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 decisionmaking 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.<sup>192</sup> Indeed, much of the evidence of the Bush White House’s role in the FDA’s decisionmaking 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.<sup>193</sup> And Obama’s exact involvement in—or lack of involvement in—Sebelius’s decision to override the FDA is still unclear.<sup>194</sup>

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

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187. Remarks on Senate Actions to Block the Vote on the Nomination of Richard A. Cordray to Be Director of the Consumer Financial Protection Bureau and an Exchange with Reporters, 2011 DAILY COMP. PRES. DOC. (Dec. 8, 2011), <https://www.whitehouse.gov/the-press-office/2011/12/08/statement-president> [<https://perma.cc/PM45-CCWX>].

188. *Id.*

189. *See* Tummino v. Hamburg, 936 F. Supp. 2d 162, 165–66 (E.D.N.Y. 2013).

190. *Id.* at 197.

191. *Id.* at 170.

192. *See supra* note 187 and accompanying text (noting that Obama claimed not to have influenced Sebelius’s decision).

193. *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 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971))); *see also* Tummino v. Torti, 603 F. Supp. 2d 519, 527 (E.D.N.Y. 2009) (referring to deposition testimony from Commissioner McClellan).

194. Heinzerling, *supra* note 160, 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.”).

and corrupting role in the context of a decision that, under the relevant statutory inquiry, involves an assessment of scientific evidence.<sup>195</sup> By pushing the FDA to disregard scientific findings and to consider factors that were not tied to the relevant statutory inquiry, presidential control tainted the FDA's decisional process and delegitimized the FDA's actions.<sup>196</sup>

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."<sup>197</sup> The Clean Air Act requires the EPA to set primary and secondary National Ambient Air Quality Standards (NAAQS) for pollutants, such as ozone, that are considered harmful to public health and welfare<sup>198</sup> without taking costs into account.<sup>199</sup> Under the terms of the CAA, both primary and secondary NAAQS must be reviewed and, if appropriate, revised by the EPA every five years.<sup>200</sup>

In 2003, various environmental groups filed suit, challenging the Bush administration's failure to update the Ozone NAAQS as required by statute.<sup>201</sup> Pursuant to a consent decree, the Bush administration issued final ozone standards in March 2008,<sup>202</sup> setting a primary standard of 0.075 parts per million and an identical secondary standard.<sup>203</sup> 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;<sup>204</sup> CASAC "provides independent advice to the EPA

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195. See *supra* note 166 and accompanying text (discussing the relevant statutory inquiry, which turns on whether the drug is "safe and effective").

196. See Louis J. Virelli III, *Science, Politics, and Administrative Legitimacy*, 78 Mo. L. Rev. 511, 514 (2013) ("HHS' decision [to override the FDA on Plan B] is a clear example of politics operating at the expense of science.").

197. *Frequent Questions*, EPA, <http://www.epa.gov/ozonedesignations/faq.htm#where> [<http://perma.cc/4SDM-F8X9>]; see also *Mississippi v. EPA*, 744 F.3d 1334, 1340 (D.C. Cir. 2013).

198. 42 U.S.C. §§ 7408–09 (2012).

199. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486 (2001).

200. 42 U.S.C. § 7409(d)(1).

201. Christopher D. Ahlers, *Presidential Authority over EPA Rulemaking Under the Clean Air Act*, 44 ENVTL. L. 31, 41–42 (2014).

202. *Mississippi*, 744 F.3d at 1340.

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

204. See *Mississippi*, 744 F.3d at 1340–41 (noting that the EPA acknowledged "that CASAC had recommended a level as low as 0.060 to 0.070 ppm").

Administrator on the technical bases for EPA's national ambient air quality standards."<sup>205</sup>

Exactly how and why the EPA settled on 0.075 as the standard for both primary and secondary ozone standards was shrouded in some mystery.<sup>206</sup> After the EPA's final rule issued, evidence emerged 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 different primary and secondary standards,<sup>207</sup> but Bush, through OIRA, overruled that decision at the eleventh hour via OIRA.<sup>208</sup>

As reports of the Bush administration's last-minute interference surfaced, critics quickly argued that the Bush administration had improperly meddled with the EPA's decisionmaking 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."<sup>209</sup> And the press alleged that Bush had "meddl[ed]" with science and had "overruled officials" at the EPA to weaken the smog standards.<sup>210</sup>

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205. EPA Clean Air Scientific Advisory Committee, EPA, <http://yosemite.epa.gov/sab/sabpeople.nsf/WebCommittees/CASAC> [<http://perma.cc/AQW3-C797>].

206. See Percival, *supra* note 17, at 2520–21 (describing the rushed and last minute nature of the EPA's about-face on the ozone rule).

207. Juliet Eilperin, *Ozone Rules Weakened at Bush's Behest, EPA Scrambles to Justify Action*, WASH. POST, Mar. 24, 2008, at A1; see Memorandum from Susan E. Dudley, Office of Info. & Regulatory Affairs, to Adm'r, Env'tl. Prot. Agency 1 (Mar. 6, 2008), [http://www.reginfo.gov/public/postreview/Steve\\_Johnson\\_Letter\\_on\\_NAAQs\\_final\\_3-13-08\\_2.pdf](http://www.reginfo.gov/public/postreview/Steve_Johnson_Letter_on_NAAQs_final_3-13-08_2.pdf) [<http://perma.cc/4BTB-JUJN>] ("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').").

208. Percival, *supra* note 17, at 2520–21 (discussing the last minute nature of Bush and OIRA's decision to reverse the EPA given that EPA was under a deadline to finalize the new Ozone standards by March 12, 2008, which was the very date the reversal decision was communicated to EPA by OIRA); see Letter from Office of Info. & Regulatory Affairs, to Stephen L. Johnson, Adm'r, Env'tl. Prot. Agency 1 (Mar. 12, 2008), [http://www.reginfo.gov/public/postreview/Steve\\_Johnson\\_Letter\\_on\\_NAAQs\\_final\\_3-13-08\\_2.pdf](http://www.reginfo.gov/public/postreview/Steve_Johnson_Letter_on_NAAQs_final_3-13-08_2.pdf) [<http://perma.cc/4BTB-JUJN>] ("The President has concluded that . . . the secondary ozone standard [should be set] identical to the new primary standard . . .").

209. EPA's New Ozone Standards: Hearing Before the H. Comm. on Oversight & Gov't Reform, 110th Cong. 1–3 (2008) (opening statement of Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight & Gov't Reform) (describing the impetus for the hearing as the disregard of science by the Bush Administration on multiple occasions, including the decision to reverse the EPA on the setting of secondary ozone NAAQS); *id.* at 7 (opening statement of Rep. Darrell E. Issa, Ranking Member, H. Comm. on Oversight & Gov't Reform) (describing the impetus of the hearing as looking into the actions of the administration with regards to the ozone standards).

210. Eilperin, *supra* note 207; Deborah Zabarenko, *Ozone Case Shows Bush Meddling in Science: Watchdogs*, REUTERS (Mar. 14, 2008, 9:16 PM), <http://uk.reuters.com/article/2008/03/14/us-bush-idUKN1441222820080314> [<http://perma.cc/443Q-6FDG>].

After various petitions challenging the EPA's 2008 standards were filed in federal court,<sup>211</sup> 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.<sup>212</sup> These new proposed standards recommended that the primary standard, which was set at 0.075 parts per million (ppm) in the 2008 final rule, "should instead be set at a lower level within the range of 0.060 to 0.070 ppm, to provide increased protection for children and other 'at risk' populations."<sup>213</sup> With regard to the secondary standard, the EPA proposed "a new cumulative, seasonal standard" expressed as a rather complicated annual concentration-weighted index.<sup>214</sup> 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.<sup>215</sup>

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."<sup>216</sup> The same day, public health and environmental groups also gathered at the White House for a meeting, emphasizing the adverse health effects of ozone.<sup>217</sup> Richard Daley, Obama's chief of staff, reportedly asked in response: "What are the health impacts of unemployment?"<sup>218</sup>

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

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211. See *Mississippi v. EPA*, 744 F.3d 1334, 1342 (D.C. Cir. 2013) (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).

212. See National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938 (proposed Jan. 19, 2010) (to be codified at 40 C.F.R. pts. 50, 58).

213. *Id.*

214. *Id.*

215. See National Ambient Air Quality Standards for Ozone, EPA-HQ-OAR-2005-0172 & FRL-RIN 2060-AP98 (to be codified at 40 C.F.R. pts. 50, 58), [http://www.epa.gov/glo/pdfs/201107\\_OMBdraft-OzoneNAAQSpreamble.pdf](http://www.epa.gov/glo/pdfs/201107_OMBdraft-OzoneNAAQSpreamble.pdf) [<http://perma.cc/KM72-HBWF>] (publishing a copy of the rule EPA sent to OIRA for review under Executive Order 12,866); Letter from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to Lisa Jackson, Adm'r, Env'tl. Prot. Agency (Sept. 2, 2011), [http://www.reginfo.gov/public/return/EPA\\_Return\\_Letter\\_9-2-2011.pdf](http://www.reginfo.gov/public/return/EPA_Return_Letter_9-2-2011.pdf) [<http://perma.cc/CV7K-9E52>] (noting that the EPA had sent its draft final rule to OIRA for review).

216. John M. Broder, *Re-Election Strategy Is Tied to a Shift on Smog*, N.Y. TIMES, Nov. 17, 2011, at A1.

217. *Id.*

218. *Id.*



ozone standards.<sup>219</sup> 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.<sup>220</sup>

Although Obama's 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.<sup>221</sup> He justified the withdrawal by noting that work was "already underway to update a 2006 review of the science that will result in the reconsideration of the ozone standard in 2013."<sup>222</sup> As he explained, he could not "support asking state and local governments to begin implementing a new standard that will soon be reconsidered."<sup>223</sup>

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.<sup>224</sup> Notably, Sunstein's letter did not mention the election as a reason for postponing action. But his letter did make it crystal clear 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."<sup>225</sup>

The EPA promptly complied with the President's wishes and withdrew its proposed standard—although allegedly not before Lisa Jackson considered resigning in protest.<sup>226</sup> 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

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219. *Id.*

220. *Id.*

221. Statement on the Ozone National Ambient Air Quality Standards, 2011 on Helping Struggling Federal Student Loan Borrowers Manage Their Debt, 2014 DAILY COMP. PRES. DOC. 1 (Sept. 2, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards> [https://perma.cc/H2LA-NTEC].

222. *Id.*

223. *Id.*

224. Letter from Cass R. Sunstein to Lisa Jackson, *supra* note 215, at 1.

225. *Id.* (emphasis added).

226. Josh Margolin, *EPA Chief on Verge of Quitting After Obama Rejected Pollution Proposal*, N.Y. POST (Sept. 19, 2011, 4:00 AM), <http://nypost.com/2011/09/19/epa-chief-on-verge-of-quitting-after-obama-rejected-pollution-proposal/> [http://perma.cc/CJ29-6RJG].

there was no “final” agency action to review.<sup>227</sup> Thus, while Obama’s decision was subject to review by the voters through the normal political process,<sup>228</sup> the President’s involvement in the withdrawal was immune from judicial review.

The EPA did not revisit the ozone standards again until November 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 ppm, and to revise the secondary standard to within the range of 0.065 to 0.070 ppm as well.<sup>229</sup> 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.”<sup>230</sup>

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.<sup>231</sup> 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.<sup>232</sup> 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 the midst of his reelection campaign. In this sense, even though Obama’s public explanation did not fess up to the role that the looming election played in his decision, Obama’s open involvement in withdrawing the ozone NAAQS did enhance political accountability and transparency, enabling the public to see the President’s fingerprints all over the EPA’s withdrawal.

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227. 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.”).

228. Just a year after ordering withdrawal of the smog rule, Obama was reelected to a second term. Jonathan Weisman, *Obama’s Night: Tops Romney for 2nd Term in Bruising Run; Democrats Turn Back G.O.P. Bid for Senate*, N.Y. TIMES, Nov. 7, 2012, at A1.

229. National Ambient Air Quality Standards for Ozone, 79 Fed. Reg. 75,234, 75,234 (proposed Dec. 17, 2014).

230. 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> [<http://perma.cc/D8TP-9HRT>].

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

232. See *supra* notes 219–225 and accompanying text.

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."<sup>233</sup> 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."<sup>234</sup> 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 decisionmaking 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.<sup>235</sup>

### 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 recent and very high-profile rulemaking proceeding conducted by the FCC involving the issue of "net neutrality," or how best to protect and promote an open Internet.<sup>236</sup> The FCC initiated its net neutrality rulemaking proceeding in May 2014.<sup>237</sup> The issue received significant public attention after John Oliver addressed the topic on his show *Last Week Tonight* in June 2014. Oliver urged viewers to "turn on caps lock" and send comments to the FCC, leading the FCC's comment system to crash due to a flood of new comments.<sup>238</sup>

By the end of the four-month comment period, the FCC received nearly 4 million comments, with most strongly favoring net neutrality.<sup>239</sup> Even

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233. *Statement by the President on the Ozone National Ambient Air Quality Standards*, *supra* note 221.

234. *Id.*

235. *See supra* notes 201–210 and accompanying text (describing controversy that erupted over the Bush administration's involvement in the EPA's ozone NAAQS).

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

237. *See FCC Launches Broad Rulemaking to Protect and Promote the Open Internet*, FCC (May 15, 2014), <http://www.fcc.gov/document/fcc-launches-broad-rulemaking-protect-and-promote-open-internet>; [<http://perma.cc/BT44-EX8V>]; *see also Fact Sheet: Protecting and Promoting the Open Internet*, FCC (May 15, 2014), <http://www.fcc.gov/document/fact-sheet-protecting-and-promoting-open-internet> [<https://perma.cc/VS5Z-3UXF>].

238. *See Soraya Nadia McDonald, John Oliver's Net Neutrality Rant May Have Caused FCC Site Crash*, WASH. POST (June 4, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/06/04/john-olivers-net-neutrality-rant-may-have-caused-fcc-site-crash/> [<http://perma.cc/4DRX-LV7B>].

239. Elise Hu, *3.7 Million Comments Later, Here's Where Net Neutrality Stands*, NPR (Sept. 17, 2014), <http://www.npr.org/blogs/alltechconsidered/2014/09/17/349243335/3-7-million->

though Obama campaigned on the issue of net neutrality,<sup>240</sup> however, Obama never filed a comment with the FCC during the comment period.<sup>241</sup> 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.”<sup>242</sup> 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.<sup>243</sup> In urging the FCC to reclassify consumer broadband service under Title II of the Telecommunications Act, the President called on the public to share the President’s plan via Facebook and Twitter buttons prominently featured on WhiteHouse.gov.<sup>244</sup>

In his public statement, Obama expressly acknowledged that “[t]he FCC is an independent agency, and ultimately this decision is theirs alone.”<sup>245</sup> 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.<sup>246</sup> 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.”<sup>247</sup> Others argued that

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comments-later-heres-where-net-neutrality-stands [http://perma.cc/NS7F-V8KU] (noting that one study of the first 800,000 comments found that “fewer than 1 percent were opposed to net neutrality enforcement”); Gigi B. Sohn & David A. Bray, *Setting the Record Straight on Open Internet Comments*, FCC (Dec. 23, 2014), <http://www.fcc.gov/blog/setting-record-straight-open-internet-comments> [https://perma.cc/2CSY-MXFX] (“The total comment count in the Open Internet docket is nearly 4 million . . .”).

240. See Alina Selyukh, *Obama Pressures FCC for Strong Net Neutrality Rules*, REUTERS (Nov. 10, 2014), <http://www.reuters.com/article/2014/11/10/us-usa-internet-neutrality-idUSKCN0!U1I620141110> [http://perma.cc/C5GL-LD7A].

241. See Marvin Ammori, *More than 3 Million Told the FCC What They Think About Net Neutrality. Why Hasn’t Obama?*, SLATE (Sept. 16, 2014, 12:01 PM), [http://www.slate.com/blogs/future\\_tense/2014/09/16/fcc\\_net\\_neutrality\\_comments\\_period\\_why\\_hasn\\_t\\_obama\\_weighted\\_in.html](http://www.slate.com/blogs/future_tense/2014/09/16/fcc_net_neutrality_comments_period_why_hasn_t_obama_weighted_in.html) [http://perma.cc/T7GN-JQXA]. Notably, various executive agencies have filed comments with the FCC in a variety of proceedings during Obama’s presidency. See *Administration FCC Filings*, FCC, [https://docs.google.com/spreadsheets/d/1wdocj8MAANTx7\\_dUbJhKoH40Q7QvkjQ519ysKWPYjPE/edit?pli=1#gid=0](https://docs.google.com/spreadsheets/d/1wdocj8MAANTx7_dUbJhKoH40Q7QvkjQ519ysKWPYjPE/edit?pli=1#gid=0) [https://perma.cc/ZD36-Y37Y].

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

243. *Id.*

244. See *id.* (“Share the news and the special thank-you message from the President with your network.”).

245. *Id.*

246. See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (“[I]ndependent agencies are sheltered not from politics but from the President . . .”).

247. Harold Furchtgott-Roth, *President Obama Attacks FCC’s Independence*, FORBES (Nov. 11, 2014, 12:23 PM), <http://www.forbes.com/sites/haroldfurchtgottroth/2014/11/11/president-obama-attacks-fccs-independence/> [http://perma.cc/9HJ6-WMNE].

the President had “injected politics into what should be a nonpartisan agency process.”<sup>248</sup> Indeed, one commentator noted that Obama had put the chairman of the FCC in a “very tough” position because, if the FCC had followed the President’s recommendation, the FCC’s decision would “reek of politics, and nobody will get [the smell] off of them.”<sup>249</sup>

A few months later, FCC Chairman Tom Wheeler announced in *Wired* that he was proposing strong net neutrality rules that aligned with Obama’s plan to reclassify consumer broadband service under Title II of the Communications Act—even though Wheeler had not endorsed reclassification prior to Obama’s statement.<sup>250</sup> Republican-led House and Senate committees launched investigations into Obama’s influence over the FCC’s proceedings, reiterating the refrain of inappropriate political influence.<sup>251</sup> The letter that 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.<sup>252</sup>

Ultimately, in the spring of 2015, the FCC adopted and released new rules that followed the President’s preferred path of reclassification, declaring broadband Internet access service to be a telecommunications service under Title II of the Communications Act.<sup>253</sup> The new rules “prohibit blocking, throttling, and paid prioritization”; prevent “broadband providers from unreasonably interfering or disadvantaging consumers or edge providers from reaching one another on the Internet”; and provide “for enhanced transparency into network management practices, network performance, and commercial terms of broadband Internet access service.”<sup>254</sup>

Although the final rule closely tracked what President Obama had asked for, the final rule and the accompanying statement of basis and purpose that the FCC published in the Federal Register said nothing of the President’s involvement.<sup>255</sup> In addition, the FCC’s Report and Order on Remand,

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248. Edward Wyatt, *Call for Open Internet Sets up Fight over Rules*, N.Y. TIMES, NOV. 12, 2014, at B8.

249. *Id.*

250. Tom Wheeler, *FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality*, WIRED (Feb. 4, 2015, 11:00 AM), <http://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality/> [<http://perma.cc/825S-FHK4>].

251. Jim Puzzanghera, *Congress Probing White House Role in FCC Chief’s Net-Neutrality Plan*, L.A. TIMES (Feb. 9, 2015, 11:50 AM), <http://www.latimes.com/business/la-fi-net-neutrality-fcc-chaffetz-probe-20150209-story.html> [<http://perma.cc/FX4Z-XPEL>].

252. Letter from Jason Chaffetz, Chairman, Comm. on Oversight & Gov’t Reform, U.S. House of Representatives, to Tom Wheeler, Chairman, Fed. Commc’ns Comm’n 1 (Feb. 6, 2015), <http://oversight.house.gov/wp-content/uploads/2015/02/2015-02-06-JEC-to-Wheeler-FCC-open-internet.pdf> [<http://perma.cc/HNA6-MX45>].

253. See Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8, 20).

254. *Id.*

255. *Id.*

Declaratory Ruling, and Order barely even hinted at the President's involvement.<sup>256</sup> However, Commissioner Wheeler's separate statement accompanying the report briefly acknowledged the President's involvement, stating:

We heard from startups and world-leading tech companies. We heard from ISPs, large and small. We heard from public-interest groups and public-policy think tanks. We heard from Members of Congress, and, *yes, the President*. Most important, we heard from nearly 4 million Americans who overwhelmingly spoke up in favor of preserving a free and open Internet.<sup>257</sup>

One commissioner, however, called out the President's involvement much more forcefully. In a dissenting statement, Commissioner Pai criticized the FCC's change of course and the President's involvement, stating:

So why is the FCC changing course? Why is the FCC turning its back on Internet freedom? Is it because we now have evidence that the Internet is not open? No. Is it because we have discovered some problem with our prior interpretation of the law? No. We are flip-flopping for one reason and one reason alone. President Obama told us to do so.<sup>258</sup>

Pai is clearly correct that President Obama played a key causal role in the FCC's shift in its approach and ultimate decisions to reclassify broadband. Yet what is much less clear is whether there is anything inherently nefarious about the President's attempts to steer the FCC's net neutrality rules—just as other members of the public tried to steer the FCC's views.<sup>259</sup> Obama's efforts to influence the FCC's proceedings were 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.<sup>260</sup> Furthermore, Obama's public statement demonstrated respect for the FCC's status as an independent agency, openly acknowledging that the decision ultimately rested in the FCC's hands

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256. See Protecting and Promoting the Open Internet, FCC 15-24, GN Docket No. 14-28 at 196 n.1223 (Mar. 12, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-24A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf) [<http://perma.cc/ZV28-2W7Y>] (referencing in passing in a footnote “the President’s push for Title II reclassification”).

257. *Id.* at 314 (Chairman Wheeler, concurring) (emphasis added).

258. *Id.* at 321 (Comm’r Pai, dissenting).

259. See Memorandum from Deputy Assistant Attorney Gen. John O. McGinnis to the Deputy Counsel to President George H. W. Bush (Jan. 14, 1991), <http://www.justice.gov/sites/default/files/olc/opinions/1991/01/31/op-olc-v015-p0001.pdf> [<http://perma/Q6BF-PBS4>] (“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 this rulemaking.”); Marvin Ammori, *The White House Gave the FCC Advice on Net Neutrality. That’s how It’s Supposed to Work*, SLATE (Feb. 11, 2015, 3:55 PM), [http://www.slate.com/blogs/future\\_tense/2015/02/11/republicans\\_say\\_white\\_house\\_interfered\\_with\\_fcc\\_on\\_net\\_neutrality\\_they\\_re.html](http://www.slate.com/blogs/future_tense/2015/02/11/republicans_say_white_house_interfered_with_fcc_on_net_neutrality_they_re.html) [<http://perma.cc/66QF-SVD9>] (“This network neutrality proceeding is an example of how the government *should* operate.”).

260. 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).

alone.<sup>261</sup> 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 FCC<sup>262</sup> but making clear that the President is doing what he can to respond to broad public sentiment on net neutrality.<sup>263</sup>

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In sum, these three case studies 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 PERVASIVE 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 reflexive “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 to refer to generalized efforts—both inside and outside courts—to try to force regulators to exercise expert judgment based on apolitical, technocratic reasons. This Part argues that expertise forcing is misguided. It focuses too myopically on restraining the negative aspects of presidential control, and in doing so, it fails to consider 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.

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261. *Id.*

262. 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. Rebecca R. Ruiz & Steve Lohr, *F.C.C. Approves New Neutrality Rules, Classifying Broadband Internet Service as a Utility*, N.Y. TIMES (Feb. 26, 2015), [http://www.nytimes.com/2015/02/27/technology/net-neutrality-fcc-vote-inter-net-utility.html?\\_r=0](http://www.nytimes.com/2015/02/27/technology/net-neutrality-fcc-vote-inter-net-utility.html?_r=0) [<http://perma.cc/2842-Y58E>].

263. 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.”).

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 decision in *Massachusetts v. EPA*.<sup>264</sup> 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.<sup>265</sup> 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.<sup>266</sup> 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.<sup>267</sup>

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.”<sup>268</sup> In Freeman and Vermeule’s view, *Massachusetts* illustrates the Supreme Court’s “increasing worries about the politicization of administrative expertise.”<sup>269</sup> According to Freeman and Vermeule, the Court is not naïve and does not think that “expert decisions should be completely separated from politics.”<sup>270</sup> 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] wished to nudge it in the other direction.”<sup>271</sup>

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 decisionmaking, expertise forcing defines how many different actors approach

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264. 549 U.S. 497 (2007).

265. *Massachusetts*, 549 U.S. at 497.

266. *Id.*

267. Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*, 102 Nw. U. L. REV. 1029, 1043–44 (2008).

268. Freeman & Vermeule, *supra* note 21, at 52.

269. *Id.*; *see also id.* at 93–94.

270. *Id.* at 108.

271. *Id.* at 109.



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 to try to force expert-driven decisions by agencies.<sup>272</sup> This is exactly what happened, for example, in the wake of Obama's recent efforts to influence the FCC's ongoing net neutrality rulemaking.<sup>273</sup> 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.<sup>274</sup> Likewise, the Republican chair of the Senate Committee on Homeland Security and Governmental Affairs launched an investigation, 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."<sup>275</sup> These and other congressional hearings and investigations reflect a kind of reflexive reaction to presidential influence—one that indiscriminately and simplistically projects the view of politics as "bad" and expertise as "good." Somewhat ironically, this is done perhaps as a smokescreen for attempts by the controlling party in Congress to further its own political will.

Second, the media, too, often projects the same sense that agency decisionmaking should be apolitical and expert driven. For example, during the net neutrality proceedings,<sup>276</sup> a *New York Times* article quoted various opponents of Obama's proposal who "said that [Obama's actions] injected politics into what should be a nonpartisan agency process."<sup>277</sup> Subsequently, just after FCC Chairman Wheeler announced that he planned to propose net neutrality rules aligned with Obama's own views,<sup>278</sup> the *Wall Street Journal* published an article casting a shadow over Obama's involvement. The *Wall Street Journal* asserted that Obama's net neutrality comments had "swept aside more than a decade of light-touch regulation of the Internet and months of work by Mr. Wheeler," and were the product of various "secret[ ]

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272. See, e.g., *Science Under Siege: Scientific Integrity at the Environmental Protection Agency, Hearing Before the Subcomm. on Oversight & Investigations of the Comm. on Energy & Commerce*, 110th Cong. (2008).

273. See *supra* Section II.C (discussing Obama's involvement in net neutrality).

274. See Letter from Jason Chaffetz to Tom Wheeler, *supra* note 252.

275. Letter from Ron Johnson, Chairman, Senate Comm. on Homeland Sec. & Governmental Affairs, to Tom Wheeler, Chairman, Fed. Commc'ns Comm'n 2–3 (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](http://www.ronjohnson.senate.gov/public/_cache/files/269a8d03-1eea-4b00-9af2-54d7408f83ab/2015-02-09-johnson-to-wheeler-fcc-re-net-neutrality.pdf) [<http://perma.cc/SD56-WV67>].

276. See *supra* Section II.C (discussing Obama's efforts to influence the FCC's net neutrality rulemaking).

277. Wyatt, *supra* note 248.

278. See *supra* note 250 and accompanying text (outlining Wheeler's proposal).

White House meetings.”<sup>279</sup> 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. After all, White House meetings, by definition, are private and closed to the general public. Instead, the news media’s coverage of Obama’s reaction rested on the same highly simplistic view that politics are “bad” and expertise is “good” when it comes to agency decisionmaking.

Third, while scholars often justify the legitimacy of the administrative state by relying on the President’s ability to hold agencies accountable,<sup>280</sup> scholars also frequently advocate in favor of expertise 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 Breyer, who has co-authored a leading administrative law casebook,<sup>281</sup> is among these scholars. Justice Breyer stresses the benefits of depoliticized decisionmaking by elite, professional experts and argues in favor of the virtues of rationalization, expertise, and insulation from politics.<sup>282</sup>

Other scholarly work echoes this same sense that agency decisionmaking should be driven by expertise, not political influence. One scholar, for example, argues for the abolition of OIRA review, because 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.”<sup>283</sup> Others have argued that White House review by OIRA of agency rules is something to be “constrain[ed].”<sup>284</sup> Still others have argued against the notion that courts should consider political influences when determining whether agencies have adequately justified their policy determinations.<sup>285</sup>

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279. Nagesh & Mullins, *supra* note 11.

280. See, e.g., Jerry L. 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); see also Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 59–60 (2008) (“Scholars with diverse ideological and methodological commitments have asserted that . . . two premises . . . —that bureaucratic policy should track majoritarian values and that this goal is best advanced by giving decision-making authority to the most politically accountable officials—imply the need for presidential control over bureaucratic policymaking . . .”).

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

282. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 55–56, 59–61 (1993).

283. Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209, 209 (2012).

284. Sidney A. Shapiro & Richard Murphy, *Constraining White House Political Control of Agency Rulemaking Through the Duty of Reasoned Explanation*, 48 U.C. DAVIS L. REV. 1457, 1457 (2015).

285. See, e.g., Enrique Armijo, *Politics, Rulemaking, and Judicial Review: A Response to Professor Watts*, 62 ADMIN. L. REV. 573, 574 (2010) (arguing that rulemaking has “to be a facts-

### B. *The Inadequacy of Expertise Forcing*

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.<sup>286</sup> 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.<sup>287</sup> Notably, these important value-based policy judgments often must be made in the face of statutory and scientific uncertainty. When 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.<sup>288</sup>

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.<sup>289</sup> Scholars routinely justify agencies' power to make these important policy decisions 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.<sup>290</sup> In other words, we justify the existence and the legitimacy of what would otherwise be a “headless fourth branch” by the fact that the

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driven process”). *But see* Watts, *supra* note 19 (arguing in favor of giving politics an accepted place in arbitrary-and-capricious review).

286. *See supra* Section II.B (discussing the ozone NAAQS case study).

287. *See* Kathryn A. Watts, *Rulemaking as Legislating*, 103 *Geo. L.J.* 1003, 1014–15 (2015).

288. *See* Kagan, *supra* note 1, at 2356–57 (arguing that a strong presidential role is appropriate when 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 both of scientific uncertainty and competing public interests”).

289. *See* MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION* 171 (1988) (“Agencies . . . mak[e] a good deal of law within broad congressional constraints and in the face of considerable uncertainty about facts and diverse and changing political sentiments.”).

290. *See, e.g.*, Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 *U. PA. L. REV.* 1, 23 (2011) (“[A]dministrative law’s 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.”).

political branches can and do exert control over agency heads. Justice Stevens recognized as much in 1984 in his now-famous *Chevron* opinion.<sup>291</sup> Although “agencies are not directly accountable to the people,” he said, “the Chief Executive is,” and it is therefore entirely appropriate for agencies to rely on “the incumbent administration’s views of wise policy” when making policy judgments.<sup>292</sup> Thus, as *Chevron* points out, presidential control can help to further positive values—namely, political accountability and regulatory coherence in agency decisionmaking. 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.<sup>293</sup> Put another way, expertise forcing may well undermine transparency,<sup>294</sup> causing agencies to sweep policy choices under the rug. One scholar—Martin Shapiro—made a similar argument almost three decades ago just as presidential control was beginning to emerge, 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.”<sup>295</sup> As a result, “what we get is secret prudence unguarded by anyone.”<sup>296</sup>

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 decisionmakers may well be tempted to bend facts or subvert science in order to reach preferred policy outcomes.<sup>297</sup> Or, they might hide policy choices that inform their scientific decisions. As Emily Meazell explains, science—even “good” science—often

291. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

292. *Id.* at 865; *see also* *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. 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 is “a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations”).

293. *See* Watts, *supra* note 19, at 40 (“Under the current technocratic model’s focus on facts and evidence, agencies have an incentive to dress up their decisions in technocratic terms and to hide political influences.”).

294. *See* 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”).

295. SHAPIRO, *supra* note 289, at 156.

296. *Id.*

297. *See* Watts, *supra* note 19, at 40 (noting that in a world in which agencies are expected to act in a technocratic manner, “[a]gencies . . . may well be tempted to align facts and science with political choices rather than giving science its own rightful place that is separate from political or value-laden considerations”).

involves and integrates policy choices.<sup>298</sup> 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.<sup>299</sup> According to Meazell, good scientific practices would simply call for the scientists to document and disclose any policy choices that they made.<sup>300</sup> 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 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 develop a more realistic and effective response. The next Part takes up that question, arguing that a variety of nonconstitutional 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.<sup>301</sup> 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, nontransparent decisions, and the weakening of science.<sup>302</sup> Thus, given its complexity, presidential control is not susceptible to a one-size-fits-all response. Nor can the

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298. Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 744 (2011) (“[P]olicy informs everything from how an experiment is designed to how results are interpreted and communicated.”).

299. *Id.* at 745.

300. *Id.* at 746 (“It may not be possible to isolate every policy decision that has been made, but to the extent one can identify specific junctures that involve policy, the norms of the scientific community demand disclosure.”).

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

302. See *supra* Part II (analyzing three different case studies that illustrate how presidential control involves a complex mix of positive and negative attributes); see also WENDY WAGNER, SCIENCE IN REGULATION: A STUDY OF AGENCY DECISIONMAKING APPROACHES 75–91 (2013),

complex nature of presidential control be effectively managed by simply tweaking just one isolated administrative law doctrine or another.<sup>303</sup> 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 that can be used to develop a powerful framework for controlling presidential control: (1) statutorily facing rules; (2) transparency-enhancing mechanisms; and (3) process-forcing rules. It then situates a variety of different administrative law doctrines within each of these three categories.

#### 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.<sup>304</sup> 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 presidential *suggestions* into account.<sup>305</sup> Both of these questions—which I refer to 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's silence on the matter and to the absence of constitutional guidance; 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.<sup>306</sup>

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[https://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation\\_Final%20Report\\_2\\_18\\_13\\_0.pdf](https://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation_Final%20Report_2_18_13_0.pdf) [https://perma.cc/U394-6CAV] (using two case studies to demonstrate the lack of transparency surrounding OIRA's influence over regulatory decisions involving science).

303. See *supra* note 19 (citing scholars who have argued that one discrete set of doctrines or another can be used to respond to political influence over agency decisions).

304. 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.”).

305. See *Motor Vehicle Mfrs. Ass'n of the 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 . . .”).

306. See JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 292 (5th ed. 2003) (“Virtually all statutes conveying rulemaking power to executive (as

Notably, these statutorily facing questions—that is, questions that involve determining the statutorily permissible space for presidential directions and suggestions—must be answered before considering how 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 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 Congress vested in a particular administrative agency. Put another way, when can the President step into the shoes of the agency and make a decision that Congress delegated to a specified agency official?

To date, the courts have yet to resolve this question.<sup>307</sup> One explanation 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 final agency action and thus may not be judicially reviewable.<sup>308</sup> 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.<sup>309</sup>

Faced with a dearth of case law on the subject, scholars have actively debated this question and have proposed dueling interpretive approaches.<sup>310</sup>

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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.”)

307. See Kagan, *supra* note 1, at 2320 (noting that the “view that the President lacks directive authority over administrative officials” has never been adjudicated); *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); Percival, *supra* note 17, at 2487–88 (describing ongoing “debate” about whether the President does or does not have directive authority).

308. See *supra* notes 221–228 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).

309. This is exactly what happened recently in the context of Obama's executive action on immigration. *The President Speaks on Fixing America's Broken Immigration System*, *supra* note 14 and accompanying text (discussing Obama's televised address on immigration). When a lawsuit was filed by more than half of the States challenging the Obama administration's deferred action program, the suit necessarily challenged the written directive issued by DHS, not any directive issued by Obama. *Texas v. United States*, 86 F. Supp. 3d 591, 607 (S.D. Tex. 2015). Indeed, the district court judge in the case noted that there were “no executive orders or other presidential proclamations or communicate” to challenge. *Id.*

310. See, e.g., 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”); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 263 (2006) (“[T]he President has statutory authority to direct the administration of the laws only under statutes that grant to the President in name.”).

This scholarly debate has created a cloud of legal uncertainty around presidential directives—a cloud that likely has helped to fuel expertise forcing.

At one end of the scholarly debate, Kagan argued almost fifteen years ago that delegations of discretionary authority running to an *executive* agency official (who is subject to “at will” removal by the President) should be presumed to grant the President ultimate control over the decision.<sup>311</sup> In contrast, when 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.<sup>312</sup>

At the other end, Professor Stack argues 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.”<sup>313</sup> 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 on “the approval of the President” or “the direction of the President,” or similar words.<sup>314</sup> He uses these examples to argue, by negative implication, that statutes that lack such references to presidential involvement necessarily preclude presidential directive authority.<sup>315</sup>

Although scholars continue to engage in the Stack-Kagan debate,<sup>316</sup> 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. In contrast, when it comes to independent agencies, Obama has taken care to merely make “suggestions” to independent agencies—consistent with Kagan’s interpretive principle that distinguishes between executive and independent agencies.<sup>317</sup>

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311. See Kagan, *supra* note 1, at 2327 (“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.”).

312. *Id.* (“In establishing [an independent] agency, Congress has acted self-consciously, by means of limiting the President’s appointment and removal power, to insulate agency decisionmaking . . .”).

313. Stack, *supra* note 310, at 267.

314. *Id.* at 268, 278–83.

315. *Id.* at 268 (“[‘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.”).

316. See, e.g., Percival, *supra* note 17, at 2494–95 (discussing debate concerning the legality of presidential directives and noting both the Kagan and Stack views).

317. 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.”); Presidential Memorandum, *supra* note 13, at § 4(d) (“Independent agencies are strongly encouraged to comply with this memorandum.”).



Kagan's interpretive approach makes sense as a policy matter. 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.<sup>318</sup> 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 and Stack focus on whether the President is legally authorized to *direct* the outcome of a discretionary agency action by effectively stepping into the agency's shoes.<sup>319</sup> 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 on presidential *suggestions* as relevant decisional factors without violating Congress's intent?<sup>320</sup> For example, may the FCC consider Obama's views concerning net neutrality?<sup>321</sup> Or may the Federal Aviation Administration consider the White House's views on how best to regulate drones?<sup>322</sup> Congress is almost always silent on these matters.<sup>323</sup> As of now, we lack a coherent theory on this front. Legal scholars have focused on assessing the legality of presidential *directives*, glossing over the issue of mere presidential *suggestions*.<sup>324</sup> Furthermore, the courts have sent conflicting messages on the subject. Indeed, even outside the context of presidential control, the courts have

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318. See *supra* notes 271–273 and accompanying text (discussing how agencies' legitimacy hinges on the notion that they are accountable to the political branches).

319. See Kagan, *supra* note 1, at 2329 (“I suggest . . . that most statutes granting discretion to executive branch—but not independent—agency officials should be read as leaving ultimate decisionmaking authority in the hands of the President.”); Stack, *supra* note 310, 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”).

320. See generally Strauss, *supra* note 17, at 696–705 (noting that the difference between “oversight” and “performance”—or between “overseeing” and “deciding”—often goes unnoticed in administrative law discussions).

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

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

323. See MASHAW, *supra* note 306, at 292 (noting congressional silence in this arena).

324. Kagan likely focuses on the legality of presidential *direction*—and glosses 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 (which, 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

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.<sup>325</sup>

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.<sup>326</sup> At the other end of the spectrum, foundational administrative law cases like *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>327</sup> and *Sierra Club v. Costle*<sup>328</sup> openly embrace the notion 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.”<sup>329</sup>

In the end, this lack of doctrinal clarity should not be resolved through reflexive application of expertise forcing as occurred in *Massachusetts v. EPA*.<sup>330</sup> 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 coming from the White House,<sup>331</sup> 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 and the *process* used to exert 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

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to gain traction, it would still be critical to clarify when agencies may consider presidential suggestions. Indeed, if Stack’s interpretive approach were to prevail, Presidents would likely turn with increasing frequency to softer mechanisms for exerting influence, making it even more critical to clarify the allowable space in which presidential suggestions can operate.

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

326. See Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003).

327. 467 U.S. 837, 865 (1984).

328. 657 F.2d 298 (D.C. Cir. 1981).

329. See *Sierra Club*, 657 F.2d at 298.

330. 549 U.S. 497, 532–33 (2007); see also Freeman & Vermeule, *supra* note 21 (describing *Massachusetts* as an example of “expertise-forcing”).

331. See MASHAW, *supra* note 306, at 292 (noting statutory silence in this area).

relevant statutory regime and so long as procedural requirements are not violated, then there should be no bar to an agency considering them.<sup>332</sup>

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.<sup>333</sup> 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.<sup>334</sup> 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 Plan B over-the-counter status could be politically damaging to the President during an election year.<sup>335</sup> 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 protecting "public health" by making sure the drug was "safe and effective" for self-administration.<sup>336</sup> Thus, the statutorily facing rule proposed here would confirm Judge Korman's determination that the FDA acted arbitrarily and capriciously in allowing political influences to trump its scientific determinations.<sup>337</sup>

Second, reconsider Obama's decision to direct the EPA to withdraw its proposed ozone standards.<sup>338</sup> 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.<sup>339</sup> 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.<sup>340</sup> Revising the standards in 2011, as Obama noted, would

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332. See *D.C. Fed'n of Civic Ass'ns 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); Watts, *supra* note 19, 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").

333. See *supra* Section II.A (discussing the FDA's handling of Plan B).

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

335. Cf. Harris, *supra* note 185 and accompanying text (noting a *New York Times* article that suggested that Sebelius's decision on Plan B "avoided what could have been a bruising political battle over parental control and contraception during a presidential election season").

336. See *supra* note 166 and accompanying text.

337. See *supra* Section II.A (describing Judge Korman's rulings in the Plan B context).

338. See *supra* Section II.B (describing Obama's decision to direct the EPA to pull its proposed ozone standards).

339. Letter from Cass R. Sunstein to Lisa Jackson, *supra* note 215.

340. *Id.*; *Statement by the President on the Ozone National Ambient Air Quality Standards*, *supra* note 221.

burden “state and local governments” by asking them “to begin implementing a new standard that w[ould] soon be reconsidered.”<sup>341</sup> 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.<sup>342</sup> 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.<sup>343</sup>

Third, reconsider Obama’s efforts to influence the FCC’s net neutrality proceeding.<sup>344</sup> In launching its rulemaking proceeding, the FCC noted that it proposed “to rely on Section 706 of the Telecommunications 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.”<sup>345</sup> 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.”<sup>346</sup> Thus, when Obama weighed in on the subject in November 2014 and recommended that the FCC use Title II to promulgate strong rules protecting the Internet,<sup>347</sup> 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.<sup>348</sup>

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. Put another way, the President, just like any other member of the public, should be free to post his views on blogs or to create

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341. *Statement by the President on the Ozone National Ambient Air Quality Standards*, *supra* note 221.

342. Letter from Cass R. Sunstein to Lisa Jackson, *supra* note 215.

343. Cf. Matthew R. Bowles, Comment, *Speak Now or Forever Be Overruled: Deferring to Political “Judgment” in EPA Rulemakings*, 20 *GEO. MASON L. REV.* 591, 629–30 (2013) (“Under the [Clean Air Act], science remains the foundation of EPA rulemakings, but the Administrator’s authority also includes discretion to consider presidential influence.”).

344. See *supra* Section II.C (describing Obama’s efforts to influence the net neutrality debate).

345. Protecting and Promoting the Open Internet, 79 *Fed. Reg.* 37,448, 37,448 (July 1, 2014) (to be codified at 47 C.F.R. pt. 8).

346. *Id.* at 37,448–49.

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

348. See *id.* (describing Obama’s plan for protecting the Internet, which includes a “no blocking” rule).

YouTube videos setting forth his views about agency action. 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.<sup>349</sup> 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 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 tied to the public values or policy choices of the statutory scheme would be 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 overseen and scrutinized by the public. The next Section turns to other mechanisms that could be used to bring presidential control 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 maneuvering, presidential control can undermine the transparency of an agency's decisionmaking process and

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349. See 1 RICHARD J. PIERCE JR., *ADMINISTRATIVE LAW TREATISE* § 7.9, at 666 (5th ed. 2010) (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) ("[T]here is good reason to think that independent agencies will adhere to presidential preferences once a majority of commissioners are from the President's party." (emphasis omitted)).

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.

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 White House attempts to influence rulemaking proceedings. This idea has ample support.<sup>350</sup> Professor Mendelson, for example, argues in favor of procedural rules that would require a “significant agency rule to include at least a summary of the substance of executive supervision.”<sup>351</sup> According to Mendelson, Congress—or the President or agencies themselves—could impose a disclosure requirement.<sup>352</sup> Similarly, Professor Gilhooley recommended more than twenty 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.”<sup>353</sup> 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.<sup>354</sup>

Nonetheless, in crafting disclosure-forcing rules, care would need to be taken to respect the President's very real need to receive honest and frank advice from his subordinates; subordinates' willingness to speak freely and

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350. See, e.g., Jaclyn L. Falk, Comment, *The Behind Closed Door Policy: Executive Influence in the Environmental Protection Agency's Informal Rulemaking*, 47 U.S.F. L. REV. 593 (2013); see also Heinzerling, *supra* note 122, at 43 (“[I]f the 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.”).

351. Mendelson, *supra* note 19, at 1130.

352. *Id.* at 1164–65 (noting that the preferred route would be for Congress to legislate a disclosure requirement).

353. Gilhooley, *supra* note 19, at 301.

354. Cf. Mendelson, *supra* note 19, 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.”).

to offer the President trustworthy advice might well be chilled if the subordinates had to offer their advice in the public eye.<sup>355</sup>

Furthermore, disclosure-forcing rules could not possibly operate in any meaningful way in isolation.<sup>356</sup> This is because increased disclosure of presidential supervision would necessarily lead to a variety of unresolved questions that touch on other aspects of administrative law. Among these questions would be: When may agencies consider presidential suggestions or comply with presidential directions without running afoul of their statutory mandates? May 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?<sup>357</sup> 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?<sup>358</sup> What weight should presidential suggestions be given? As these questions illustrate, the effectiveness of disclosure rules ultimately would turn on broader administrative law questions.

In particular, the practical impact of any disclosure rules—whether enacted by Congress,<sup>359</sup> by the President or by agencies themselves—would

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355. Cf. Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. REV. 1665, 1728 (2013) (noting concerns that have arisen over time about whether the Presidential Records Act has created a chilling effect, prompting Presidents to refrain from creating written and electronic records that might be subject to disclosure under the Act).

356. Mendelson acknowledges this. See Mendelson, *supra* note 19 at 1166 (“[A] disclosure requirement would likely mean that the judiciary would be presented with a stream of administrative review cases posing questions regarding the treatment of political reasons.”).

357. See 5 U.S.C. § 553(c) (2012) (requiring that a final rule incorporate “a concise general statement of [the rules’] basis and purpose”).

358. 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 160, at 976–77 (explaining that while discovery beyond the administrative record is available in theory, it is 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 into the open, then perhaps, as Heinzerling suggests, the “strong presumption against probing decision makers’ minds should be softened.” Heinzerling, *supra* note 160, at 981.

359. If Congress took action, it would have to take care to avoid tripping over executive privilege issues. See generally PIERCE, *supra* note 349, at 667 (“[Congress] has considered passage of a statute that would require public disclosure of all communications between OMB and the agencies it ‘regulates.’ [But] Congress’ ability to require such disclosure may be limited to some uncertain extent by the doctrine of Executive Privilege.”). Congress also would need to avoid violating the Opinions Clause, which empowers the President to demand information from and consult with agency officials. See U.S. CONST. art. II, § 2, cl. 1 (“The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . .”).

turn heavily on how courts ultimately treated presidential influences in reviewing agencies' rules. If, for example courts responded to a disclosure requirement by reflexively engaging in the kind of expertise forcing seen in *Massachusetts v. EPA*,<sup>360</sup> then the disclosure 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 Subsection 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 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.<sup>361</sup> The second is *Chevron* deference, which involves courts deferring to an agency's reasonable interpretation of statutory ambiguity.<sup>362</sup>

With respect to arbitrary-and-capricious review, I have 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."<sup>363</sup> 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 on.<sup>364</sup> Simply reconceptualizing arbitrary and capricious review in isolation, however, would not do much to bring many of the hidden and sometimes corrupting aspects of presidential control out of the shadows.<sup>365</sup> If anything is to be learned from the lessons of the Bush and Obama administrations'

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360. See Freeman & Vermeule, *supra* note 21, at 93–94 (arguing that the Court's decision in *Massachusetts* represents an example of expertise forcing by the judiciary); *supra* Section III.A (describing how *Massachusetts* represents a case of expertise forcing).

361. See 5 U.S.C. § 706(2)(A) (2012).

362. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

363. Watts, *supra* note 19, at 5.

364. *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 . . .").

365. See *id.* 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"—



efforts to control the regulatory state, it is that presidential control is extremely complex and nuanced.<sup>366</sup> Thus, reconceptualization of arbitrary-and-capricious review should be coupled with an affirmative disclosure requirement and with a statutorily facing interpretive rule.<sup>367</sup>

*Chevron* deference, which courts grant to agencies' reasonable interpretations of ambiguities in the statutes that they administer,<sup>368</sup> is 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.<sup>369</sup> But *Chevron* does nothing to incentivize agencies to disclose the impact of presidential influences on their legal conclusions. As of now, presidential influence is irrelevant to the "reasonableness" inquiry at *Chevron* Step Two.<sup>370</sup>

This shortcoming could be redressed if *Chevron* Step Two were conceptualized in tandem with arbitrary-and-capricious review in a way that incentivized agencies to reference presidential influences in explaining *why* they picked one reasonable interpretation of statutory ambiguity over another or *why* their chosen interpretation is reasonable.<sup>371</sup> This, for example, might help the FCC to justify under a Step Two analysis why it is reasonable to conclude that the Internet should now be regulated using Title II of the Communications Act.<sup>372</sup> 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

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that is, granting deference when agencies openly and transparently rely on political influences—might need to be balanced by a "stick," such as a statutory mechanism that forces disclosure of political influences).

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

367. See *supra* Section IV.A (discussing statutorily facing rules); *supra* Section IV.B.1 (discussing disclosure rules).

368. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

369. See *id.* at 863–64 ("An initial agency interpretation is not instantly carved in stone."); *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.'" (quoting 46 Fed. Reg. 16,281 (1981))).

370. See *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").

371. 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, 483 n.7 (2011) ("[U]nder *Chevron* step two, we ask whether an agency interpretation is 'arbitrary or capricious in substance.'" ); Nat'l Ass'n of Regulatory Util. Comm'rs v. Interstate Commerce Comm'n, 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, 1254 (1997).

372. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 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).

views helped to persuade it to resolve statutory ambiguity in the Communications Act as it did.

In her 2001 article, Kagan suggests that *Chevron* deference should be directly linked to—indeed, limited to—agency interpretations influenced by “presidential involvement.”<sup>373</sup> Under this version of *Chevron*, Kagan argues that courts should award greater deference to executive than independent agencies since the President cannot direct independent agencies.<sup>374</sup> Furthermore, she argues 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 decisionmaking processes.”<sup>375</sup>

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.<sup>376</sup> 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—when it exists—should be an *additional* factor (not the sole factor) that agencies can point to in demonstrating the reasonableness of their interpretations of statutory ambiguity.

Nor would I limit *Chevron* deference to executive agencies, as Kagan suggests. Rather, to induce transparent disclosure of presidential involvement from both executive and independent agencies, Step Two’s reasonableness inquiry should consider any presidential involvement that is transparently and openly disclosed in the agency’s rulemaking record—regardless of whether the agency is an independent or an executive agency.<sup>377</sup> Despite their protection from removal by the President, independent agencies, such as the FCC, should be able to rely on 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*, just as it does the views of other actors.

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373. Kagan, *supra* note 1, at 2376.

374. *Id.* at 2376–77.

375. *Id.* at 2377.

376. See Exec. Order No. 12,866, 3 C.F.R. 638, 641 (1994) (defining “significant regulatory action” as including action having “an annual effect on the economy of \$100 million or more”).

377. Cf. COMM’N ON LAW & THE ECON., AM. BAR ASS’N, FEDERAL REGULATION: ROADS TO REFORM 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”).

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 into the open and furthering political accountability and oversight.

### 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).<sup>378</sup> Under the judiciary’s reading of section 553 of the APA, agencies must include sufficient information in their notices of proposed rulemaking to inform interested parties of the relevant issues and to ensure “meaningful” public participation.<sup>379</sup> Similarly, when issuing a final rule, the courts have required agencies’ statements of basis and purpose to respond to any “significant” comments received.<sup>380</sup> This statement of basis and purpose then serves as the “primary document that judges turn to in deciding the validity of challenged rules.”<sup>381</sup>

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.<sup>382</sup> Nonetheless, when the President injects himself into an agency’s rulemaking proceeding, concerns may 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.

*Undisclosed presidential involvement:* First, when the President exerts control through nontransparent 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 scrutinize them. This undermines the integrity of the notice-and-comment process by allowing the President

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378. 5 U.S.C. § 553 (2012) (setting forth notice-and-comment process for informal rulemaking).

379. *Action for Children’s Television v. FCC*, 564 F.2d 458, 470–71 (D.C. Cir. 1977).

380. *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1151 (9th Cir. 2002) (“[S]ignificant comments’ [are] those which ‘raise relevant points, and which, if adopted, would require a change in the agency’s proposed rule’ ” (quoting *Am. Mining Congress v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992))); *Rodway v. USDA*, 514 F.2d 809, 816–17 (D.C. Cir. 1975).

381. JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 257, 337 (5th ed. 2012) (“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.”).

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

to inject factors into the rulemaking process that the public never has an opportunity to judge.<sup>383</sup>

*Transparent and public presidential involvement that remains unacknowledged in the agency's rulemaking record:* Second, even when 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 appears in 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.<sup>384</sup> 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 spilled onto the pages of *Wired* and other major publications.<sup>385</sup>

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 Obama's own plan.<sup>386</sup> Yet the FCC's explanation supporting its order barely gives a nod to the President's involvement,<sup>387</sup> leaving the notice-and-comment proceeding and the political proceeding disconnected from one another and making the notice-and-comment process look like no more than a smokescreen. Unfortunately, this is all too common today in agency rulemaking 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, as he did in the FCC's net neutrality rules.<sup>388</sup>

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383. Thomas O. McGarity, *Presidential Control of Regulatory Agency Decision Making*, 36 AM. U.L. REV. 443, 456–57 (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, much less of its content").

384. See *supra* Section II.C (discussing Obama's written statement and video).

385. See, e.g., Wheeler, *supra* note 250 and accompanying text (discussing how the FCC's chair used *Wired* magazine to release an outline of a proposed rule that he was presenting to the FCC).

386. See Ruiz & Lohr, *supra* note 262.

387. See *supra* notes 253–257 and accompanying text.

388. See Watts, *supra* note 19, 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,

*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 backdoor mechanism for setting substantive policies, raising concerns about the evasion of notice-and-comment procedures.<sup>389</sup> 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.”<sup>390</sup> Policy statements merely “advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power,”<sup>391</sup> and—because they do not carry the force and effect of law—they are exempt from notice and comment.<sup>392</sup>

Obama’s 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.<sup>393</sup> Soon after DHS issued its memo, Obama stated in a speech in Chicago that he had taken action “to change the law.”<sup>394</sup> Texas and twenty-five other states then 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.<sup>395</sup> In February 2015, a federal district court judge issued a preliminary injunction, ruling that the states were likely to succeed on their procedural claim alleging 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.<sup>396</sup> In May

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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 . . .”).

389. See Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 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”).

390. See 5 U.S.C. § 553(b) (2012) (exempting “interpretative rules” and “general statements of policy” from notice and comment).

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

392. See *id.* at 1108–09.

393. See *supra* note 309 and accompanying text (noting DHS’s directive).

394. See Opinionated Patriot, *Obama Admits He Changed Immigration Law*. . . ., YOUTUBE (Nov. 26, 2014), <https://www.youtube.com/watch?v=YAJZupYbT0c> [<https://perma.cc/DGAV-SVM8>] (providing a video of Obama’s speech in Chicago where Obama stated that he took action to “change the law” in the immigration arena).

395. *Texas v. United States*, 86 F. Supp. 3d 591, 607 (S.D. Tex. 2015).

396. *Id.* at 663 (“The DHS Secretary is not just rewriting the laws; he is creating them from scratch.”).

2015, the Fifth Circuit denied a motion to stay the preliminary injunction,<sup>397</sup> and as of this writing, the case is still pending.

As each of these three scenarios suggest, the extent to which presidential control might undermine the APA's rulemaking process cannot be resolved using a one-size-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 on both judicial review doctrines and disclosure rules to both force and incentivize more disclosure of presidential influences.<sup>398</sup> In particular, a new statutory requirement calling for more disclosure around White House involvement would help. This rule 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 challenged 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.<sup>399</sup>

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.<sup>400</sup> 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,<sup>401</sup> 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*.<sup>402</sup> There, the Reagan administration's

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397. *Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015).

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

399. *See supra* notes 192–194 and accompanying text (discussing how discovery was allowed in the *Torti* case).

400. *See* 5 U.S.C. § 553 (2012) (setting forth the requisite procedures for notice-and-comment rulemaking).

401. *See supra* notes 361–372 and accompanying text (discussing how courts should reshape deference doctrines to incentivize agencies to disclose presidential influences).

402. 463 U.S. 29 (1983).

National Highway Traffic Safety Administration failed to acknowledge political influences that likely influenced the agency's decision to rescind a Carter administration rule 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,<sup>403</sup> 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 decisions" so that it also would "consider the opposing political position."<sup>404</sup>

Finally, the third scenario described above—that of Presidents encouraging agencies to set policy outside of the notice-and-comment process by relying on 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.<sup>405</sup> Currently, the line between legislative rules and nonlegislative rules is "enshrouded in considerable smog."<sup>406</sup> 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 future Presidents find themselves as frustrated by congressional inaction as Obama has,<sup>407</sup> then they may increasingly try to effect legal change through backdoor 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 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.

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403. *Motor Vehicle Mfrs.*, 463 U.S. at 30.

404. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1783 (2007).

405. In distinguishing policy statements from legislative rules, the D.C. Circuit has focused on whether the agency retained discretion or whether it bound itself. *U.S. Tel. Ass'n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994) ("[W]e 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.").

406. *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (quoting *Am. Bus. Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980)).

407. See Shear, *supra* note 140 and accompanying text (noting that Obama has been particularly frustrated by "congressional inaction").

## 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 subconstitutional administrative law doctrines could be coordinated to provide a more nuanced and proactive response to 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—that provide a powerful and much-needed roadmap for responding to many current controversies swirling around presidential control.