

## WHO'S IN CHARGE? DOES THE PRESIDENT HAVE DIRECTIVE AUTHORITY OVER AGENCY REGULATORY DECISIONS?

*Robert V. Percival\**

Most regulatory statutes specify that agency heads rather than the President shall make regulatory decisions.<sup>1</sup> Yet for more than four decades every President has established some program to require pre-decisional review and clearance of agency regulatory decisions, usually conducted by the Office of Management and Budget (OMB).<sup>2</sup> On January 18, 2011, President Barack Obama joined his seven predecessors in expressly endorsing regulatory review when he signed Executive Order 13,563.<sup>3</sup>

President Obama's regulatory review program generally emulates those of his two most recent predecessors, relying on OMB's Office of Information and Regulatory Affairs (OIRA) to review only the most significant agency rulemaking actions.<sup>4</sup> Although this form of presidential oversight of rulemaking is now well established, an important, unresolved question is whether the President has the authority to dictate the substance of regulatory decisions entrusted by statute to agency heads. While proponents of a unitary executive argue in favor of presidential directive authority,<sup>5</sup> this article demonstrates that each President's regulatory review program has disclaimed such authority, even though OIRA at times has tried to displace agency decisionmaking.

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\* Robert Stanton Professor of Law and the Director of the Environmental Law Program, University of Maryland School of Law. The author would like to express his appreciation to Peter Hogge, Esther Houseman, Megan Marzec, Molly Madden, and Helena Mastrogianis for their outstanding research assistance with this Article.

1. See, e.g., Clean Air Act § 109, 42 U.S.C. § 7409 (2006) (specifying that the Administrator of EPA shall promulgate and regularly review and revise national ambient air quality standards for air pollutants).

2. The history of presidential review of rulemaking is comprehensively reviewed in Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127 (1991) [hereinafter Percival, *Checks Without Balance*], and Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001) [hereinafter Percival, *Presidential Management*].

3. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

4. See *id.* § 1(b), 76 Fed. Reg. at 3821. President Obama's executive order supplements and reaffirms the existing regulatory review program established by President Bill Clinton under Executive Order 12,866, 3 C.F.R. 638 (1994), and continued by President George W. Bush. See Exec. Order No. 13,422, 3 C.F.R. 191 (2008); Exec. Order No. 13,258, 3 C.F.R. 204 (2003).

5. See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008).

After describing three principal views on whether the President has directive authority, this Article discusses the constitutional foundations of this debate. It then reviews the history of presidential oversight of agencies and its implications for the debate over directive authority. The Article concludes by explaining why, even if the President has unfettered removal authority over the heads of non-independent agencies, it matters that this removal power does not imply the power to control decision making entrusted by law to agency heads.

### I. THREE VIEWS OF PRESIDENTIAL DIRECTIVE AUTHORITY

There are three principal approaches to the question of whether the President has directive authority over regulatory decisions entrusted by statute to agency heads. First, the unitary executive theory holds that presidential directive authority is constitutionally required (unitary executive approach).<sup>6</sup> The second approach argues that statutes entrusting regulatory decisions to agency heads should be interpreted to grant the President directive authority unless they expressly restrict it (“directive authority” as an “interpretive principle”).<sup>7</sup> The third approach, which the author has advocated, is that the President does not have directive authority unless a statute expressly gives it to him (“not-so-unitary executive” or “disunitary executive” approach).<sup>8</sup>

Proponents of the unitary executive theory view it as self-evident that the President should have directive authority over agency heads.<sup>9</sup> They infer this authority from the President’s ability to remove the heads of non-independent agencies, and they argue that independent agencies are unconstitutional. This approach was advocated in Justice Scalia’s lone dissent in *Morrison v. Olson*<sup>10</sup> in 1988 when the Court upheld the constitutionality of the Ethics in Government Act that limited the President’s ability to remove independent counsels investigating allegations of crime by high executive officers.<sup>11</sup> Even though *Morrison* represents a clear rejection of the unitary executive theory, Professors Steven G. Calabresi and Christopher S. Yoo have argued vociferously for its revival. In their book *The Unitary Executive: Presidential Power from Washington to Bush*<sup>12</sup> they maintain that the Vesting Clause of Article II of the Constitution, which vests the executive power in the President, “includes the power to remove and direct all lower-level executive officials.”<sup>13</sup> Reviewing the history of presidential oversight of the executive, Calabresi and Yoo claim that no President has acquiesced to any legislative or judicial

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6. *See id.*

7. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2330 (2001).

8. *See* Percival, *Presidential Management*, *supra* note 2.

9. *See* CALABRESI & YOO, *supra* note 5.

10. 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

11. *Id.* at 696–97 (majority opinion).

12. CALABRESI & YOO, *supra* note 5.

13. *Id.* at 3–4.

encroachment on the unitary executive, despite the U.S. Supreme Court's upholding of the constitutionality of Congress's creating independent agencies and of placing limitations on the President's power to remove their leaders.<sup>14</sup>

In the two decades since *Morrison* was decided, the Court has become more sympathetic to claims of broad presidential removal power. Last year, by a 5–4 majority, the Court invalidated a restriction on the President's ability to remove members of the Public Company Accounting Oversight Board (PCAOB) created by the Sarbanes-Oxley Act.<sup>15</sup> The Act provided that the members of the PCAOB could only be removed for cause by the Securities and Exchange Commission whose members themselves can only be removed by the President for cause.<sup>16</sup> Although the Court determined that this double for-cause restriction on the President's removal authority violated Article II's vesting of executive power in the President, it did not question the constitutionality of independent agencies whose members can only be removed for cause.<sup>17</sup>

The second approach to the question of presidential directive authority was proposed by Elena Kagan, prior to becoming a Supreme Court Justice. In an influential article entitled *Presidential Administration*, Kagan argued that where Congress has not acted expressly to restrict the President's ability to direct an agency decision, regulatory statutes should be interpreted to permit the President to do so.<sup>18</sup> She argued that such an interpretive principle ("presuming an undifferentiated presidential control of executive agency officials")<sup>19</sup> is a more accurate interpretation of congressional intent when Congress has not restricted the President's removal powers. As discussed below, precisely the contrary assumption prevails now and did at the time Congress enacted most of the current federal regulatory statutes.<sup>20</sup> Because it was thought that the President did not have the authority to dictate regulatory decisions entrusted to agency heads by law, all of the executive orders establishing regulatory review programs expressly disclaimed such authority.<sup>21</sup> While OIRA has tried at times, particularly during the Reagan Administration, to dictate the substance of regulatory

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14. See generally *Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

15. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010).

16. *Id.* at 3148.

17. The Court held that dual for-cause limitations on the removal of members of the Public Company Accounting Oversight Board (PCAOB) unconstitutionally infringed on presidential power, but it declined an invitation to invalidate PCAOB on constitutional grounds. *Id.* at 3138.

18. See generally Kagan, *supra* note 7.

19. *Id.* at 2328.

20. See, e.g., Percival, *Presidential Management*, *supra* note 2, at 965; Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 25 (1995); Kevin M. Stack, *The President's Statutory Power To Administer the Laws*, 106 COLUM. L. REV. 263, 270–99 (2006); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 649 (1984).

21. See Percival, *Presidential Management*, *supra* note 2, at 965 n.7.

decisions entrusted to agencies by statute, it was quick to disclaim such directive authority whenever its actions were challenged.<sup>22</sup>

Ten years ago, in a detailed historical review of presidential oversight of agencies, I described a third vision of our constitutional scheme as reflecting a “not-so-unitary executive” in which the President does not have directive authority over decisions entrusted by statute to agency heads.<sup>23</sup> Although I acknowledge that the President’s ability to remove non-independent agency heads at will gives him enormous power to persuade them to accede to his wishes, I argue that presidential directive authority cannot be inferred from the removal power. If an agency head refuses to accommodate the President’s policy preferences, there is no constitutional problem with the President removing him from office. But this does not imply that the President has the authority to dictate the substance of agency decisions that regulatory statutes entrust to agency heads.<sup>24</sup>

In Part II, after reviewing the constitutional dimensions of the debate over presidential directive authority, this Article discusses how statutes granting regulatory authority to the executive should be interpreted. Part III then reviews the historical record relevant to directive authority. It notes that every President who established a regulatory review program disclaimed directive authority in the context of such review to avoid undermining its legality. The Article concludes in Part IV by explaining why the answer to the directive authority question matters even though the President’s removal power greatly diminishes the number of incidents in which agency heads will be bold enough to defy the President. As the article explains, history demonstrates that the absence of presidential directive authority can serve as an important check on presidential abuses of power for political ends.

## II. DIRECTIVE AUTHORITY, THE CONSTITUTION, AND STATUTORY INTERPRETATION

As the Supreme Court recently reaffirmed in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,<sup>25</sup> the President’s authority over the agencies under him flows from Article II of the Constitution, but can be channeled—within limits—by congressional enactment. As I discuss below, however, neither of these sources supports presidential directive authority.

### A. Directive Authority and the Constitution

By now the contours of the constitutional debate over presidential directive authority are well known. Article II of the Constitution vests the

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22. See Robert V. Percival, *Rediscovering the Limits of the Regulatory Review Authority of the Office of Management and Budget*, 17 ENVTL. L. REP. 10,007, 10,019–20 (1987).

23. Percival, *Presidential Management*, *supra* note 2.

24. *Id.* at 1003–06.

25. 130 S. Ct. 3138 (2010).

executive power in the President.<sup>26</sup> At the Constitutional Convention the framers rejected a proposal to share the executive power among the members of an executive council in order to create a single, effective, and accountable chief executive.<sup>27</sup> Proponents of the unitary executive theory maintain that Article II's vesting clause and the rejection of a plural executive should be interpreted to give the President both removal at will and directive authority over all executive branch officers, rendering independent agencies unconstitutional.

Other features of the constitutional text cut against the notion that the President has directive authority over decisions entrusted by statute to the heads of executive agencies. The establishment of executive agencies is left entirely to legislation in Article II, Section 2,<sup>28</sup> leaving it to Congress to define "the functions, powers, and duties of the heads of such Departments . . ."<sup>29</sup> Article I, Section 8's famous Necessary and Proper Clause refers to "Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," suggesting that there is no constitutional barrier to Congress vesting powers in agency heads.<sup>30</sup> When the first U.S. Congress, comprised of many members who were delegates to the Constitutional Convention, established the Department of Treasury as the second federal agency, it directed the Treasury Secretary to submit reports directly to Congress, and it reserved the right to require information from him unfiltered by the President.<sup>31</sup>

The President's power under Article II, Section 2 to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," implies presidential supervisory authority over agency heads.<sup>32</sup> However, if the framers deemed it necessary to make this power explicit, it would seem strange not to mention expressly an even more significant directive authority. Article II, Section 2 also provides the President with authority to appoint officers of the U.S. "by and with the Advice and Consent of the Senate." This serves as an important check on presidential power that is inconsistent with the notion of presidential directive authority. If the President can control the substance of every agency decision, why would it be necessary to have the Senate confirm his nominees to lead the agencies?

The Constitution is silent on presidential removal powers. The first constitutional debate in Congress, undertaken when Congress created the Department of Foreign Affairs to be the first federal agency, occurred over the question of whether the President could remove cabinet officers without

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26. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

27. CALABRESI & YOO, *supra* note 5, at 34.

28. U.S. CONST. art. II, § 2, cl. 2 (giving the President power to appoint officers to offices "which shall be established by Law.").

29. JAMES HART, *THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES* 189 (1925).

30. U.S. CONST. art. I, § 8, cl. 18.

31. JOHN C. MILLER, *THE FEDERALIST ERA: 1789-1801*, at 26-27 (1960).

32. U.S. CONST. art. II, § 2, cl. 1.

obtaining the approval of the Senate.<sup>33</sup> Vice President John Adams broke a tie in the Senate in July 1789 to resolve the issue in favor of not requiring Senate approval before the President could remove the Secretary of Treasury.<sup>34</sup> Major battles between Congress and the President over the removal power occurred at various times throughout history, resulting in the impeachment of President Andrew Johnson in 1868,<sup>35</sup> but it now seems settled that the President can remove at will the heads of executive agencies, save that Congress can require cause for removals of the heads of independent agencies.

The Take Care Clause of Article II, Section 3 requires that the President “take Care that the Laws be faithfully executed.” This clause also is frequently cited as support for a unitary executive with presidential directive authority. However, in 1823 Attorney General William Wirt issued an opinion declaring that the Take Care Clause had precisely the opposite effect. “If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it . . . he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.”<sup>36</sup> Wirt maintained that if a statute provides for a decision to be made by an agency head, the Take Care Clause does not allow the President “to perform the duty, but to see that the officer assigned by law performs his duty faithfully.”<sup>37</sup>

Thirty-five years later, a subsequent Attorney General, Caleb Cushing, rejected this view, as I have noted elsewhere.<sup>38</sup> Cushing believed that “no Head of Department can lawfully perform an *official* act against the will of the President; and that will is by the Constitution to govern the performance of all such acts.”<sup>39</sup> But Cushing noted that when a statute provides for an action to be taken by an agency head, the President must act through the official designated by Congress when the President exercises his discretion.<sup>40</sup>

The Supreme Court’s decisions in *Marbury v. Madison*<sup>41</sup> and *Kendall v. United States*<sup>42</sup> establish that there are certain “ministerial” duties given to agency heads by statute with which the President cannot interfere. In *Marbury* Chief Justice John Marshall declared that:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his

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33. See generally Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006).

34. MARGARET C.S. CHRISTMAN, *THE FIRST FEDERAL CONGRESS: 1789–1801*, at 136 (1989).

35. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL’Y 667, 746–58 (2003).

36. *The President and Accounting Officers*, 1 Op. Att’y Gen. 624, 625 (1823).

37. *Id.* at 626 (emphasis omitted).

38. See Percival, *Presidential Management*, *supra* note 2, at 977.

39. *Relation of the President to the Executive Departments*, 7 Op. Att’y Gen. 453, 469–70 (1855).

40. *Id.* at 468.

41. 5 U.S. (1 Cranch) 137 (1803).

42. 37 U.S. (12 Pet.) 524 (1838).

own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.<sup>43</sup>

However, Chief Justice Marshall also stated:

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.<sup>44</sup>

In *Kendall* the Court rejected the argument that the Take Care Clause gave the President power to countermand a legal requirement that the postmaster general make a payment required by statute.<sup>45</sup> The Court observed that “[t]o contend, that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”<sup>46</sup> This helps clarify a proposition that should be self-evident from the text of the Constitution. Whatever the scope of the President’s directive authority, he cannot legally use it to direct a result that is contrary to law. One implication of this could be that if an agency head is acting contrary to law, the President’s responsibilities under the Take Care Clause may require him to oppose the agency decision. Certainly a President who removes agency heads for failing to follow the law is on sound constitutional ground, while a President who seeks to require an agency head to take an illegal action to benefit a campaign contributor would not be.

In *Kendall* the Court also declared that the Vesting Clause<sup>47</sup> did not give the President directive authority:

The executive power is vested in a President; and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly cannot be claimed by the President.

There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And

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43. *Marbury*, 5 U.S. (1 Cranch) at 165–66.

44. *Id.* at 166.

45. *Kendall*, 37 U.S. (12 Pet.) at 613.

46. *Id.*

47. U.S. CONST. art. II, § 1, cl. 1.

this is emphatically the case, where the duty enjoined is of a mere ministerial character.<sup>48</sup>

As Professor Kevin Stack ably argues, *Marbury* and *Kendall* clearly rule out presidential directive authority when agency officials have been required by Congress to perform non-discretionary, ministerial duties, but they leave open the question of whether such authority exists in the context of discretionary decisions entrusted to agency heads.<sup>49</sup> Although agencies today retain considerable discretion in making most regulatory decisions, the Administrative Procedure Act (APA) subjects them to judicial review for fidelity to law, indicating that they do not fall within the class of *Marbury*'s unreviewable political judgments.

### B. Directive Authority and Statutory Interpretation

Even if the Constitution does not support the unitary executive theory, proponents of directive authority as an interpretive principle maintain that such authority should be inferred from legislation that does not expressly disclaim it.<sup>50</sup> Now-Justice Kagan supports this view by comparing delegations of regulatory authority to independent agencies with delegations to other executive agencies.<sup>51</sup> She argues that delegations to independent agencies reflect a congressional intent to insulate certain decisions from presidential influence because the President cannot remove heads of independent agencies at will.<sup>52</sup> Conversely, she maintains that delegations to agency heads who are removable by the President at will should be interpreted as reflecting an intent to give the President directive authority.<sup>53</sup> Yet some statutes specify that the President is to make certain decisions, while providing that other decisions are to be made by agency heads.<sup>54</sup> Following Attorney General Cushing's interpretation, Kagan maintains that these delegations should be viewed only as establishing who has initial responsibility for the decision, without foreclosing the President from assuming ultimate responsibility for decisions initially entrusted to agency heads.

I previously have responded to this argument by noting that some regulatory statutes expressly specify the circumstances under which the President can suspend decisions made by agency heads.<sup>55</sup> Calling these delegations "mixed agency-president delegations," Professor Stack has demonstrated that they have been a not-infrequent feature of legislation

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48. *Kendall*, 37 U.S. (12 Pet.) at 610.

49. Stack, *supra* note 20, at 273.

50. *See generally* Kagan, *supra* note 7.

51. *Id.* at 2327.

52. *See id.*

53. *See id.* at 2327–28.

54. *See, e.g.*, Comprehensive Environmental Response, Compensation & Liability Act, 42 U.S.C. §§ 9601–9675 (2006). Section 104 authorizes the President to direct actions responding to releases of hazardous substances, while section 102 requires the Environmental Protection Agency (EPA) Administrator to determine what quantities of hazardous substances trigger response authorities.

55. Percival, *Presidential Management*, *supra* note 2, at 1008.



since the early days of the republic continuing until today.<sup>56</sup> These include conditional delegations that “expressly condition the grant of authority to an official on the oversight of the President” and agency-specific delegations that specify “the agent through whom the President must act.”<sup>57</sup> Traditional principles of statutory interpretation dictate that if Congress deems it necessary in some circumstances to specify when the President may exercise authority to override an agency decision, such authority should not be inferred when Congress has not so specified.<sup>58</sup> Indeed, the case for inferring that Congress meant something different when it chose not to mention the President or to grant him express directive authority in regulatory statutes is compelling enough to suggest that there is no ambiguity justifying application of principles of constitutional avoidance.

### III. UPDATING THE HISTORICAL RECORD ON DIRECTIVE AUTHORITY

In previous articles I have reviewed in detail the history of presidential review of rulemaking<sup>59</sup> and the history of presidential management of the administrative state through the first year of the George W. Bush Administration.<sup>60</sup> Two of the principal proponents of the unitary executive theory—Stephen Calabresi and Christopher Yoo—subsequently have published a lengthy history examining how each President in U.S. history has asserted authority over the executive branch.<sup>61</sup> Calabresi and Yoo assert that this history demonstrates that “all of our nation’s Presidents have believed in the theory of the unitary executive.”<sup>62</sup> While they acknowledge that the judiciary has confirmed the constitutionality of independent agencies, they invite the judiciary to reconsider, maintaining that “presidential nonacquiescence to congressional claims of power to create independent entities in the executive branch renders congressional historical practice irrelevant as a guidepost to constitutional interpretation.”<sup>63</sup>

Calabresi and Yoo focus most of their historical analysis on presidential removal powers, while maintaining that directive authority necessarily follows from their unitary executive theory.<sup>64</sup> While the breadth of the book’s historical review is impressive, their effort to conform history to their theory results at times in important omissions or unwarranted “spin” on certain historical events. After reviewing these instances below, the article updates the historical record relevant to directive authority from the dawn of the George W. Bush Administration to the present. This update includes efforts by the Bush Administration to force the U.S.

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56. Stack, *supra* note 20, at 276–84.

57. *Id.* at 278, 282.

58. *Id.* at 284.

59. Percival, *Checks Without Balance*, *supra* note 2.

60. Percival, *Presidential Management*, *supra* note 2.

61. CALABRESI & YOO, *supra* note 5.

62. *Id.* at 4.

63. *Id.* at 8.

64. *See, e.g., id.* at 8 (“While it is certainly true that presidential control over the executive branch is a complex phenomenon, this book seeks to show that it would be a great mistake to underestimate the importance of the removal power.”).

Environmental Protection Agency (EPA) to veto California's program to control emissions of greenhouse gases (GHGs), to prevent the Food and Drug Administration (FDA) from licensing "Plan B" emergency contraception for non-prescription use, and Vice President Richard Cheney's efforts to force the Office of the Attorney General to approve the issuance of a national security directive on warrantless surveillance that Justice Department officials believed to be illegal. In the first two controversies White House pressure persuaded agency heads to make decisions of questionable legality, both of which have now been overturned. Vice President Cheney's efforts faltered when resignation threats by legal officials in the Justice Department, the Federal Bureau of Investigation, and the Central Intelligence Agency ultimately forced significant changes in the directive. Finally, the article examines President Barack Obama's issuance of directives to agency heads, including directives to increase fuel economy standards and to reconsider EPA's veto of California's regulation of GHG emissions from motor vehicles.

One initial quibble with Calabresi and Yoo's history concerns their account of the origins of presidential review of rulemaking. Calabresi and Yoo maintain that presidential review of agency regulatory actions started with the Administration of President Lyndon Johnson. They maintain that Johnson "pioneered what would emerge as a critical device in allowing the President to control the execution of the law when he began using the oversight responsibilities of the Bureau of the Budget to influence the development of important agency regulations."<sup>65</sup> They attribute unwarranted significance to this alleged "fact" by asserting that it, combined with the use of regulatory review by all subsequent administrations, "undercuts any suggestion that OMB review of regulations reflects an ideological slant in either direction."<sup>66</sup>

While it is true that all Presidents since Richard Nixon have employed some form of a regulatory review program, the initial impetus for such review was an effort by President Nixon to curb regulatory actions by the newly created EPA.<sup>67</sup> The only source Calabresi and Yoo cite for the assertion that regulatory review originated with the Johnson Administration is an interview with former OMB official Jim Tozzi, cited in another article.<sup>68</sup> Yet Tozzi himself subsequently has told interviewers that "[r]eviews of regulations began when Richard Nixon created the Environmental Protection Agency."<sup>69</sup>

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65. *Id.* at 342.

66. *Id.* at 13.

67. See Percival, *Checks Without Balance*, *supra* note 2, at 129–38.

68. CALABRESI & YOO, *supra* note 5, at 342 n.19; Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 9 & n.19 (1984) (citing Interview with Jim Tozzi, former Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA) Deputy Administrator (June 14, 1983)).

69. Dan Davidson, *Jim Tozzi: Nixon's "Nerd" Turns Regulations Watchdog*, FEDERALTIMES.COM (Nov 11, 2002), [http://www.thecre.com/pdf/20021111\\_fedtimes-tozzi.pdf](http://www.thecre.com/pdf/20021111_fedtimes-tozzi.pdf). During the Johnson Administration, Tozzi was employed by the Office of

A. *Regulatory Review in the Nixon Administration*

The origin of OMB review of regulations more properly can be understood to date from May 21, 1971 when OMB Director George Shultz sent a letter to EPA Administrator William Ruckelshaus asserting authority to review and clear EPA regulations that were likely to impose significant costs or create additional demands on the federal budget.<sup>70</sup> EPA was directed to submit proposed regulations to OMB thirty days before publication and to include analyses of the regulation's objectives, alternatives, and estimates of costs and benefits.<sup>71</sup> This program later was expanded into what became known as "Quality of Life" (QOL) review.<sup>72</sup> Although the QOL program required that proposed regulations be submitted to OMB, who then circulated them to other agencies for comment,<sup>73</sup> it is significant that OMB was made responsible only for mediating conflicts between agencies. OMB was not given ultimate decision making authority.<sup>74</sup> Indeed, a proposal that would have allowed OMB to exercise directive authority was rejected because of concerns about its legality.<sup>75</sup>

While nominally applicable to all executive agencies, EPA was the only agency routinely subjected to QOL review.<sup>76</sup> The review process became a convenient vehicle for industry representatives who were members of President Nixon's National Industrial Pollution Control Council (NIPCC) to try to influence regulatory decisions. NIPCC consisted of sixty-three corporate executives appointed by Commerce Secretary Maurice Stans who met in secret with Stans and other federal officials to air complaints about impending regulatory actions.<sup>77</sup> It had been established on April 9, 1970

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Budget's Systems Analysis Group that argued for expanding reviews of the U.S. Army Corps of Engineers' budget to include review of Corps regulations. See Jim Tozzi, Commentary of Dr. Alan Schmid's Paper, THECRE.COM, <http://www.thecre.com/ombpapers/TozziAnalOfEconomicsOfRulemaking.htm> (last visited Apr. 20, 2011). The members of the Office of Budget's Systems Analysis Group later helped establish and manage President Nixon's Quality of Life Review process, which was the first presidential regulatory review program. See *id.*

70. GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA 47-48 (1984).

71. See Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 658-59 (2005).

72. See *id.*

73. MARC K. LANDY, MARC J. ROBERTS & STEPHEN R. THOMAS, THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS 37 (1990).

74. See Yoo et al., *supra* note 71, at 659.

75. EADS & FIX, *supra* note 70, at 48.

76. See Yoo et al., *supra* note 71, at 659.

77. The stated purpose of the National Industrial Pollution Control Council (NIPCC) was to "allow businessmen to communicate regularly with the President, the Council on Environmental Quality and other governmental officials and private organizations" with respect to regulatory initiatives. Percival, *Checks Without Balance*, *supra* note 2, at 130 (quoting Statement on Establishing the National Industrial Pollution Control Council, 2 PUB. PAPERS 344, 344 (Apr. 9, 1970)). NIPCC's meetings were not publicly announced and were closed to the public. See *id.* at 168-70. For example, after discovering that NIPCC would be meeting on October 14, 1970, representatives of ten consumer and environmental groups showed up at the Department of Commerce and sought to attend the meeting. The Commerce Department not only refused to allow them to attend the meeting, but it also

through the issuance of Executive Order 11,523.<sup>78</sup> The QOL review process has been described as marked by “heated arguments between EPA and the Department of Commerce, its principal antagonist, with . . . reviews . . . [focused on] industry-prepared information presented by the Commerce Department.”<sup>79</sup>

In the early days of the EPA, fierce battles occurred between the agency and the White House. As I have noted in my previous scholarship,<sup>80</sup> Deputy Administrator John R. Quarles, Jr. reports that he was summoned to the White House in an effort to force the EPA to drop one of its first enforcement actions against a company whose management had supported President Nixon.<sup>81</sup> After the incident leaked to the press and a congressional hearing was held, the White House backed down and Administrator Ruckelshaus pledged to resign “if environmental decisions are overruled because of political considerations.”<sup>82</sup> Responding to charges at a congressional hearing that the QOL review process had forced the EPA to weaken regulations implementing the Clean Air Act, EPA Administrator William Ruckelshaus asserted that he, and not OMB, had made the final decision about the regulations.<sup>83</sup> Ruckelshaus vociferously argued that Executive Office officials were not making decisions for EPA and “[i]f they were, I would be breaking the law, and I would not function as Administrator of this Agency if I let them do so.”<sup>84</sup> To reinforce Ruckelshaus’s claim that OMB lacked directive authority, OMB Director George Shultz advised the committee in writing that “EPA has final authority on plans for implementation of air quality standards under the Clean Air Amendments of 1970.”<sup>85</sup> These incidents powerfully indicate that it was well understood that the President lacked directive authority over agency regulatory decisions.

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refused their request to provide a transcript of it. See E.W. Kenworthy, *U.S. Pollution Control Panel Bars Environmental and Consumer Observers*, N.Y. TIMES, Oct. 15, 1970, at 40. Commerce Department officials refused reporters’ request for a press conference. See Percival, *Checks Without Balance*, *supra*, at 169. The NIPCC, however, subsequently released summary minutes of some of its meetings. See *Implementation of the Clean Air Act Amendments of 1970—Part 2: Hearings Before the Subcomm. on Air & Water Pollution of the S. Comm. on Pub. Works*, 92d Cong. 583–94 (1972) [hereinafter *Hearings*]. These summaries, however, amounted to little more than “a skeletal outline of the issues discussed, evidently thoroughly sanitized.” William H. Rodgers, Jr., *The National Industrial Pollution Control Council: Advise or Collude?*, 13 B.C. INDUS. & COM. L. REV. 719, 727 (1972). The members of the NIPCC apparently edited the draft summaries extensively “with the consequence that all damaging, and some useful, information has disappeared from the public record.” *Id.*

78. Exec. Order No. 11,523, 3 C.F.R. 117 (1966–1970).

79. EADS & FIX, *supra* note 70, at 49.

80. Percival, *Checks Without Balance*, *supra* note 2, at 135.

81. See JOHN QUARLES, *CLEANING UP AMERICA: AN INSIDER’S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY* 58–76 (1976).

82. *Id.* at 68–70.

83. *Hearings*, *supra* note 77, at 325 (testimony of William Ruckelshaus).

84. *Id.*

85. *Id.* at 338.

Disputes between EPA and the White House were so heated that Administrator Ruckelshaus insisted as a condition for remaining EPA Administrator after the 1972 election that he receive written assurance from the President that the EPA Administrator retained the ultimate authority for EPA policy decisions.<sup>86</sup> President Nixon verbally agreed to this, but EPA “bargained in vain with OMB” to spell it out in writing.<sup>87</sup>

When appointed to succeed Ruckelshaus as EPA Administrator during the summer of 1973, Russell Train also insisted upon written assurances that he retained ultimate policy authority.<sup>88</sup> At his confirmation hearing, Train emphasized that it was “of crucial importance that EPA establish and maintain at all times a strongly independent role.”<sup>89</sup> He asserted that while he would welcome comments from within the government, he alone would make all final EPA regulatory decisions.<sup>90</sup> Train announced that he had “already discussed this matter with responsible officials in OMB” and that he had “full concurrence[] that all processes of interagency comment, review, and suggestion with respect to proposed regulatory decisions by the Administrator of EPA will be directed by the Administrator of EPA and be conducted by him and on his behalf, not controlled by the Office of Management and Budget.”<sup>91</sup>

Train carried out this promise, as illustrated by his reaction to the fierce lobbying he was subjected to when EPA issued the first regulations limiting the amount of lead that could be placed in leaded gasoline.<sup>92</sup> Despite strong opposition from presidential aides and OMB and Interior officials, Train ultimately established the lead limits he initially wanted, while extending the final deadline for lead phasedown by one year.<sup>93</sup>

While this demonstrates that it was understood from the first days of EPA that neither the President nor OMB had directive authority over the agency, Calabresi and Yoo place a rather different spin on this history. They assert that the inability of Ruckelshaus or Train to obtain written assurances of their independence demonstrates that administrative control was centralized in OMB. Calabresi and Yoo criticize my conclusion that this history is evidence of agency independence and maintain that it is “consistent with the unitary executive” because “resignation or removal is the natural outcome under our theory when an executive official finds himself or herself out of step with administration policy.”<sup>94</sup> Yet this history demonstrates that both Administrators Ruckelshaus and Train successfully

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86. See Percival, *Checks Without Balance*, *supra* note 2, at 137.

87. QUARLES, *supra* note 81, at 117–19.

88. *Id.* at 119.

89. *Nomination of Russell E. Train: Hearing Before the S. Comm. on Pub. Works*, 93rd Cong. 3 (1973) (“I assure you that I, as Administrator, will make the final decisions. I will seek and welcome comments and suggestions both from within Government and from the public, but the final decisions will be mine.” (statement of Russell E. Train)).

90. *Id.*

91. *Id.* at 8 (statement of Russell E. Train).

92. See QUARLES, *supra* note 81, at 117–42.

93. *Id.* at 138.

94. CALABRESI & YOO, *supra* note 5, at 348.

resisted White House efforts to influence EPA policy, something that could not occur if the President actually possessed directive authority.<sup>95</sup>

*B. Regulatory Review During the Ford and Carter Administrations*

Both the Ford and Carter Administrations shifted the focus of presidential oversight away from prepublication review of agency actions in favor of review during the public comment period mandated by the APA.<sup>96</sup> President Ford's Council on Wage and Price Stability (CWPS), part of the Executive Office of the President, submitted written statements on the inflationary impact of proposed rules to the agency rulemaking record during the public comment period.<sup>97</sup> The White House did not assert that it possessed directive authority. Instead it sought to influence agency decisions by having CWPS participate in rulemaking proceedings with CWPS officials often testifying at agency hearings.<sup>98</sup> Congress expressly endorsed this practice when it amended CWPS's enabling act in 1975.<sup>99</sup>

The Ford Administration's continuation of QOL review was more controversial than its new inflation impact analysis requirement. Reviewing OMB's management of the QOL review program, the *Environment Reporter* concluded in 1976: "The Office of Management and Budget plays an influential part in shaping federal environmental policies, frequently with little public awareness or understanding of its role."<sup>100</sup> Repeating some of the same criticisms made during the Nixon Administration, the report noted that EPA officials believed that their Agency had been unfairly "singled out" for QOL reviews and that other federal agencies sought to use the review process to weaken EPA regulations.<sup>101</sup>

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95. Calabresi and Yoo also maintain that President Nixon's resignation showed that an independent counsel law is not needed. *Id.* at 355. Yet Nixon's downfall was the direct result of a special prosecutor who effectively could not be fired by the President seeking and obtaining White House tapes that proved the President's culpability in Watergate. Had Justice Scalia's position in *Morrison v. Olson* prevailed, the only effective check on presidential wrongdoing would be at the ballot box, which was no check at all on a President who had begun his second and last term.

96. 5 U.S.C. § 553(c) (2006); see George C. Eads, *White House Oversight of Executive Branch Regulation*, in *SOCIAL REGULATION: STRATEGIES FOR REFORM* 177, 192–93 (Eugene Bardach & Robert A. Kagan eds., 1982).

97. See Council on Wage and Price Stability Act, Pub. L. No. 93-387, 88 Stat. 750 (1974).

98. See Percival, *Checks Without Balance*, *supra* note 2, at 139–40.

99. Congress confirmed CWPS's authority to "intervene and otherwise participate on its own behalf in rulemaking, ratemaking, licensing and other proceedings before any of the departments and agencies of the United States, in order to present its views as to the inflationary impact that might result from the possible outcomes of such proceedings." Pub. L. No. 94-78 § 4, 89 Stat. 411, 411 (1974); see NAT'L ACAD. OF PUB. ADMIN., *PRESIDENTIAL MANAGEMENT OF RULEMAKING IN REGULATORY AGENCIES* 9 (1987); *Office of Management and Budget Plays Critical Part in Environmental Policymaking, Faces Little External Review*, 7 *Env't Rep.* (BNA) 693 (1976) [hereinafter *Office of Mgmt. & Budget*].

100. *Office of Mgmt. & Budget*, *supra* note 99, at 693.

101. *Id.*

President Jimmy Carter surprised some observers by playing a more active role than President Gerald Ford in efforts to temper agency regulations. But as in the Ford Administration, the Carter Administration's regulatory review program, established by Executive Order 12,044,<sup>102</sup> was expressly structured to respect rulemaking procedures required by the APA and underlying regulatory statutes. Carter's Regulatory Analysis Review Group (RARG), which was responsible for assessing the economic impact of proposed rules, conducted its reviews on the public record during the normal course of agency rulemaking proceedings.<sup>103</sup> RARG reviewers could not attempt to prevent agencies from issuing proposed rules because RARG review occurred only after proposed rules were published in the Federal Register. RARG reviews produced public documents summarizing the reviewers' concerns, which were submitted to the rulemaking record.<sup>104</sup> The RARG program encouraged agencies to take a harder look at alternatives to proposed regulations, while leaving the ultimate regulatory decisions to the agency designated by statute to issue the regulation.

In a few cases President Carter was involved in efforts to influence agency regulatory decisions. The most famous of these occurred on April 30, 1979, when he met with EPA Administrator Douglas Costle and other officials at the White House to discuss a new source performance standard (NSPS) for coal-fired power plants that the agency was about to promulgate pursuant to its authority under the Clean Air Act. Environmental groups challenging the NSPS promulgated in June 1979 argued that EPA's failure to mention this meeting in the public docket of the rulemaking denied them due process and violated statutory docketing requirements established by the Clean Air Act. However, in *Sierra Club v. Costle*<sup>105</sup> the U.S. Court of Appeals for the D.C. Circuit rejected these arguments, finding that the regulations were not based on information arising from the meeting.<sup>106</sup> Writing for the majority, Judge Patricia Wald went on in dictum to recognize not only the constitutional authority of the President to supervise executive policymaking, citing *Myers v. United States*,<sup>107</sup> but also the desirability of such presidential oversight.<sup>108</sup>

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102. Exec. Order No. 12,044, 3 C.F.R. 152, 154 (1979) (issued on March 23, 1978).

103. See Percival, *Checks Without Balance*, *supra* note 2, at 144-45.

104. See *id.* at 145.

105. 657 F.2d 298 (D.C. Cir. 1981).

106. *Id.* at 410.

107. 272 U.S. 52 (1926).

108.

The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. . . . Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.

*Sierra Club*, 657 F.2d at 406 (internal citations omitted). Surprisingly, Calabresi and Yoo do not discuss *Sierra Club v. Costle* in their discussion of President Carter's Administration,

A close reading of Judge Wald's opinion indicates that it recognizes limits on the President's supervisory authority over agency heads. Her discussion of the relationship between the President and the EPA Administrator appears to assume that the Administrator retains ultimate responsibility for the regulatory decision. Judge Wald notes that the Administrator "needs to know the arguments" of White House staff, not that she must ultimately adopt them.<sup>109</sup> She recognizes that the President may be successful in "prodding" the Administrator into adopting a different regulation,<sup>110</sup> but she does not imply that the President has the authority to dictate the result.

At the close of the Carter Administration in 1980, Congress enacted the Paperwork Reduction Act,<sup>111</sup> which provided OMB with its first statutory basis for regulatory review. The Paperwork Reduction Act requires agencies to obtain clearance for all requests to collect information from the public and it created OIRA in OMB, which is now responsible for conducting regulatory reviews.<sup>112</sup> However, the Paperwork Reduction Act does not provide any basis for inferring directive authority granted by Congress. The Act expressly provides that it shall not increase the authority of the President or OMB with respect to agency substantive policy.<sup>113</sup>

### C. Regulatory Review during the Reagan Administration

Less than a month after taking office, President Ronald Reagan launched his Administration's regulatory review program by issuing Executive Order 12,291.<sup>114</sup> The Reagan regulatory review program was a significant departure from its predecessors in several important respects. First, it centralized unprecedented power in OIRA. Unlike previous programs that only required review of selected regulations, the Reagan program required that *all* proposed and final regulations be submitted to OMB for

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even though Judge Wald's dictum probably comes closest of any judicial opinion to support their argument for presidential directive authority.

109. *Id.*

110.

Of course, it is always possible that undisclosed presidential prodding may direct an outcome that *is* factually based on the record, but different from the outcome that would have obtained in the absence of presidential involvement. In such a case, it would be true that the political process did affect the outcome in a way the courts could not police. But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of presidential power.

*Id.* at 408.

111. Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified as amended at 44 U.S.C. §§ 3501-3521 (2006)).

112. *See* 44 U.S.C. §§ 3503, 3507.

113. *Id.* § 3518(e) (2006) ("Nothing in this subchapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices . . .").

114. Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (issued on February 17, 1981).



prepublication review.<sup>115</sup> Even more significantly, the Reagan program purported to give OMB the authority to block publication of regulations for an indefinite period while review was pending. Unlike RARG reviews that were conducted during the course of public rulemaking proceedings, the Reagan executive order directed agencies to “refrain from publishing” any rule until OMB had completed its review.<sup>116</sup>

The Reagan regulatory review program also specified substantive criteria for agencies to use in setting regulatory standards. Executive Order 12,291 directed agencies not simply to analyze the costs of regulation but to base regulatory decisions on the results of cost-benefit analysis.<sup>117</sup> The executive order specified not only that least-cost regulatory alternatives be selected but also that agencies should not regulate unless cost-benefit analysis demonstrated that the benefits of regulation outweigh the costs.<sup>118</sup> The Reagan Administration later supplemented Executive Order 12,291 with Executive Order 12,498 on January 4, 1985.<sup>119</sup> This order required agencies to submit annually to OMB for review a list of all significant regulatory actions they planned to take during the next year.<sup>120</sup>

Despite the boldness of its shift to a centralized system of regulatory review for virtually all agency actions, Executive Orders 12,291 and 12,498 included some legal qualifications that are highly significant for the debate over directive authority. Both executive orders provided that OMB is authorized to take action only “to the extent permitted by law.”<sup>121</sup> Executive Order 12,291 also specified that nothing in the order “shall be construed as displacing the agencies’ responsibilities delegated by law.”<sup>122</sup> In its opinion supporting the legality of Executive Order 12,291, the U.S. Department of Justice emphasized that “the President’s exercise of supervisory powers must conform to legislation enacted by Congress.”<sup>123</sup> Therefore, “the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress.”<sup>124</sup> To prevent the President from usurping authority delegated to EPA, the executive

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115. Section 8(b) of Executive Order 12,291 did authorize the OMB to exempt certain types of regulations from review. Section 8(a) purported to exempt from the prepublication review requirement regulations that respond to emergency situations and regulations for which review would conflict with statutory or judicial deadlines. OMB generally ignored Section 8(a) until they were successfully sued in *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566, 567 (D.D.C. 1986), for illegally blocking promulgation of a regulation subject to an expired statutory deadline.

116. See Exec. Order No. 12,291, § 3(f)(1), 3 C.F.R. at 129–30.

117. See *id.* § 3(d), 3 C.F.R. at 129.

118. *Id.* § 2(b), 3 C.F.R. at 128.

119. Exec. Order No. 12,498, 3 C.F.R. 323 (1986).

120. See *id.* §§ 1–2, 3 C.F.R. at 323–24.

121. Exec. Order No. 12,498, § 4, 3 C.F.R. at 325; Exec. Order No. 12,291, §§ 2, 3(a), 6(a), 7(e), 3 C.F.R. at 127–28, 131–32.

122. Exec. Order No. 12,291, § 3(f)(3), 3 C.F.R. at 130.

123. Memorandum from U.S. Department of Justice, Office of Legal Counsel, Proposed Executive Order Entitled “Federal Regulation” (Feb. 13, 1981), reprinted in *Role of OMB in Regulation: Hearing Before Subcomm. on Oversight & Investigation of H. Comm. on Energy & Commerce*, 97th Cong. 486, 488 (1981).

124. *Id.*

orders are founded on the theory that OMB's role is an "advisory and consultative" one that does not include authority to reject an agency's ultimate judgment on matters delegated to it by law.<sup>125</sup> Thus, it is clear that President Reagan deliberately chose not to assert directive authority over agency decision making.<sup>126</sup>

Several studies of the Reagan regulatory review program have noted that, despite eschewing directive authority, OMB tried mightily to dictate the substance of agency decision making.<sup>127</sup> OMB's strategy was to use its power under Executive Order 12,291 to invoke the "extended review" provisions contained in section 3(f). If OMB notified an agency that it was extending its review beyond the normal ten- or sixty-day review period, Executive Order 12,291 directed the agency to "refrain from publishing" the rule until OMB's review was concluded.<sup>128</sup> This provision enabled OMB to block regulations it disfavored for an indefinite period of time. Although OMB officials initially denied that they used delay as a tool to influence the substance of rules, they announced in 1989 that they would pursue a "new direction" that would not use delay to block rules.<sup>129</sup>

OMB's conversion may have been a response to an important judicial decision confirming the illegality of using regulatory review to delay rules subject to statutory deadlines. In *Environmental Defense Fund v.*

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125. *Id.* at 492.

126. After conceding that "Reagan specifically disclaimed any intent to direct agency decisionmaking," Calabresi and Yoo cite my prior scholarship on regulatory review to support this statement: "Even opponents of the unitary executive theory recognized that the [Reagan] regulatory review program did in fact have a direct impact on regulatory outcomes and represented one of the most sweeping invocations of the unitary executive yet seen." CALABRESI & YOO, *supra* note 5, at 381.

127. See Olson, *supra* note 68 (discussing OMB's substantive impact on rulemaking, focusing on EPA regulations); Percival, *Checks Without Balance*, *supra* note 2, at 161-68. EPA Administrator Anne Gorsuch Burford, initially an enthusiastic promoter of the program, later testified that while Presidential oversight of rulemaking is appropriate, "there were some serious abuses" by OMB. *EPA: Investigation of Superfund and Agency Abuses (Part 3): Hearings Before Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 98th Cong. 234 (1983) (testimony of Anne Gorsuch Burford). Claims of abuses by OMB in conducting regulatory reviews were explored in detail in a series of oversight hearings by congressional committees. See, e.g., *OMB Review of EPA Regulations: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 99th Cong. (1986); *Oversight of the Office of Management and Budget Regulatory Review and Planning Process: Hearing Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Governmental Affairs*, 99th Cong. (1986); *EPA: Investigation of Superfund and Agency Abuses*, *supra*; *EPA's Asbestos Regulations: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 99th Cong. (1985); *Office of Management and Budget Control of OSHA Rulemaking: Hearings Before a Subcomm. of the H. Comm. on Government Operations*, 97th Cong. (1982); *Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 97th Cong. (1981).

128. Exec. Order No. 12,291 § 3(f)(1), 3 C.F.R. 127, 129-30 (1982).

129. OMB Director Richard Darman reportedly instructed OMB staff that, rather than delaying rules indefinitely, they were to meet with agency staff and "try to hash it out" in cases where "genuine disagreement exists." *OMB Official Promises End to Rule Delays, But RCRA Rule Still at Agency After Seven Months*, 20 Env't Rep. (BNA) 8 (1989) (quoting Robert Grady, Assoc. Director, OMB).

*Thomas*<sup>130</sup> a federal district court held that Reagan's OMB had acted illegally in blocking EPA from issuing a regulation that was subject to a statutory deadline that had expired. The court flatly declared: "OMB has no authority to use its regulatory review under EO 12291 to delay promulgation of EPA regulations . . . beyond the date of a statutory deadline."<sup>131</sup> The court reasoned that although a "certain degree of deference must be given to the authority of the President to control and supervise executive policymaking," action to block promulgation of regulations required by statute "is incompatible with the will of Congress and cannot be sustained as a valid exercise of the President's Article II powers."<sup>132</sup>

The court implicitly rejected the notion that OMB had directive authority over EPA, noting that "the use of EO 12291 to create delays and to impose substantive changes raises some constitutional concerns."<sup>133</sup> As the court explained:

Congress enacts environmental legislation after years of study and deliberation, and then delegates to the expert judgment of the EPA Administrator the authority to issue regulations carrying out the aims of the law. Under EO 12291, if used improperly, OMB could withhold approval until the acceptance of certain content in the promulgation of any new EPA regulation, thereby encroaching upon the independence and expertise of EPA. Further, unsuccessful executive lobbying on Capitol Hill can still be pursued administratively by delaying the enactment of regulations beyond the date of a statutory deadline.<sup>134</sup>

#### *D. Regulatory Review During the George H.W. Bush Administration*

After pledging during the 1988 presidential campaign to be "the environmental President," President George H.W. Bush won an important victory when he shepherded comprehensive amendments to the Clean Air Act through Congress, which were approved by overwhelming, bipartisan majorities in both houses in 1990.<sup>135</sup> But later in his term, with the economy weakening and another election approaching, President Bush did

130. 627 F. Supp. 566 (D.D.C. 1986).

131. *Id.* at 571. In the interests of full disclosure, the author was lead counsel for the Environmental Defense Fund in this litigation.

132. *Id.* at 570.

133. *Id.*

134. *Id.* Remarkably, Calabresi and Yoo cite this decision for the proposition that, although President "Reagan did not invoke any particular statutory authority for issuing these orders, . . . [c]ourts reviewing these orders apparently agreed" with the President's assertion of authority. CALABRESI & YOO, *supra* note 5, at 381. In a footnote they cite the court's statement that "[a] certain degree of deference must be given to the authority of the President to control and supervise executive policymaking," without mentioning that the Court ruled that OMB had acted illegally by seeking to prevent EPA from performing its statutory duty. *Id.* at 501 n.51.

135. An Act to Amend the Clean Air Act, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified as amended in scattered titles of U.S.C.); see Steven J. Shimberg, *Stratospheric Ozone and Climate Protection: Domestic Legislation and the International Process*, 21 ENVTL. L. 2175, 2180-81 (1991) (discussing the congressional votes).

an about face and blamed excessive regulation for the soft economy.<sup>136</sup> He imposed and extended a regulatory moratorium that delayed implementation of his signature environmental achievement—the 1990 Clean Air Act Amendments.<sup>137</sup>

Bush had agreed to continue the regulatory review program established during the Reagan Administration.<sup>138</sup> When the Paperwork Reduction Act came up for reauthorization in 1989, congressional critics of OMB sought to enact requirements to ensure greater public disclosure of OMB's regulatory review activities.<sup>139</sup> While OMB agreed to implement the disclosure procedures voluntarily, the Bush Administration ultimately refused to approve the deal.<sup>140</sup> In retaliation, Congress refused to confirm a new administrator for OIRA.<sup>141</sup> While OIRA continued to conduct regulatory reviews, its activities were overshadowed by a new interagency task force known as the Council on Competitiveness, created in 1989 and chaired by Vice President Dan Quayle.<sup>142</sup> The Council was designed to serve as the successor to the Reagan Administration's Task Force on Regulatory Relief, which Bush had chaired at the beginning of the Reagan Administration before it had been disbanded in 1983.<sup>143</sup> Bush authorized the Council to intervene in disputes between OMB and agencies that arose in the course of regulatory reviews.<sup>144</sup>

The membership of the Council on Competitiveness was heavily tilted toward agencies unlikely to be sympathetic to regulation, including the director of OMB, the Secretary of Commerce, the Secretary of Treasury, the chairman of the President's Council of Economic Advisers, the White House Chief of Staff, and the Attorney General.<sup>145</sup> The Council described its mission entirely as reducing regulatory burdens, rather than improving the net benefits of regulation.<sup>146</sup>

In its first major regulatory intervention, the Council disapproved an EPA NSPS for municipal incinerators that banned incineration of lead acid

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136. See Lincoln L. Davies, *Lessons for an Endangered Moment: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism Has To Teach Environmentalists Today*, 31 ENVTL. L. 229, 337 (2001).

137. See *id.*

138. See Percival, *Presidential Management*, *supra* note 2, at 993.

139. See Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 167–68 (1995).

140. See *id.* at 168.

141. See *id.*

142. See Percival, *Checks Without Balance*, *supra* note 2, at 155.

143. When he announced the creation of the Council on Competitiveness on February 9, 1989, President George H.W. Bush confirmed that “[i]n reviewing regulatory matters, the Council will be continuing the work of the former President’s Task Force on Regulatory Relief . . . .” EXECUTIVE OFFICE OF THE PRESIDENT, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT, APRIL 1, 1990–MARCH 31, 1991, at 5 (1990).

144. See *id.*

145. See Percival, *Checks Without Balance*, *supra* note 2, at 155.

146. See EXECUTIVE OFFICE OF THE PRESIDENT, *supra* note 143, at 5 (“The Council will work closely with OIRA to augment the regulatory review process, ensure that the benefits of regulation outweigh their costs, and coordinate development of legislative and administrative initiatives to reduce unnecessary regulatory burdens.”).

batteries and required recycling of twenty-five percent of waste streams.<sup>147</sup> Ironically, the recycling requirement had been touted by the Bush Administration a year before “as a remedy to the nation’s burgeoning solid waste problem.”<sup>148</sup> The Council issued a triumphant press release declaring that it had slayed a regulatory dragon, forgetting the fiction that agencies were supposed to retain the ultimate decisionmaking authority.<sup>149</sup> Although EPA complied with the Council’s “decision,” when the NSPS was challenged in court, the deletion of the ban on lead acid batteries was struck down as not adequately justified.<sup>150</sup>

There was no consistent pattern concerning the stage of the regulatory process at which Competitiveness Council review occurred. While the Council reviewed incinerator NSPS on the eve of final promulgation, it also attempted to dictate changes to a wetlands delineation manual during extensive pre-proposal review.<sup>151</sup> In a March 22, 1991 Memorandum to the Heads of Executive Departments and Agencies, Vice President Quayle asserted that the Council had jurisdiction over an extraordinarily broad range of agency activities including even agency issuances of press releases.<sup>152</sup> Most agencies apparently ignored this directive.<sup>153</sup>

In 1992 the George H.W. Bush Administration also was involved in a controversy over efforts to exempt the Bureau of Land Management from compliance with the Endangered Species Act (ESA) for sales of timber from public lands. Using a special procedure provided in the Act,<sup>154</sup> the Administration convened an Endangered Species Committee, popularly known as the “God squad,” that held a hearing to determine whether an exemption should be granted. Pursuant to the statute, the Committee consisted of six administration officials and one representative of the affected states.<sup>155</sup> On May 15, 1992, the Committee voted 5–2 to approve

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147. See Percival, *Checks Without Balance*, *supra* note 2, at 155.

148. Michael Weisskopf, *EPA Proposal on Recycling Is Trashed*, WASH. POST, Dec. 20, 1990, at A17.

149. See President’s Council on Competitiveness Fact Sheet (Dec. 19, 1990), reprinted in *Clean Air Act Implementation (Part 1): Hearings Before the Subcomm. on Health & the Environment of the H. Comm. on Energy & Commerce*, 102d Cong. 164–65 (1991).

150. *New York v. Reilly*, 969 F.2d 1147 (D.C. Cir. 1992).

151. See E. Donald Elliot, *Portage Strategies for Adapting Environmental Law and Policy During a Logjam Era*, 17 N.Y.U. ENVTL. L.J. 24, 42 n.43 (2008).

152. See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1442 n.271 (1992).

153. See *id.* (“If the executive agencies had taken this directive seriously, OMB would have soon become inundated with submissions of such informal policymaking devices.”).

154. Section 7(a)(2) of the Endangered Species Act (ESA) requires federal agencies to ensure that their actions are “not likely to jeopardize the continued existence of any endangered species.” 16 U.S.C. § 1536(a)(2) (2006). However, section 7(h) of the ESA allows a specially-convened interagency committee known as the “God squad” to grant an exemption if it determines, following a formal adjudicatory hearing, that “there are no reasonable and prudent alternatives to the agency action” and that the action meets three other requirements. *Id.* § 1536(h)(1)(A)(i).

155. The seven-member Committee was comprised of: the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Council of Economic Advisors, the Administrator of the Environmental Protection Agency, the Secretary of the Interior, the Administrator of the National Oceanic and Atmospheric Administration, and “one individual

the exemption.<sup>156</sup> When this decision was challenged in court, it was revealed that White House officials had put substantial pressure on the Committee members to vote for the exemption, including summoning three members to the White House.<sup>157</sup>

The U.S. Court of Appeals for the Ninth Circuit ruled that it was illegal for the White House to have ex parte contacts with the members of the “God squad” while they were considering the exemption because the hearing they were conducting was a formal adjudication.<sup>158</sup> The APA prohibits ex parte contacts by any “interested person outside the agency” with those involved in the decisional processes of formal adjudications.<sup>159</sup> Noting that “the Committee is, in effect, an administrative court,” the Ninth Circuit stated that “[e]x parte contacts are antithetical to the very concept of an administrative court reaching impartial decisions through formal adjudication.”<sup>160</sup> The court rejected the Administration’s arguments that neither the President nor any of the members of his staff could be considered an “interested person outside the agency.”<sup>161</sup> The court observed that:

As the head of government and chief executive officer, the President necessarily has an interest in every agency proceeding. No ex parte communication is more likely to influence an agency than one from the President or a member of his staff. No communication from any other person is more likely to deprive the parties and the public of their right to effective participation in a key governmental decision at a most crucial time.<sup>162</sup>

Responding to the Administration’s argument that the President, as the head of the executive branch, cannot be deemed to be “outside the agency,” the court noted:

The Supreme Court soundly rejected the basic logic of this argument in *United States ex rel. Accardi v. Shaughnessy*. The Court held that where legally binding regulations delegated a particular discretionary decision to the Board of Immigration Appeals, the Attorney General could not dictate a decision of the Board, even though the Board was appointed by the Attorney General, its members served at his pleasure, and its decision was subject to his ultimate review. Here, the Endangered Species Act explicitly vests discretion to make exemption decisions in the Committee and does not contemplate that the President or the White House will

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from each affected State” appointed by the President, 16 U.S.C. § 1536(e)(3), with the state representatives having one collective vote. Committee Meetings, 50 C.F.R. § 453.05(d) (1991).

156. See Scott A. Powell, Comment, *Global Protection of Threatened and Endangered Species: Rethinking Section 7 of the Endangered Species Act*, 31 WILLAMETTE L. REV. 523, 529 n.29 (1995).

157. *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1538 (9th Cir. 1993).

158. See *id.* at 1543.

159. 5 U.S.C. § 557(d)(1)(A) (2006).

160. *Portland Audubon*, 984 F.2d at 1543.

161. See *id.* at 1546.

162. *Id.* at 1545 (emphasis omitted).

become involved in Committee deliberations. The President and his aides are not a part of the Committee decision-making process. They are “outside the agency” for the purposes of the ex parte communications ban.<sup>163</sup>

The court noted that the ESA does contain one mixed agency-President delegation giving the President ultimate decisionmaking authority on exemption applications relating to restoration of a public facility in a disaster area,<sup>164</sup> but it noted that the Act did not provide for the President’s involvement in the God squad’s deliberative process.<sup>165</sup>

Finally, the court rejected the Administration’s claim that it would be a violation of constitutional principles of separation of powers for the APA to bar the President from pressuring committee members. The court observed:

While the government’s argument to the contrary arises in the context of Committee decisions regarding Endangered Species Act exemption applications, carried to its logical conclusion the government’s position would effectively destroy the integrity of all federal agency adjudications. It is a fundamental precept of administrative law that . . . when an agency performs a quasi-judicial (or a quasi-legislative) function its independence must be protected. There is no presidential prerogative to influence quasi-judicial administrative agency proceedings through behind-the-scenes lobbying. *Myers* itself clearly recognizes that “there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control.” And in *Humphrey’s Executor v. United States* the Court observed that “[t]he authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted.” The government’s position in this case is antithetical to and destructive of these elementary legal precepts, and we unequivocally reject it.<sup>166</sup>

One of the most celebrated regulatory disputes during the George H.W. Bush Administration involved a conflict between the FDA and the U.S. Department of Agriculture (USDA) that reached a dénouement shortly before President Bill Clinton assumed office. FDA was charged with issuing regulations to implement the Nutrition Labeling and Education Act of 1990.<sup>167</sup> When the USDA objected that FDA’s preferred regulations were likely to reduce meat consumption by making it easier for consumers to learn the fat content of food products, OMB sided with USDA.<sup>168</sup> FDA refused to back down, believing that the statute’s purpose was to make it

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163. *Id.* (internal citations omitted).

164. On mixed agency-President delegations see the text accompanying note 56.

165. *Portland Audubon*, 984 F.2d at 1545 n.24.

166. *Id.* at 1546–47 (internal citations omitted).

167. Pub. L. No. 101-535, 104 Stat. 2353 (codified as amended in scattered sections of 21 U.S.C.).

168. See DAVID KESSLER, *A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY* 57–58 (2001).

easier for consumers to understand nutrition data, rather than to protect the economic interest of the politically powerful livestock industry.<sup>169</sup>

As then-FDA Commissioner David Kessler notes, OMB repeatedly refused to approve FDA's draft final rule, which it kept returning to the FDA with amendments that "had been taken almost verbatim from industry comments we already had carefully considered."<sup>170</sup> Kessler felt so strongly about the issue that he had decided to resign in protest if ordered to adopt the regulations in the form favored by OMB and USDA.<sup>171</sup> Both agencies refused to budge, and USDA enlisted the Council on Competitiveness to side with its position, which was elevated to the White House for decision.<sup>172</sup> Kessler writes that "[m]y fate as commissioner and the fate of nutrition labeling had become inextricably linked. If the decision went against us, I could not disobey an order from the President. For me as a political appointee, the only response to defeat was to leave."<sup>173</sup>

At a White House meeting to resolve the controversy, President Bush expressed surprise at the notion that "I'm being told that I can't just make a decision and have it promptly executed, that the Department can't just salute smartly and go execute whatever decision I make. Why is that?"<sup>174</sup> The reason was that there was no support in the rulemaking record for the USDA's preferred option, and it would have taken a long time to try to manufacture a record that would support it.<sup>175</sup> Louis Sullivan, the Secretary of the Department of Health and Human Services, ultimately persuaded the President by showing him a McDonald's tray liner with nutrition information that was more in line with what FDA wanted.<sup>176</sup> President Bush ultimately ruled in favor of FDA with one minor modification concerning restaurants, which the agency implemented.<sup>177</sup>

In their book on the unitary executive, Calabresi and Yoo argue that in my previous scholarship I erroneously characterized Bush's "I can't just make a decision and have it promptly executed" quotation "as a reflection of limitations on the President's sole authority to execute the law."<sup>178</sup> They argue that:

Bush's inability to impose OMB's proposal did not reflect any substantive restrictions on the President's authority to execute the law. Changes of the magnitude proposed by OMB would have to be subjected to the notice and comment requirements of the Administrative Procedure Act, which would delay the decision by at least six to eight weeks and leave the final decision to the Clinton administration.<sup>179</sup>

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169. *See id.* at 58–59.

170. *Id.* at 58.

171. *Id.* at 59.

172. *See* Marian Burros, *Eating Well*, N.Y. TIMES, Oct. 14, 1992, at C4.

173. KESSLER, *supra* note 168, at 67.

174. *Id.* at 68.

175. *See id.* at 68–69.

176. *See id.* at 69.

177. *See id.* at 70–71.

178. CALABRESI & YOO, *supra* note 5, at 388.

179. *Id.* at 388–89.



Calabresi and Yoo are correct in their reading of Kessler's memoirs, but their apparent agreement that the APA can trump the directive authority that they champion for the President is telling. The APA requires that regulatory decisions not be arbitrary or capricious or contrary to law, and the underlying regulatory statute here required that the decision be made by the FDA Commissioner and not the President. Moreover, both the agency and the President are constrained to make a decision that has sufficient support in the rulemaking record, which, as Kessler notes, meant only his preferred outcome and not that favored by OMB and USDA because the economic interests of the beef industry was not a statutorily relevant factor. Thus, in the short run, it made little difference who the President sided with in this case because only one of the two proposed outcomes would likely be upheld in court. The fact that Kessler was willing to resign rather than accede to a regulatory outcome that would be inconsistent with the law does not support the notion that the President has directive authority. Rather it powerfully suggests that Kessler had the integrity not to want to continue to work for an administration if it tried to force him to violate the law.

#### *E. Regulatory Review During the Clinton Administration*

President Clinton established the regulatory review program that remains in effect today when he issued Executive Order 12,866 on September 30, 1993.<sup>180</sup> The most significant feature of the Clinton program is that it made regulatory review far more selective than it had been under Presidents Reagan and Bush. Under Executive Order 12,866 only "significant regulatory actions" (those estimated to cost more than \$100 million per year) are subject to review by OMB.<sup>181</sup> Clinton's program also sought to prevent OMB from indefinitely delaying agency action by establishing a firm ninety-day deadline for completion of OMB review.<sup>182</sup> It also specified that the Vice President should resolve disputes between agencies and OMB.<sup>183</sup>

Because of its greater selectivity and transparency, Clinton's regulatory review program was far less controversial than those employed by the two preceding administrations.<sup>184</sup> But President Clinton did not shy away from involvement in regulatory decisions. He greatly expanded the issuance of formal presidential directives to executive agencies. In his two full terms in office, President Reagan issued only nine directives to agencies, and President George H.W. Bush issued only four during his term—three of these instructed agencies to delay or halt the issuance of regulations.<sup>185</sup> In his eight years in office President Clinton issued 107 presidential directives, including many directing agencies to take action to address particular

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180. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

181. *Id.* § 6(a)(3)(A), 3 C.F.R. at 645.

182. *See id.* § 6(b)(2)(B), 3 C.F.R. at 647.

183. *Id.* § 7, 3 C.F.R. at 648.

184. *See* Percival, *Presidential Management*, *supra* note 2, at 995.

185. Kagan, *supra* note 7, at 2294.

problems.<sup>186</sup> Only fifteen of these directives were issued in Clinton's first three years in office, but he then averaged more than eighteen directives in each of his last five years.<sup>187</sup> Rather than focusing exclusively on reducing costs to industry, President Clinton frequently directed agencies to take actions to strengthen protection of public health, safety, and the environment. Justice Kagan, who was then a professor, described Clinton's actions as a new model of "presidential administration" that she predicted would be embraced by future Presidents.<sup>188</sup>

Although regulatory review is far more selective under Executive Order 12,866 than under its predecessors, Kagan notes that Clinton's executive order, "unlike the Reagan orders, suggested that the President had authority to direct executive department (though not independent agency) heads in the exercise of their delegated rulemaking power."<sup>189</sup> This authority is contained in section 7 of the executive order, which provides that:

[t]o the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested governmental officials).<sup>190</sup>

The order provides that, after considering recommendations developed within sixty days by the Vice President, this "conflict resolution" process is to culminate in notification to the agency and OMB "of the President's decision with respect to the matter."<sup>191</sup> This tracks the process used by the George H.W. Bush Administration to resolve the dispute between FDA and USDA over the nutrition labeling regulations. Executive Order 12,866 adds new requirements for disclosure of any outside lobbying during this conflict resolution process. Communications during the review period with any person not employed by the federal government must be in writing and included in the public rulemaking docket.<sup>192</sup>

However, like the regulatory review executive orders issued by previous administrations, Executive Order 12,866 expressly disclaims directive authority when Congress has made agency heads responsible for regulatory decisions. In fact, this disclaimer occupies an even more prominent part of Executive Order 12,866 where it appears as an entire section—section 9—instead of being buried in one of nine subsections of section 3, as it was in Executive Order 12,291. Section 9 of Executive Order 12,866 provides: "Nothing in this order shall be construed as displacing the agencies'

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186. *Id.* at 2294–95.

187. *Id.*

188. *Id.* at 2317.

189. *Id.* at 2288. Executive Order 12,866 purported to subject independent agencies to OMB's regulatory planning process for the first time, though like its predecessors it did not require independent agencies to submit individual rules to OMB for review. Exec. Order No. 12,866, § 4(c), 3 C.F.R. 638, 642 (1994).

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

191. *Id.*

192. *Id.*

authority or responsibilities, as authorized by law.”<sup>193</sup> Thus, all of the executive orders establishing presidential regulatory review programs expressly disclaim directive authority.

Kagan does not argue that the Constitution grants directive authority to the President. She notes that “unlike the unitarians, I acknowledge that Congress generally may grant discretion to agency officials alone and that when Congress has done so, the President must respect the limits of this delegation.”<sup>194</sup> But she argues that regulatory statutes should be interpreted as intending to confer such authority on the President: “[W]hen Congress designates an agency official as a decisionmaker, the President himself may step into that official’s shoes.”<sup>195</sup> However, a fundamental problem with her argument is that the presumption was precisely the opposite when those statutes were enacted, which is reflected in the fact that the Reagan, Bush, and Clinton executive orders expressly eschewed assertions of such authority.<sup>196</sup>

#### *F. Regulatory Review During the George W. Bush Administration*

President George W. Bush surprised some observers early in his second term in office when he signed Executive Order 13,258, which continued the regulatory review program adopted by President Clinton’s Executive Order 12,866 with only one change. The surprise stemmed from the fact that the Clinton Administration’s review program was far more selective than its predecessors, even though President George W. Bush was far more skeptical of regulation than the Clinton Administration had been. The one change was that Bush transferred the Vice President’s authority to resolve disputes between OMB and the agencies to the White House Chief of Staff or the Director of OMB.<sup>197</sup> In his book *Angler: The Cheney Vice Presidency*, Barton Gellman reports another surprise—the reason for this change. He notes that “Cheney arrived in office to find a gold mine of authority over environmental and other rules,” including the fact that Executive Order 12,866 gave the Vice President a role in resolving inter-agency disputes, adopted by Clinton to enhance Gore’s role in regulatory policy.<sup>198</sup> Gellman reports that the deletion of the Vice President’s role in the executive order was made at Cheney’s request because Cheney wanted “the power, but not the public profile.”<sup>199</sup> Cheney wanted to direct regulatory policy behind the scenes. “Rather than directing the process openly, Cheney interceded through allies at the Office of Management and Budget” and “through eager-to-please staffs at Interior, Commerce, Energy, and their subagencies” where he had carefully placed his loyalists.<sup>200</sup>

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193. *Id.* § 9, 3 CFR at 649.

194. Kagan, *supra* note 7, at 2320.

195. *Id.* at 2322.

196. See text accompanying note 121–26, 174–75 *supra*.

197. Exec. Order No. 13,258, 3 C.F.R. 204 (2003).

198. BARTON GELLMAN, *ANGLER: THE CHENEY VICE PRESIDENCY* 198 (2008).

199. *Id.* at 199.

200. *Id.*

Although Cheney had installed his former employee Christine Todd Whitman as EPA Administrator, Gellman reports that he ultimately precipitated her resignation as a result of two stunning policy shifts that undermined her authority. First, in March 2001 Cheney persuaded President Bush to reverse his campaign pledge to control emissions of carbon dioxide to combat climate change. Gellman reports that Cheney engineered this stunning policy reversal by carefully excluding EPA and the State Department from having any input into the decision and ensuring that Bush would sign the confirming document minutes before Whitman and the Secretary of State arrived at the White House to protest.<sup>201</sup>

Gellman reports that the issue that ultimately prompted Whitman's resignation was Cheney's efforts to force EPA to gut the rules governing new source review of powerplants. The existing rules had been the subject of a successful ongoing enforcement campaign started during the final years of the Clinton Administration that had upset the utility industry.<sup>202</sup> Gellman quotes Whitman as saying, "I just couldn't sign" the rule.<sup>203</sup> "The President has a right to have an administrator who could defend it, and I just couldn't."<sup>204</sup> The rule subsequently was struck down by the D.C. Circuit.<sup>205</sup>

Gellman also reports that Cheney personally spearheaded a successful effort to stop the Interior Department from protecting three species of fish by reducing the amount of Klamath River water supplied to private farmers.<sup>206</sup> "In late September 2002, the first of an estimated seventy-seven thousand dead salmon began washing up on the banks of the Klamath River," a "kill [that] would not have happened without the diversion of water to farms."<sup>207</sup>

President Bush's nomination of Harvard professor John Graham to be administrator of OIRA was vigorously opposed by environmental and consumer groups who argued that he was too sympathetic to corporate interests.<sup>208</sup> On July 19, 2001, the Senate confirmed Graham's appointment by a vote of 61–37.<sup>209</sup> In an effort to demonstrate that he planned to be even-handed in conducting regulatory review, Graham announced that OIRA would issue "prompt" letters to agencies to direct their attention to issues that deserve greater regulatory attention.<sup>210</sup> In

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201. *Id.* at 82–85, 88–90.

202. *Id.* at 205.

203. *Id.* at 208.

204. *Id.*

205. *New York v. Envtl. Prot. Agency*, 443 F.3d 880, 883 (D.C. Cir. 2006).

206. GELLMAN, *supra* note 198, at 195–213.

207. *Id.* at 213.

208. *See, e.g.*, Dick Durbin, Op-Ed., *Graham Flunks the Cost-Benefit Test*, WASH. POST, July 16, 2001, at A15.

209. 147 CONG. REC. 13,943–44 (2001).

210. *See* John D. Graham, Memorandum for the President's Management Council, Presidential Review of Agency Rulemaking by OIRA, Sept. 20, 2001, at 5, available at [http://www.whitehouse.gov/omb/inforeg\\_OIRA\\_review\\_process](http://www.whitehouse.gov/omb/inforeg_OIRA_review_process) (describing the meaning of "prompt" letters); *see also* John D. Graham, Paul R. Noe & Elizabeth L. Branch, *Managing*

September 2001, OIRA sent prompt letters to the Occupational Safety and Health Administration (OSHA) and to the Department of Health and Human Services (HHS). The letter to OSHA encouraged the agency to require companies to use automated external defibrillators to prevent deaths from heart attacks.<sup>211</sup> The letter to HHS encouraged it to require food labeling that would disclose trans-fatty acid content.<sup>212</sup>

During the latter part of his second term in office, President George W. Bush extended the scope of OMB review. On January 18, 2007, Bush issued Executive Order 13,422, which amended Executive Order 12,866.<sup>213</sup> The new executive order required that each agency's "regulatory policy officer" (RPO), required by Executive Order 12,866, be a presidential appointee, and it mandated that OMB review agencies' "significant guidance documents" for the first time.<sup>214</sup> The RPOs no longer were to report to the head of the agency, but their approval was required before any agency rulemaking could be commenced.<sup>215</sup> The executive order also required agencies to identify in writing the specific market failure or problem that warrants a new regulation and to provide their "best estimates" of the cumulative regulatory costs and benefits of rules to be issued in the next year.<sup>216</sup>

The George W. Bush Administration was marked by several important controversies over White House influence over rulemaking. Six of these controversies are outlined below.

#### 1. The Congressional Review Act and the OSHA Ergonomics Standard

On the day the Bush Administration took office, White House Chief of Staff Andrew Card, Jr. issued a memorandum to the heads of all executive department agencies directing them not to send any proposed or final regulations to the Federal Register without the approval of a Bush appointee and to withdraw all regulations that had been sent to the Federal Register which had not yet been published except for rules dealing with emergency situations.<sup>217</sup>

After an initial effort to block the outgoing Clinton Administration's tighter regulation of arsenic in drinking water created a public furor, the

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*the Regulatory State: The Experience of the Bush Administration*, 33 *FORDHAM URB. L.J.* 953, 972 (2006).

211. Letter from John D. Graham, Adm'r, OIRA, to John Henshaw, Assistant Sec'y of Labor (Sept. 18, 2001), [http://www.reginfo.gov/public/prompt/osha\\_prompt\\_letter.html](http://www.reginfo.gov/public/prompt/osha_prompt_letter.html).

212. Letter from John D. Graham, Adm'r, OIRA, to Tommy G. Thompson, HHS Sec'y (Sept. 18, 2001), [http://www.reginfo.gov/public/prompt/hhs\\_prompt\\_letter.html](http://www.reginfo.gov/public/prompt/hhs_prompt_letter.html); see Ellen Nakashima, *OMB Asks Agencies for Action*, *WASH. POST*, Sept. 21, 2001, at A30.

213. Exec. Order No. 13,422, 3 C.F.R. 191 (2008).

214. *Id.* §§ 5(b), 7, 3 C.F.R. at 193.

215. *Id.* § 4(b), 3 C.F.R. at 192.

216. CURTIS COPELAND, *CONG. RESEARCH SERV.*, RL 33862, *CHANGES TO THE OMB REGULATORY REVIEW PROCESS BY EXECUTIVE ORDER 13422* (2007).

217. Memorandum from Andrew H. Card, Jr. for the Heads and Acting Heads of Executive Departments and Agencies (Jan. 20, 2001), 66 *Fed. Reg.* 7702 (Jan. 24, 2001).

Bush Administration ultimately decided to let the rule take effect.<sup>218</sup> However, President Bush did succeed in killing one significant regulation promulgated by the outgoing administration. In March 2001 President Bush enthusiastically signed a joint resolution approved by Congress under the fast-track provisions of the Congressional Review Act (CRA)<sup>219</sup> to veto OSHA's ergonomics standard, which had been under development by the agency for nearly a decade.<sup>220</sup> The CRA requires agencies to send all regulations to Congress for review sixty days before they take effect, and it creates a special fast track procedure to enable Congress to enact joint resolutions disapproving regulations.<sup>221</sup> If Congress enacts a joint resolution of disapproval, the regulation shall not take effect or continue in effect, and the agency that issued it is prohibited from issuing any new rule that is "substantially the same as" the disapproved rule unless specifically authorized by subsequent legislation.<sup>222</sup>

Using the fast track procedures of the CRA, the joint resolution disapproving OSHA's regulation was adopted without any hearings or committee action, with no opportunity for amendments, and with floor debate limited to ten hours.<sup>223</sup> President Bush endorsed the disapproval effort and signed the joint resolution repealing the rule.<sup>224</sup> Many of those who voted to repeal the rule stated that they were not opposed to having an ergonomics standard, but that they objected to the particular standard that had been adopted by OSHA.<sup>225</sup> Labor Secretary Elaine Chao announced that the department would consider a new rule to protect workers from repetitive-motion injuries.<sup>226</sup> The regulation's supporters, however, believed that its opponents would use the CRA to preclude OSHA from

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218. See GELLMAN, *supra* note 198, at 207.

219. 5 U.S.C. §§ 801–808 (2006).

220. On March 1, 2001, Congressional Republicans introduced a resolution of disapproval, which was approved by the Senate on March 6, 2001 by a vote of 56–44. Pub. L. No. 107-5, 115 Stat. 7 (2001); 147 CONG. REC. 2682, 2873–74 (2001). On March 7, the U.S. House of Representatives adopted the joint resolution by a vote of 223–206. *Id.* at 3037–38. OSHA had expected that its ergonomics rule would prevent 4.6 million worker injuries per year from carpal tunnel syndrome, back strains, and other ailments over ten years. See 65 Fed. Reg. 68,772 (Nov. 14, 2000). OSHA acknowledged that the rule would be expensive for businesses, estimating that it ultimately could cost \$4.5 billion to implement, but it projected that it would save \$9 billion per year by reducing worker injuries. See *id.* at 68,773.

221. See 5 U.S.C. § 802(a).

222. 5 U.S.C. § 801(b)(2). In *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), the Supreme Court held that a legislative veto of regulations is unconstitutional because it bypassed the President's role in approving or disapproving of legislation. *Id.* at 956–59. The Congressional Review Act avoids this constitutional problem by providing that joint resolutions of disapproval must either be signed by the President or enacted over his veto.

223. See 147 CONG. REC. 2815 (statement of Sen. Trent Lott).

224. Statement on Signing Legislation To Repeal Federal Ergonomics Regulations, 1 PUB. PAPERS 269 (Mar. 20, 2001).

225. See, e.g., 147 CONG. REC. 2828 (statement of Sen. Fred Thompson); *id.* at 2836 (statement of Sen. Christopher Bond).

226. See *id.* at 2816 (statement of Sen. James Jeffords).

issuing a new ergonomics rule without new legislation specifically authorizing it to do so.<sup>227</sup>

President Bush's support for using the CRA to veto OSHA's ergonomics standard actually reinforced the notion that the President does not have directive authority over regulatory decisions by agencies. Otherwise, Bush simply could have directed OSHA to repeal the standard. If the President has the authority to dictate agency decisions, then it is hard to envision why President Clinton would have signed the CRA into law. If the President exerts complete control over agency rulemaking decisions, he would not need a special vehicle to expedite repeal of them. Indeed, the circumstances surrounding the repeal of OSHA's ergonomics regulation—a new administration supporting repeal of a rule issued by the outgoing administration—probably reflects the already high degree of presidential control over rulemaking. Because the President already has so much influence over what agencies do, OSHA's ergonomics regulation is the only regulation that has ever been repealed using the CRA in the quarter century of its existence.

## 2. The California Greenhouse Gas Waiver Controversy

On December 19, 2007, EPA Administrator Stephen Johnson unexpectedly denied California's request for a waiver that would permit the state to implement its program to regulate GHG emissions from motor vehicles.<sup>228</sup> California requested the waiver pursuant to the Clean Air Act (CAA) section 209, which provides that the EPA Administrator shall waive section 209's preemption of state law if the Administrator determines that the state standards will be, in the aggregate, at least as protective of public health as applicable federal standards.<sup>229</sup> Section 209 stipulates that no waiver shall be granted if: (A) the relevant state regulation is arbitrary and capricious or (B) the state does not need the standards to meet "compelling and extraordinary conditions."<sup>230</sup>

Johnson's decision to deny the waiver was a clear break from prior agency practice, and it defied the EPA career staff's unanimous recommendation to grant at least a partial waiver.<sup>231</sup> A subsequent investigation by the House Committee on Oversight and Government Reform revealed that Johnson had supported granting at least a partial

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227. See 5 U.S.C. § 801(b)(2); 147 CONG. REC. 2836 (statement of Sen. Dianne Feinstein) ("If what I think will happen happens when . . . the ergonomics standard is overturned, OSHA is barred from introducing any standard that is substantially similar to the rule unless specifically authorized by a subsequent act of Congress. This effectively kills a 10-year effort.").

228. Letter from Stephen L. Johnson, Adm'r, EPA, to Arnold Schwarzenegger, Governor of California (Dec. 19, 2007), <http://www.epa.gov/otaq/climate/20071219-slj.pdf>.

229. 42 U.S.C. § 7543(b) (2006).

230. *Id.* § 7543(b)(1)(A)–(B).

231. See Juliet Eilperin, *EPA Chief Denies Calif. Limit on Auto Emissions*, WASH. POST, Dec. 20, 2007, at A1.

waiver until shortly before his decision to deny it.<sup>232</sup> Johnson abruptly changed course after meeting with White House officials, despite the EPA career staff's insistence that the most legally defensible course of action would be to grant the waiver.<sup>233</sup> The waiver is particularly important because at least thirteen states had adopted California's standards<sup>234</sup> and several others had pledged to do so.<sup>235</sup> Collectively these states represent nearly half of the U.S. market for new vehicles.<sup>236</sup>

Administrator Johnson stated that he denied the waiver because California lacked the requisite "compelling and extraordinary conditions" to warrant a waiver<sup>237</sup> because climate change is a "global problem" that is not exclusive to California and thus requires a national solution.<sup>238</sup> That "national solution" to which Johnson referred ostensibly was the Energy Independence and Security Act of 2007,<sup>239</sup> which was signed into law hours before Johnson denied the waiver. Johnson claimed that by denying the waiver, the Bush Administration was "moving forward with a clear national solution, not a confusing patchwork of state rules."<sup>240</sup>

In May of 2008, the House Committee on Oversight and Government Reform concluded its investigation that revealed that between June and December 2007 the EPA staff held several briefings regarding the waiver request and in each meeting advised Johnson that the clearest option was to grant the waiver.<sup>241</sup> A final briefing took place in October 2007 and included a presentation that contained the professional opinions of EPA's technical and legal staff.<sup>242</sup> The EPA staff concluded that the circumstances surrounding the waiver were "compelling and extraordinary," and EPA would almost certainly win if it faced a lawsuit for

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232. See *EPA's New Ozone Standards: Hearing Before the H. Comm. on Oversight & Government Reform*, 110th Cong. 2 (2008) [hereinafter *EPA's New Ozone Standards*] (statement of Rep. Henry Waxman); *id.* at 136 (testimony of EPA Administrator Stephen Johnson).

233. Eilperin, *supra* note 231.

234. Memorandum from the H. Comm. on Oversight and Government Reform on the EPA's Denial of the California Waiver (May 19, 2008), <http://www.cleancarscampaign.org/web-content/cleanairact/docs/Waxman-result-5-19-08.pdf> [hereinafter Memorandum]. The states that adopted California's standards were Arizona, Connecticut, Maine, Maryland, Massachusetts, New Mexico, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. *Id.*

235. Eilperin, *supra* note 231.

236. *Id.*

237. Memorandum, *supra* note 234.

238. Matthew L. Wald, *E.P.A. Chief Defends His Decision on California*, N.Y. TIMES, Jan. 25, 2008, at A19.

239. Pub. L. No. 110-140, 121 Stat. 1492 (codified as amended in scattered sections of 42 U.S.C.).

240. Eilperin, *supra* note 231. Notably, in the Clean Air Act's thirty-seven year history, EPA had never before denied a waiver to California under section 209. *Id.* Since 1970, the EPA granted more than fifty waivers involving tailpipe emissions that affected some states more than others. John M. Broder & Micheline Maynard, *Denial of California Bid on Emissions Should Have Been Foreseen*, N.Y. TIMES, Dec. 21, 2007, at A37.

241. See Comm. on Oversight & Gov't Reform, Majority Staff, Memorandum, EPA's Denial of the California Waiver (May 19, 2008), at 6-16, in *EPA's New Ozone Standards*, *supra* note 232, at 11, 16-28 [hereinafter Memorandum].

242. *Id.* at 23-26.



granting the waiver and that it could likely lose if it did not.<sup>243</sup> The Committee's investigation found substantial evidence to suggest that Administrator Johnson supported the waiver, but changed his mind after communicating with the White House, despite his staff's unanimous conclusion that a denial of the waiver was likely to be overturned in court.<sup>244</sup> Johnson refused to reveal his discussions with the White House, but he maintained that denial of the waiver was his own decision.<sup>245</sup>

### 3. EPA's Greenhouse Gas Endangerment Finding

As indicated by the California waiver controversy, EPA Administrator Steven Johnson was widely considered to be a weak administrator who was easily manipulated by OMB and the White House.<sup>246</sup> This also is reflected in controversies over whether or not EPA would make an endangerment finding for emissions of GHGs and a dispute over EPA's revisions to national ambient air quality standards (NAAQS) for ozone.

In April 2007 the Supreme Court ruled that EPA was required to determine whether GHG emissions endangered public health or welfare pursuant to the CAA.<sup>247</sup> After reviewing the scientific data and holding multiple inter- and intra-agency meetings, EPA decided to proceed with its endangerment report, which it emailed to OMB on December 5, 2007.<sup>248</sup> Minutes later the associate administrator who sent the email received a phone call from the White House instructing the agency to retract the email and to say that it had been sent in error.<sup>249</sup> Johnson refused and said that he had approval to issue the draft findings.<sup>250</sup> Johnson also refused to withdraw the document when later asked to say that it could become moot as a result of energy legislation moving through Congress.<sup>251</sup> OMB then

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243. Memorandum, *supra* note 241, at 23. An earlier version of the slide contained "much stronger language" regarding the litigation outcome should EPA deny the waiver. *Id.* at 23–24. Multiple witnesses testifying before the House committee investigating EPA's denial of the waiver request confirmed that Administrator Johnson was made aware of the waiver criteria and legal risks that would come with a denial. *Id.* at 24–26.

244. *See id.* at 12.

245. *EPA's New Ozone Standards*, *supra* note 232, at 137 (testimony of EPA Administrator Stephen Johnson).

246. *See Bush Leaves Weak Environmental Legacy, Ex-EPA Officials Say*, ASSOCIATED PRESS, Dec. 8, 2008, available at [http://www.pennlive.com/midstate/index.ssf/2008/12/bush\\_leaves\\_weak\\_environmental.html](http://www.pennlive.com/midstate/index.ssf/2008/12/bush_leaves_weak_environmental.html) ("Here we see a real failure of leadership," said Russell Train, EPA administrator during the Nixon and Ford eras. "EPA has become a nonentity.").

247. *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 532–35 (2007).

248. Juliet Eilperin, *White House Tried To Silence EPA Proposal on Car Emissions*, WASH. POST, June 26, 2008, at A2.

249. *Id.*

250. *See* Letter from EPA Administrator Stephen L. Johnson to President George W. Bush (January 31, 2008), available at [http://democrats.energycommerce.house.gov/sites/default/files/documents/EnclosureLetter\\_PresidentfromStephenJohnson\\_2.8.2011\\_2.pdf](http://democrats.energycommerce.house.gov/sites/default/files/documents/EnclosureLetter_PresidentfromStephenJohnson_2.8.2011_2.pdf) [hereinafter Letter].

251. *See id.*

decided simply never to open the email because it would start the review process and eventually result in the document becoming public.<sup>252</sup>

On January 31, 2008, Johnson sent a letter to President Bush stating that in light of the latest scientific evidence, EPA was required to respond to the Supreme Court's *Massachusetts v. EPA* ruling by proposing a positive endangerment finding for GHG emissions under the CAA. Johnson's letter, which was revealed by Congressman Henry Waxman in February 2011, stated:

[*Massachusetts v. EPA*] combined with the latest science of climate change requires the Agency to propose a positive endangerment finding, as was agreed to at the Cabinet-level meeting in November . . . . [T]he state of the latest climate change science does not permit a negative finding, nor does it permit a credible finding that we need to wait for more research.<sup>253</sup>

The letter then refers to a "prudent and cautious yet forward thinking" plan that will meet EPA's legal obligations in response to several lawsuits.<sup>254</sup> While noting that "I welcome your guidance as we move forward," Johnson stated that "[a]fter careful and sometime[s] difficult deliberation, I have concluded that it is in the Administration's best interest to move forward with this plan in the next few weeks."<sup>255</sup> In an appendix marked "Privileged Communication to the President," Johnson outlined an "EPA Climate Change Plan" that included issuance of a proposed positive endangerment finding for public notice and comment in March or April 2008 and finalizing it by the end of 2008.<sup>256</sup> Johnson's plan reportedly was blocked by OMB, which required the agency to strip out the endangerment finding from its proposal.<sup>257</sup> Finally on July 11, 2008, EPA issued an advance notice of proposed rulemaking, which asked for public comment on whether or not GHG emissions pose any danger.<sup>258</sup>

#### 4. National Ambient Air Quality Standard for Ozone

EPA also ran into OMB interference when it finally reviewed the NAAQS for ozone. On February 22, 2008, EPA submitted its draft final

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252. Felicity Barringer, *White House Refused To Open E-Mail on Pollutants*, N.Y. TIMES, June 25, 2008, at A15. Six weeks before this incident, OMB had eviscerated draft testimony on the effects of climate change on public health that Julie Gerberding, the head of the Centers for Disease Control, had planned to deliver before a hearing of the Senate Environment and Public Works Committee. Brandon Keim, *White House Censors CDC Official's Testimony on Climate Change and Health*, WIRED (Oct. 24, 2007, 9:18 AM), <http://www.wired.com/wiredscience/2007/10/white-house-cen/>. Due to deletions ordered by OMB, her written statement shrunk from twelve pages to six pages. *Id.*

253. Letter, *supra* note 250.

254. *Id.*

255. *Id.*

256. *Id.*

257. See generally SELECT COMM. ON ENERGY INDEPENDENCE & GLOBAL WARMING, 110TH CONG., INVESTIGATION OF THE BUSH ADMINISTRATION'S RESPONSE TO *MASSACHUSETTS v. EPA* (July 18, 2008), <http://globalwarming.house.gov/tools/2q08materials/files/0110.pdf>.

258. Env'tl. Prot. Agency, Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354 (July 30, 2008).

regulation to OMB.<sup>259</sup> EPA's draft would tighten the primary standard to seventy-five parts per billion (ppb) and adopt a secondary standard of seventy ppb.<sup>260</sup> Two weeks later OIRA Administrator Susan Dudley objected to EPA's decision to adopt different primary and secondary NAAQS for ozone for the first time.<sup>261</sup> EPA was under a deadline to finalize the standard by March 12, 2008.<sup>262</sup>

Administrator Johnson had scheduled a 1:00 p.m. press conference that day to announce the new standard.<sup>263</sup> Shortly before the press conference, Dudley informed Johnson that President Bush "has concluded that, consistent with Administration policy, added protection should be afforded to public welfare by strengthening the secondary ozone standard and setting it to be identical to the new primary standard" at seventy-five ppb.<sup>264</sup> Johnson then postponed the press conference to 6:00 p.m. when he announced the standards dictated by OMB.<sup>265</sup> John Walke, an attorney for the Natural Resources Defense Council, denounced the decision, claiming that it was "unprecedented and an unlawful act of political interference for the President personally to override a decision that the Clean Air Act leaves exclusively to EPA's expert scientific judgment."<sup>266</sup>

#### 5. The FDA and "Plan B"

For several years the Bush Administration was embroiled in controversy over whether the FDA should approve Plan B, an emergency contraceptive, for non-prescription use. FDA was caught between intense pressure from the White House not to approve the request and pressure from members of Congress who blocked confirmation of two nominees for FDA Commissioner until they promised at least to make a decision.<sup>267</sup> When FDA finally acted to deny non-prescription use of the drug for women under the age of eighteen, its decision was challenged by the Center for Reproductive Rights in *Tummino v. Torti*.<sup>268</sup>

Plaintiffs who sued FDA were able to explore the unusual decisionmaking procedure it employed when it decided to continue to require prescriptions for women under eighteen who wished to use Plan B. Discovery revealed that in a Commissioner's meeting concerning the switch

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259. *EPA's New Ozone Standards*, *supra* note 232, at 76 (statement of Susan E. Dudley).

260. Melanie Marlowe, *The Unitary Executive and Review of Agency Rulemaking*, in *THE UNITARY EXECUTIVE AND THE MODERN PRESIDENCY* 77, 95 (Ryan J. Barilleaux & Christopher S. Kelley eds., 2010).

261. *See EPA's New Ozone Standards*, *supra* note 232, at 76 (statement of Susan E. Dudley).

262. *Id.* at 77.

263. Marlowe, *supra* note 260, at 95.

264. *Id.*

265. *See id.*

266. Juliet Eilperin, *Ozone Rules Weakened at Bush's Behest*, WASH. POST, March 14, 2008, at A1.

267. *See generally* *Nomination of Andrew von Eschenbach and Paul DeCamp: Hearing Before the S. Comm. on Health, Educ., Labor, & Pensions*, 109th Cong. (2006).

268. 603 F. Supp. 2d 519 (E.D.N.Y. 2009).

application, the discussion among Deputy Commissioner Dr. Lester Crawford and review staff turned to the “political sensitivity” of the switch.<sup>269</sup> Moreover, Commissioner Dr. Mark McClellan discussed the application with Jay Lefkowitz, the Deputy Assistant to the President for Domestic Policy, and provided updates on the application to White House staff.<sup>270</sup> According to the testimony of FDA senior staff members, political and ideological factors also played a determinative role in the nomination and selection of Advisory Committee for Reproductive Health Drugs (ACRHD) members.<sup>271</sup> Many individuals appointed by the Commissioner to the Committee were inexperienced and underqualified.<sup>272</sup> These members were selected not for their qualifications but to reach what the Office of the Commissioner referred to as a “balance of opinion” on the ACRHD, thus stacking the committee with individuals who were active in Right to Life antiabortion causes.<sup>273</sup>

Plan B’s sponsor reported its actual use study data to the FDA, showing that “the frequency of unprotected sex did not increase, condom use did not decrease, and the overall use of effective contraception did not decrease.”<sup>274</sup> In light of these results, the Advisory Committee voted overwhelmingly in favor of approving Plan B for over the counter (OTC) use without age or point-of-sale restrictions.<sup>275</sup> Though the FDA had followed the Advisory Committee in every OTC switch decision between 1994 and 2004, it denied the Plan B switch request.<sup>276</sup> Testimony of FDA officials showed that Dr. McClellan, the Acting Deputy Commissioner, did not make the decision on his own. The White House had made it clear to him that an OTC Plan B would be politically unpopular and that the public “needed to have the message that we were taking adolescents and reproductive issues seriously.”<sup>277</sup> Dr. Houn, the director of the FDA office that evaluated Plan B, testified that Dr. Janet Woodcock told her that a denial was necessary “to appease the [present] administration’s constituents,” and then later this could be approved.<sup>278</sup> Under political pressure from the White House, the FDA in May 2004 issued a non-approvable letter for Plan B, citing the lack of age restrictions.<sup>279</sup>

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269. *Id.* at 527.

270. *Id.*

271. *Id.* at 527–28.

272. *Id.* at 527.

273. *Id.* at 528.

274. *Id.*

275. *Id.* The committee voted twenty-three to four in favor of a recommendation to approve Plan B for over-the-counter (OTC) status without age or point-of-sale restrictions. *Id.* It also voted unanimously in favor of finding that Plan B is safe for OTC use and by a vote of twenty-seven to one that the actual use study data could be generalized to the total population of OTC Plan B users. *Id.*

276. *Id.*

277. *Id.* at 529.

278. *Id.* at 530 (alterations in original).

279. There was also evidence that Dr. McClellan made the decision before FDA staff had even completed its scientific reviews of the actual use data. *Id.*

Shortly after the first supplemental new drug application was denied, the Plan B sponsor amended its request to seek OTC sale of Plan B to women sixteen and older who presented a valid identification to the pharmacist, and prescription-only sales for women fifteen and younger.<sup>280</sup> Although many FDA scientists found the age restriction to be unwarranted, the FDA delayed its decision beyond the normal 180-day time frame.<sup>281</sup> Acting Commissioner Crawford had removed Dr. Steven Galson's authority to make the switch decision, effectively freezing the review process for over seven months.<sup>282</sup> In light of the FDA's handling of the Plan B switch application, Dr. Susan Wood, the Assistant Commissioner and Director of the FDA Office of Women's Health, resigned, as did Dr. Frank Davidoff, a member of the FDA's Non-Prescription Drug Advisory Committee.<sup>283</sup> On August 24, 2006, the FDA approved non-prescription use of Plan B only for women eighteen and older.<sup>284</sup>

An investigation by the Government Accountability Office found four irregularities in the agency's decision process.<sup>285</sup> First, the Directors of the Offices of Drug Evaluation, who are normally responsible for deciding on the application, disagreed with the decision and refused to sign the non-approval letter.<sup>286</sup> Second, FDA's senior leadership was heavily involved in the process, which was unusual for switch applications.<sup>287</sup> Third, it was unclear whether the decision was made before or after the reviews of the application were completed; high-level management told the reviewing bodies that the application would be denied before reviews were complete.<sup>288</sup> Fourth, the rationale for the decision—concern for adolescents engaging in unsafe sexual behavior—was unusual because behavioral factors normally are not considered in switch decisions.<sup>289</sup>

In March 2009, Judge Edward R. Korman of the U.S. District Court for the Eastern District of New York ruled in favor of the plaintiffs. The judge concluded that the "FDA's decision was not the result of good faith and reasoned agency decision-making."<sup>290</sup> He cited "repeated and unreasonable delays, pressure emanating from the White House, and the obvious connection between the confirmation process of two FDA Commissioners and the timing of the FDA's decisions."<sup>291</sup> The court also found that the FDA departed significantly from its normal procedures for switch applications and did so for implausible reasons and without sufficient

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280. *Id.* at 531.

281. *Id.* at 534.

282. *Id.*

283. *Id.* at 535.

284. *Id.* at 536.

285. GOV'T ACCOUNTABILITY OFFICE, FOOD & DRUG ADMIN. DECISION PROCESS TO DENY INITIAL APPLICATION FOR OVER-THE-COUNTER MARKETING OF THE EMERGENCY CONTRACEPTIVE DRUG PLAN B WAS UNUSUAL 19 (2005).

286. *Id.* at 19–20.

287. *Id.* at 20–21.

288. *Id.* at 21–22.

289. *Id.* at 22–29.

290. *Tummino v. Torti*, 603 F. Supp. 2d 519, 544 (E.D.N.Y. 2009).

291. *Id.*

evidence to support its decision.<sup>292</sup> The court concluded that the “FDA simply has not come forward with an adequate explanation [for the departure], nor has it presented any evidence to rebut plaintiffs’ showing that it acted in bad faith and in response to political pressure.”<sup>293</sup> Declaring that the record was so clear on one issue, the court took the unusual step of ordering the agency to make Plan B available without prescription to women seventeen and older. It remanded the rest of the case and ordered FDA to reconsider whether any age restrictions on non-prescription use are appropriate.<sup>294</sup>

## 6. The Justice Department and Domestic Surveillance

Another incident from the Bush Administration that subsequently has come to light illustrates the power of agency officials who threaten to resign when they believe the White House is asking them to do something illegal or improper. In response to the September 11, 2001 terrorist attacks, President Bush signed a secret order in 2002 that authorized the National Security Agency (NSA) to conduct warrantless electronic surveillance on United States citizens and foreign nationals in the United States.<sup>295</sup> The order allowed NSA to gather signals intelligence from communications involving U.S. citizens without first obtaining a warrant or court order.<sup>296</sup> The White House’s purported basis for this surveillance program was the President’s power to authorize the use of ““all necessary and appropriate force”” to engage with those responsible for the September 11 attacks,<sup>297</sup> which required that NSA not wait to obtain warrants at the risk of losing vital information.<sup>298</sup> Every forty-five days the Department of Justice (DOJ) had to review the program to ensure its legality, and, if the DOJ certified the program, the President had to sign an order to renew it.<sup>299</sup> When the program was reviewed beginning in late 2003, the review process dragged beyond the forty-five-day timeline as the White House battled with cabinet members and top DOJ officials over the program’s legality.<sup>300</sup> President

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292. *Id.* at 550.

293. *Id.* at 548.

294. *Id.* at 550.

295. Richard M. Pious, *Warrantless Surveillance and the Warrantless Presidency*, in UNITARY EXECUTIVE, *supra* note 260, at 163, 163; Dan Eggen, *Bush Authorized Domestic Spying*, WASH. POST, Dec. 16, 2005, at A1. This surveillance program was justified by a classified legal opinion authored by John C. Yoo, the former deputy in the Department of Justice Office of Legal Counsel. *See* Eggen, *supra*. The program permitted the NSA to monitor emails and calls between the United States and locations overseas if one party was believed to be linked to a terrorist group. Dan Eggen & Paul Kane, *Gonzales Hospital Episode Detailed*, WASH. POST, May 16, 2007, at A1.

296. Elizabeth B. Bazan & Jennifer K. Elsea, CONG. RESEARCH SERV., Memorandum on the Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information 1 (Jan 5, 2006).

297. *Id.* at 2 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)).

298. Eggen, *supra* note 295.

299. Barton Gellman, *Conflict Over Spying Led White House to Brink*, WASH. POST, Sept. 14, 2008, at A1.

300. *See* GELLMAN, *supra* note 198, at 287–92.

Bush renewed the program on March 11, 2004, but less than one week later he retracted his renewal and permitted the DOJ to amend the program.<sup>301</sup> President Bush changed course when he realized that by renewing the program without DOJ certification he would face mass resignations of officials in the upper echelon of his Administration.<sup>302</sup>

Vice President Dick Cheney played the leading role in the execution of the program from the start. Cheney chaired surveillance program briefings for select members of Congress while his counsel, David Addington, drafted the original authorization letter signed by President Bush.<sup>303</sup> Addington worked with Cheney in an effort to persuade DOJ officials to certify the legality of the program.<sup>304</sup> When Cheney briefed members of Congress on the program, he reassured them that the NSA's top law and ethics officers approved of the program.<sup>305</sup> In reality, Joel Brenner, NSA's inspector general, and Vito Potenza, NSA's acting general counsel, were simply acting in reliance on the renewal orders certified by the Attorney General and signed by President Bush, not on their own independent analysis of the legality of the program.<sup>306</sup> Meanwhile, Jack L. Goldsmith, the Assistant Attorney General for DOJ's Office of Legal Counsel (OLC) and one of the few officials who had been briefed on the program,<sup>307</sup> warned of major legal problems throughout the surveillance program's review process.<sup>308</sup>

Upon reviewing the surveillance program, Goldsmith determined that it was "the biggest legal mess" he had ever seen in his life.<sup>309</sup> Goldsmith wanted Deputy Attorney General James Comey to be consulted about the program as well, and Addington and White House Counsel Alberto Gonzales reluctantly agreed on the condition that Goldsmith give his definitive answer on the program's legality by the March 11, 2004 deadline.<sup>310</sup> Goldsmith and Patrick Philbin, an OLC lawyer, began working on bringing the program into compliance with the law, but concluded that certain parts of the program had no legal support.<sup>311</sup> Comey then met with Scott Muller, General Counsel at the CIA, who agreed with Goldsmith and Philbin's conclusions.<sup>312</sup> On March 4, Comey presented the findings to Attorney General John Ashcroft, who said that he would not sign the order to renew the surveillance program unless the White House

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301. *Id.* at 313–26.

302. *Id.* at 319–21.

303. *Id.* at 143, 153–54, 279.

304. *Id.* at 282–98.

305. Gellman, *supra* note 299.

306. *Id.* In fact, neither official had even seen the DOJ's classified legal analysis authored by Yoo. *See* GELLMAN, *supra* note 198, at 277–81.

307. Gellman, *supra* note 299. Addington briefed Goldsmith on the program shortly after he took his post in DOJ in October 2003. *Id.*

308. Barton Gellman, *Cheney Shielded Bush from Crisis*, WASH. POST, Sept. 15, 2008, at A1.

309. Gellman, *supra* note 299.

310. *Id.*

311. *See* GELLMAN, *supra* note 198, at 289–94.

312. *Id.* at 293.

agreed to significant changes in it.<sup>313</sup> The next day, Ashcroft entered the hospital for treatment of acute gallstone pancreatitis, and Comey became the Acting Attorney General.<sup>314</sup>

On March 6, Goldsmith informed Gonzales and Addington that DOJ would not certify the program.<sup>315</sup> Two days before the program was set to expire Cheney still had yet to inform President Bush about the brewing controversy.<sup>316</sup> Gonzalez made one last effort to convince Goldsmith to reconsider, but Goldsmith refused.<sup>317</sup> That evening, Cheney convened a meeting at which he and Addington attempted once more to persuade Comey and Goldsmith to certify the program, but Comey refused to certify it, despite its importance, because it lacked legal support.<sup>318</sup>

On March 10, the day before the surveillance program was set to expire, officials engaged in both sides of the battle made their final moves. Comey checked to see whether Frances Fragos Townsend, President Bush's deputy National Security Advisor for combating terrorism, was briefed on the program and learned, to his surprise, that she was not.<sup>319</sup> Other notable officials left out of the loop were Homeland Security Advisor John Gordon, Deputy National Security Advisor Steven J. Hadley, Homeland Security Secretary Tom Ridge,<sup>320</sup> and Bush's chief political advisor Karl Rove.<sup>321</sup> Cheney convened a meeting attended by Hayden, Gonzales, four ranking members of the House, four ranking members of the Senate, and chairmen and vice chairmen of intelligence committees.<sup>322</sup> Gonzales later testified that there was a "consensus in the room" to push forward with the surveillance program, but this statement was disputed by participants from both parties, and Goldsmith and Comey refused to certify the program.<sup>323</sup> White House officials made a last-ditch effort to secure the DOJ's certification. With less than twenty-four hours before the surveillance program was to expire, Gonzales and Card raced to George Washington University Medical Center in an effort to obtain Ashcroft's signature.<sup>324</sup> Comey, Goldsmith, and Philbin rushed to the hospital as well, arriving before the White House officials. Ashcroft managed to sit up and not only refused to sign the certification—he also told Gonzales and Card that he

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313. *Id.*

314. Gellman, *supra* note 299.

315. *Id.*

316. GELLMAN, *supra* note 198, at 296.

317. *Id.* at 294.

318. Gellman, *supra* note 299. Also in attendance at the meeting were Andrew Card, NSA Director Mike Hayden, FBI Director Robert S. Mueller, and John McLaughlin of the CIA. *Id.*

319. *Id.* Comey made this determination by asking Townsend whether she recognized the classified code name of the program; she did not. *Id.*

320. *Id.*

321. Gellman, *supra* note 308. Although National Security Advisor Condoleezza Rice had clearance, Cheney did not invite her to significant meetings. *Id.*

322. *Id.* President Bush was not involved at this point in time. *Id.*

323. *Id.*

324. *Id.*



“never should have certified the [surveillance] program in the first place.”<sup>325</sup>

By this point, Goldsmith and Comey had resolved to resign should the President renew the program without DOJ certification, and several other high-ranking officials were reportedly prepared to follow suit.<sup>326</sup> Several lawyers would leave DOJ if Comey quit;<sup>327</sup> FBI General Counsel Valerie Caproni and the CIA General Counsel Scott Mueller told colleagues that they would resign if the program were reauthorized; and Assistant Attorney General Christopher Wray said that he would resign if Comey resigned.<sup>328</sup> Even Ashcroft was prepared to resign.<sup>329</sup> But President Bush, away on the campaign trail, was unaware of the impending mass resignations.<sup>330</sup>

Addington reached a “solution” to the threat to the surveillance program’s survival by editing the March 11 renewal order so that in place of the Attorney General’s signature line there was a line for Alberto Gonzales’s signature.<sup>331</sup> This switch in authorization essentially allowed the President to rely on his own authority to certify the program as lawful. President Bush signed the order but did agree, at Condoleezza Rice’s recommendation, to meet with Comey to discuss the controversy. President Bush expressed concern that Comey was “raising this at the last minute,” signaling that he had not been informed of the resignation plans or that Comey and others had been voicing their objections to the surveillance program for months.<sup>332</sup> It was clear that the White House would have to

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325. *Id.* Ashcroft further stated that the White House officials “drew the circle so tight” that he could not receive the advice that he needed. *Id.*

326. *Id.* Both men drafted resignation letters. Goldsmith instructed his deputy, Ed Whelan, to draft his resignation letter immediately after the hospital meeting. GELLMAN, *supra* note 198, at 305. Comey reiterated in his resignation letter that he had promised at his confirmation hearing that he “would never be a part of something that [he] believe[d] to be fundamentally wrong” and that the DOJ had been unable to right the wrong in this case. *Id.* at 313–14. Thus, he must “do the right thing” and resign. Letter from James B. Comey, Deputy Att’y Gen., to President George W. Bush (Mar. 16, 2004) (unsent), *available at* <http://www.washingtonpost.com/wp-srv/politics/interactives/cheney/doc-comey-resig.html>.

327. Comey testified that he believed that a large portion of his staff was set to resign. Written Questions from Sen. Charles E. Schumer to James B. Comey 1 (May 15, 2007), *available at* <http://www.washingtonpost.com/wp-srv/politics/interactives/cheney/doc-comey-senate.html> [hereinafter Questions].

328. Gellman, *supra* note 308. Caproni was bound by the FBI’s central mission—to “uphold and enforce the criminal laws of the United States,” which she could not do if she were to enforce a program that the DOJ refused to certify as legal. Gellman, *supra* note 299.

329. Eggen & Kane, *supra* note 295.

330. Gellman, *supra* note 308. Cheney, Addington, Card, and Gonzales were all aware of the potential resignations. *Id.*

331. *Id.*

332. *Id.* Mueller also met privately with the President and informed him that the FBI could not participate in operations that DOJ deemed to be criminal violations of the law, so he would be forced to resign. *Id.* Moreover, Comey later testified that DOJ’s views on the legality of the surveillance program, including the view that neither Comey nor Ashcroft would certify the program, were communicated orally and in writing in the weeks or months preceding the March 10 meeting. Written Questions to Former Deputy Att’y Gen. James B. Comey Submitted by Sen. Patrick Leahy 2 (May 22, 2007), *available at* <http://www.washingtonpost.com/wp-srv/politics/interactives/cheney/doc-comey-senate.html>.

backtrack in order to avoid a mass resignation and a certain political scandal.

One week after signing the order renewing the surveillance program, President Bush amended the directive by placing legal certification authority back on the DOJ and telling Comey “to do what [the DOJ] thinks needs to be done.”<sup>333</sup> Much of the program remained the same,<sup>334</sup> though Comey refused to specify whether the program was the same after 2004 and what, if any, changes had been made.<sup>335</sup> Despite the President’s backtracking, as of 2007 Gonzales continued to defend the program the DOJ refused to certify.<sup>336</sup>

### G. Regulatory Review and Presidential Directives Under President Obama

#### 1. Regulatory Review During the Obama Administration

From the first days of his Administration, President Barack Obama made it clear that he would play an active role in seeking to mobilize the federal bureaucracy to achieve his policy ends. Moving swiftly to reverse certain Bush Administration policies, on his first full day in office he revoked Executive Order 13,233, which the Bush Administration had used to block the release of presidential records.<sup>337</sup> Nine days later, he revoked the two executive orders President Bush had issued to modify the Clinton Administration’s regulatory review program,<sup>338</sup> and he announced that he would develop a new regulatory review program after requesting public comment on how a new executive order should structure the process.<sup>339</sup>

Obama endorsed the concept of presidential review of agency action: “While recognizing the expertise and authority of executive branch departments and agencies, I also believe that, if properly conducted, centralized review is both legitimate and appropriate as a means of promoting regulatory goals.”<sup>340</sup> The President requested his OMB Director, “in consultation with representatives of regulatory agencies, as

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333. Gellman, *supra* note 308. President Bush sent this message to Comey through Mueller. *Id.*

334. *Id.*

335. Questions, *supra* note 327, at 1.

336. Eggen & Kane, *supra* note 295.

337. Exec. Order No. 13,489, § 6, 3 C.F.R. 191, 193 (2010). For a discussion of Executive Order 13,233 see Percival, *Presidential Management*, *supra* note 2, at 1012–13.

338. Exec. Order No. 13,497, §§ 1–2, 3 C.F.R. 218, 218 (2010) (revoking Exec. Order 13,422, 3 C.F.R. 191 (2008), and Exec. Order 13,258, 3 C.F.R. 204 (2003)); *see supra* notes 197, 213–15 and accompanying text (detailing how Executive Orders 13,258 and 13,422 modified Executive Order 13,233). Curiously, on March 4, 2009, OMB Director Peter R. Orszag issued a memorandum “clarifying” that the President did not intend to revoke OIRA’s authority to review guidance documents. Peter R. Orszag, Director, Office of Mgmt. & Budget, Memorandum for the Heads & Acting Heads of Exec. Dep’ts & Agencies (Mar. 4, 2009) (on file with the *Fordham Law Review*). He based this claim on the assertion that OMB occasionally had reviewed agency guidance documents prior to the issuance of Executive Order 13,422. *Id.*

339. Barack H. Obama, Memorandum for the Heads of Exec. Dep’ts & Agencies (Jan. 30, 2009), 74 Fed. Reg. 5977 (Feb. 3, 2009).

340. *Id.*

appropriate, to produce within 100 days a set of recommendations for a new Executive Order on Federal regulatory review.”<sup>341</sup>

On February 26, 2009, OMB published a request for “public comments on how to improve the process and principles governing regulation.”<sup>342</sup> Comments particularly were solicited on:

- The relationship between OIRA and the agencies;
- Disclosure and transparency;
- Encouraging public participation in agency regulatory processes;
- The role of cost-benefit analysis;
- The role of distributional considerations, fairness, and concern for the interests of future generations;
- Methods of ensuring that regulatory review does not produce undue delay;
- The role of the behavioral sciences in formulating regulatory policy; and
- The best tools for achieving public goals through the regulatory process.<sup>343</sup>

The public comment request emphasized that executive orders are not subject to the notice and comment procedures of the APA, but it stated that public comment was useful due to the “unusually high level of public interest.”<sup>344</sup>

The public comment request resulted in 183 comments from academia, trade interest groups, public policy and interest groups, and private citizens.<sup>345</sup> Comments received from the agencies were not made public.

While many observers expected the Obama Administration to move quickly to establish its own regulatory review program, it was not until January 18, 2011 that the President issued Executive Order 13,563.<sup>346</sup> The executive order leaves all the elements of the Clinton regulatory review program largely intact, while modifying it to give priority also to weeding out obsolete regulations and to improving existing rules that are insufficient to achieve regulatory objectives.<sup>347</sup> Among the significant themes embedded in the new executive order are the value of learning from prior experience with regulatory policy; the importance of adopting an even-

341. *Id.*

342. Office of Management and Budget, Federal Regulatory Review—Request for Comments, 74 Fed. Reg. 8819 (Feb. 26, 2009).

343. *Id.* at 8819.

344. *Id.*

345. See Public Comments on OMB Recommendations for a New Executive Order on Regulatory Review, REGINFO.GOV, <http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp> (last visited Apr. 20, 2011).

346. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

347. *Id.* § 6, 76 Fed. Reg. at 3822; see Barack Obama, Opinion, *Toward a 21st-Century Regulatory System*, WALL ST. J., Jan. 18, 2011, at A17 (stating that the administration is “making it our mission to root out regulations that conflict, that are not worth the cost, or that are just plain dumb”).

handed, results-oriented approach to regulation; and the value of flexibility in approaches to regulations, embracing default rules, warnings and informational strategies.<sup>348</sup> Equity, dignity, fairness, and the distributional consequences of regulation are identified as important considerations to supplement evaluations of regulatory costs and benefits.<sup>349</sup>

On the question of presidential directive authority, the Obama executive order disclaims authority to displace decision making entrusted by statute to agency heads. Section 7(b) of the executive order specifies that “[n]othing in this order shall be construed to impair or otherwise affect: (i) authority granted by law to a department or agency, or the head thereof.”<sup>350</sup> Thus, President Obama continues the tradition of eschewing directive authority in the executive order outlining his regulatory review program.

## 2. Presidential Directives During the Obama Administration

From the first days of his Administration, President Obama issued directives to agencies asking them to reconsider Bush Administration policies. Six days after taking office, President Obama signaled that he intended to effect significant changes in the nation’s environmental policies. On January 26, 2009, Obama issued separate memoranda to the EPA Administrator<sup>351</sup> and to both the Secretary of Transportation and the National Highway Traffic Safety Administration (NHTSA) Administrator.<sup>352</sup> These memoranda directed both the EPA Administrator to reconsider former Administrator Johnson’s decision to deny California a waiver to set statewide GHG emissions standards for new motor vehicles<sup>353</sup> and the Secretary of Transportation and NHTSA Administrator to promulgate stronger fuel efficiency standards under the 2007 Energy Independence and Security Act.<sup>354</sup> Both memoranda served as significant reversals of Bush Administration policies.<sup>355</sup>

In his first two years in office, President Obama issued seventy-four Executive Orders.<sup>356</sup> Other Obama directives also addressed energy and environmental issues. On February 5, 2009, President Obama asked the Department of Energy to enact higher appliance efficiency standards under the 1975 Energy Policy and Conservation Act and the 2005 Energy Policy

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348. See Exec. Order No. 13,563, § 4, 76 Fed. Reg. at 3822.

349. *Id.* § 1, 76 Fed. Reg. at 3821.

350. *Id.* § 7(b), 76 Fed. Reg. at 3822.

351. Memorandum, *supra* note 234.

352. Barack Obama, Memorandum, The Energy Independence and Security Act of 2007 (Jan. 26, 2009), 74 Fed. Reg. 4907 (Jan. 28, 2009).

353. Memorandum, *supra* note 234, at 20.

354. Obama, *supra* note 352.

355. *Obama Moves To Revise Fuel Efficiency Policies*, PBS NEWSHOUR (Jan. 26, 2009, 1:20 PM), [http://www.pbs.org/newshour/updates/environment/jan-june09/fuel\\_01-26.html](http://www.pbs.org/newshour/updates/environment/jan-june09/fuel_01-26.html).

356. *Barack Obama Executive Orders Disposition Tables*, NATIONAL ARCHIVES, <http://www.archives.gov/federal-register/executive-orders/obama.html> (last visited Apr. 20, 2011).

Act.<sup>357</sup> On March 3, 2009, the President again acted to reverse Bush Administration policy,<sup>358</sup> requesting federal agencies to resume full scientific review of activities that could harm endangered species.<sup>359</sup> President Obama also directed agencies to shield government scientific research from political influence.<sup>360</sup> He created a working group to design biofuel policy while asking the Secretary of Agriculture to develop investment mechanisms for biofuels.<sup>361</sup> In June 2009 the President issued a memorandum creating a taskforce aimed at designing and implementing comprehensive national policy to protect oceans, coasts, and the Great Lakes.<sup>362</sup>

On October 5, 2009, President Obama issued Executive Order 13,514, which requires federal agencies to set targets to control their greenhouse gas emissions.<sup>363</sup> The Order also directs agencies to increase energy efficiency, reduce waste, conserve water, reduce fleet petroleum consumption, support sustainable communities, and utilize government purchasing power to support environmentally friendly products.<sup>364</sup> In response to the catastrophic oil spill in the Gulf of Mexico, the President issued a memorandum to improve fuel efficiency<sup>365</sup> and also issued an executive order establishing the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling.<sup>366</sup> The memorandum ordered federal agencies to develop fuel economy and emissions standards for medium and heavy-duty trucks for model years 2014–18,<sup>367</sup> the first ever efficiency targets for these classes of trucks.<sup>368</sup> The memorandum also called for another round of fuel efficiency and emissions targets for passenger cars and light-duty trucks starting in 2017.<sup>369</sup> Executive Order 13,543 established the President's oil spill commission and directed it to analyze

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357. Barack Obama, Memorandum, Appliance Efficiency Standards (Feb. 5, 2009), 74 Fed. Reg. 6537 (Feb. 9, 2009).

358. *Reversing Bush Rule, Obama Resumes Safeguards for Endangered Species*, PBS NEWSHOUR (Mar. 3, 2009, 5:05 PM), [http://www.pbs.org/newshour/updates/science/jan-june09/speciesrule\\_03-03.html](http://www.pbs.org/newshour/updates/science/jan-june09/speciesrule_03-03.html).

359. Barack Obama, Memorandum, The Endangered Species Act (Mar. 3, 2009), 74 Fed. Reg. 9753 (Mar. 6, 2009).

360. Barack Obama, Memorandum, Scientific Integrity (Mar. 9, 2009), 74 Fed. Reg. 10,671 (Mar. 11, 2009).

361. *Id.*

362. Barack Obama, Memorandum, National Policy for the Oceans, Our Coasts, and the Great Lakes (June 12, 2009), 74 Fed. Reg. 28,591 (June 17, 2009).

363. Exec. Order No. 13,514, § 2, 3 C.F.R. 248, 249 (2010).

364. *Id.*

365. Barack Obama, Memorandum, Improving Energy Security, American Competitiveness and Job Creation, and Environmental Protection Through a Transformation of Our Nation's Fleet of Cars and Trucks (May 21, 2010), 75 Fed. Reg. 29,399 (May 26, 2010).

366. Exec. Order No. 13,543, 75 Fed. Reg. 29,397 (May 26, 2010).

367. Obama, *supra* note 365, § 1; *U.S. Sets Sights on Auto Fuel Efficiency for 2017*, REUTERS (May 21, 2010, 11:46 AM) <http://www.reuters.com/article/2010/05/21/us-autos-fuel-idUSTRE64J75120100521>.

368. *U.S. Sets Sights on Auto Fuel Efficiency for 2017*, *supra* note 367.

369. Obama, *supra* note 365.

the causes of the oil spill and to develop policies to prevent future spills from offshore drilling.<sup>370</sup>

President Obama also employed a large number of advisors with responsibility for coordinating certain policy areas. Responding to charges that these “czars,” who are not subject to Senate confirmation, had too much authority, the White House argued that they are not intended to “supplant or replace” responsibilities delegated by law to executive agencies. Instead, their duties are to “help coordinate” agency efforts and to assist in devising “comprehensive solutions to complex problems.”<sup>371</sup>

#### IV. DIRECTIVE AUTHORITY IN HISTORICAL PERSPECTIVE

Arguments that presidential directive authority is constitutionally mandated are unconvincing,<sup>372</sup> as even the most ardent proponents of the unitary executive must acknowledge.<sup>373</sup> Calabresi and Yoo’s efforts to uncover historical roots for directive authority collide with a historical record that is almost entirely to the contrary. They claim that “[p]erhaps the most dramatic assertion” of directive authority is the establishment of presidential programs requiring OMB review of budgetary and regulatory initiatives.<sup>374</sup> Yet, as discussed above, each of the executive orders issued over the last thirty years to establish a new program of presidential oversight of agency action has expressly disclaimed directive authority.<sup>375</sup> This powerfully undermines not only the argument that presidential practice supports directive authority as a constitutional imperative but also the suggestion that statutes granting agency heads regulatory authority should be interpreted to reflect implicit congressional intent to give the President directive authority.

In subsequent work Calabresi and Yoo maintain that their book “probably [does] not pay sufficient attention” to President Clinton’s

370. Exec. Order No. 13,543, 75 Fed. Reg. 29,397.

371. Letter from Gregory B. Craig, Counsel to the President, to Senator Russell D. Feingold 3 (Oct. 5, 2009), available at <http://theplumline.whorungov.com/wp-content/uploads/2009/10/feingoldletter.pdf>.

372. See generally Richard J. Pierce, Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of The Unitary Executive by Steven G. Calabresi and Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593 (2010); Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

373. Christopher S. Yoo, Symposium, *Presidential Power in Historical Perspective: Reflections on Calabresi and Yoo’s The Unitary Executive—Foreword*, 12 U. PA. J. CONST. L. 241, 246 (2010) (“Several commentators have observed that our book offers a stronger showing of presidential assertions of the power to remove executive officials and a weaker showing of the President’s authority to direct executive officials in their actions.”).

374. CALABRESI & YOO, *supra* note 5, at 421. Moreover, all of the other examples they cite of Presidents directing subordinates occurred long before the dawn of the regulatory state when statutes routinely specified that regulatory decisions were to be made by agency heads.

375. See, e.g., Exec. Order No. 13,563, § 7(b), 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011); Exec. Order No. 12,866, § 9, 3 C.F.R. 638, 649 (1994); Exec. Order No. 12,291, § 3(f)(3), 3 C.F.R. 127, 130 (1982).

expanded use of presidential directives, as outlined by Elena Kagan.<sup>376</sup> These instances are discussed below, but it is worth noting for now that Kagan herself concedes that any directive authority allegedly asserted by President Clinton was not derived from the Constitution.<sup>377</sup> At best, Calabresi and Yoo's history suggests that nearly all Presidents have tried to influence regulatory decisions by executive agencies, indicating perhaps that they would like to have directive authority, but that is a far cry from establishing that the President actually has directive authority, or even that any President genuinely believed that the Constitution mandates it.<sup>378</sup> Given that the Constitution says so little about executive agencies, leaving it largely to Congress to fill in the details, it is not surprising that the unitary executive theory has been overwhelmingly rejected by scholars, particularly since the actions of the first Congress are at odds with it.<sup>379</sup>

Proponents of the unitary executive theory also claim that because the President has authority to remove executive officers at will, it makes little or no difference whether the President has directive authority because he can remove any officer who resists his direction. Yet the historical record demonstrates that, despite the President's broad removal authority, the answer to the separate directive authority question matters greatly. It determines whether agency heads have a legal entitlement to refuse to comply with a presidential directive when it directs them to act in a way they believe is illegal, improper, or unwise. The historical record powerfully supports the notion that the absence of directive authority provides an important check on potentially egregious abuses of presidential power. Even if the President's removal authority enables him to fire the heads of executive agencies at will, requiring him to fire a resistant officer and replace him with an officer who will take the action he desires invariably has substantial political costs.

Directive authority to override Congress's choice of regulatory decision maker also would undermine the U.S. Senate's advice and consent power over the confirmation of agency heads, an important constitutional qualification on the President's appointment power established by Article II, Section 2 of the Constitution. The process of confirmation of agency heads now frequently is used to obtain assurances that presidential nominees will implement their statutory responsibilities with some degree of independence from the President's political preferences.<sup>380</sup> If the

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376. See Yoo, *supra* note 373, at 246–47.

377. Kagan, *supra* note 7, at 2251, 2320.

378. Mark Tushnet suggests that theories of the unitary executive have evolved historically in three stages that correspond remarkably to the desires of whatever administration is in power. Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, 12 U. PA. J. CONST. L. 313 (2010).

379. See Percival, *Presidential Management*, *supra* note 2, at 975–76 (discussing how the first Congress “even while acknowledging the President's broad executive powers, . . . entrusted agency heads with certain decisionmaking responsibilities, and . . . sought to preserve some independence for agency heads in their performance of those responsibilities”).

380. See *id.* at 1005–06.

President had directive authority over decisions entrusted by statute to agency heads, it would make little difference whether he appointed officials acceptable to the Senate because he always could override their judgments.

As discussed in the historical update above, time after time when White House officials tried to persuade agency heads to make decisions for reasons that deviated from statutory commands, agency heads have resisted. From White House requests for EPA to drop its first enforcement actions against Republican campaign contributors<sup>381</sup> to orders seeking to countermand climate science,<sup>382</sup> the absence of directive authority has afforded the moral high ground to agency officials who are willing take a stand when the White House crosses the line. This is well demonstrated by the refusal of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus to fire Special Prosecutor Archibald Cox when President Nixon was trying to avoid further inquiry into the Watergate scandal.<sup>383</sup> Most recently, the threat of mass resignations by top Bush Administration officials over the President's domestic surveillance program forced the administration to make substantial modifications in the program.<sup>384</sup>

To be sure, the absence of presidential directive authority does not mean that the President is unlikely to prevail when he disagrees with agency heads over regulatory policy matters. At will removal authority is a powerful tool that dictates that few agency heads will defy the President. But this means that such defiance will only occur when it is a matter so essential that it rises to the level of importance that former FDA Commissioner David Kessler dubbed a "resignable" event.<sup>385</sup>

Given the President's removal power, agency heads frequently agree to comply voluntarily with White House directives, even if the President does not have directive authority. Because agency decisions must be consistent with the underlying regulatory statutes and supported by evidence in the administrative record, if the White House dictates a result that is inconsistent with the regulatory statute or the rulemaking record, the decision is vulnerable to being overturned in court, as occurred in *Public Citizen Health Research Group v. Tyson*<sup>386</sup> and in *New York v. Reilly*.<sup>387</sup> If the agency head is willing to embrace the decision as his or her own, the fact that the decision was the product of OMB or, in a rare case, presidential persuasion is unlikely to affect its chances of surviving judicial review.

As discussed above, there are strong reasons to believe that EPA Administrator Stephen Johnson dutifully complied with numerous White

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381. See text accompanying note 81 *supra*.

382. See *supra* notes 228–66 and accompanying text.

383. See the discussion of the "Saturday Night Massacre" in Percival, *Presidential Management*, *supra* note 2, at 1004.

384. See text accompanying notes 295–330, *supra*.

385. KESSLER, *supra* note 168, at 69.

386. 796 F.2d 1479, 1481, 1483 (D.C. Cir. 1986) (reversing and remanding decision by OSHA's head to carry out OMB's last-minute directive to delete short-term exposure limit for ethylene oxide without any support or explanation in the administrative record).

387. 969 F.2d 1147, 1148–50 (D.C. Cir. 1992) (remanding to EPA).



House directives to quash regulatory initiatives. This explains why he did not propose a finding that GHG emissions endanger public health and welfare and why he weakened other environmental standards presented to him for decision. So long as the agency head insists, as Johnson did, that the decision is his own, and not that of the White House, the decision is not legally vulnerable unless it is arbitrary, capricious, contrary to law or procedure, or insufficiently supported in the administrative record.

Yet agency decisions reached at the behest of White House officials are likely to be more vulnerable to legal challenges than are other regulations because regulatory review often emphasizes factors that are not made relevant by the underlying regulatory statute. This is well illustrated by the USDA's efforts to have President George H.W. Bush require the FDA to adopt nutritional guidelines that would protect the economic interests of the domestic meat industry. The President was informed that if he tried to direct the FDA to promulgate more meat-friendly nutrition labels, that "the Department can't just salute smartly and go execute whatever decision" he made because the record would not support it.<sup>388</sup> If the President were able to direct a decision for political reasons that would require an agency to manufacture a new administrative record, it would undermine the purposes of conducting an informal notice-and-comment rulemaking pursuant to the requirements of the APA.<sup>389</sup>

It is extremely rare, however, that parties seeking judicial review of agency action will be able to prove that the President or his staff overrode an agency head's decision. But it is not impossible. Vice President Quayle's Council on Competitiveness was so proud of its rejection of EPA's proposed ban on incineration of lead acid batteries and the agency's incinerator recycling requirement that it publicly boasted that it had vetoed EPA's decision.<sup>390</sup> One participant in the Council's closed meeting told the press that the real reason for the decision was a "strong sense that they needed to give business something" because of "concern that we lost our commitment to deregulation."<sup>391</sup> Thus it is not surprising that the D.C. Circuit struck down EPA's failure to ban incineration of lead acid batteries

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388. KESSLER, *supra* note 168, at 68.

389. Moreover, as Kevin Stack has ably argued, decisions that can be shown to be the product of presidential prodding should be less likely to qualify for *Chevron* deference from a reviewing court. Stack, *supra* note 20, at 307. *But cf.* Kagan, *supra* note 7, at 2376 (arguing for linking deference to presidential involvement given the President's more direct electoral accountability); *see also* Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008) (questioning whether insulating an agency from the influence of elected officials reduces the agency's responsiveness to preferences of political majorities).

390. President's Council on Competitiveness Fact Sheet, *supra* note 149.

391. The Council on Competitiveness's fact sheet cited three reasons for its decision: (1) the recycling requirement was not a performance standard, (2) the regulation interfered with local government decision making, and (3) it was not cost-beneficial under Executive Order 12,291. *Id.*; *see* David Littell, Note, *The Omission of Materials Separation Requirements from Air Standards for Municipal Waste Incinerators: EPA's Commitment to Recycling Up in Flames*, 15 HARV. ENVTL. L. REV. 601 (1991); Michael Weisskopf, *EPA Proposal on Recycling Is Trashed*, WASH. POST, Dec. 20, 1990, at A17.

as insufficiently supported by the record.<sup>392</sup> Decisions based on grounds divorced from the statutory criteria are vulnerable when subjected to judicial review.

A federal district court's invalidation of FDA's refusal to approve the Plan B emergency contraceptive for use by women under eighteen also demonstrates that when political interference can be shown, agency decisions will get less judicial deference.<sup>393</sup> This is consistent with Professor Stack's argument that when the statute does not designate the President as the regulatory decision maker, decisions dictated by him are not entitled to the same level of deference on judicial review.<sup>394</sup>

Legal scholars who have considered the directive authority issue have long agreed on one important point—the President cannot claim directive authority over decisions reached by formal adjudicatory procedures.<sup>395</sup> This was confirmed when the Ninth Circuit upheld application of the APA's ban on ex parte contacts in formal adjudicatory hearings to the deliberations of the inter-agency "God squad" considering an exemption from the ESA during the George H.W. Bush Administration.<sup>396</sup> The court concluded that "Congress clearly has the authority" to "create the

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392. *New York v. Reilly*, 969 F.2d 1147, 1149 (D.C. Cir. 1992). The court did note that the fact that EPA went along with the Competitiveness Council's decision "does not mean that EPA failed to exercise its own expertise in promulgating the final rules." *Id.* at 1152. As Michael Herz notes: "Although the general understanding, and my own belief, is that EPA Administrator William Reilly was forced to cave in to White House commands on the incinerator issue, officially the agency and the Council reached consensus, with the latter convincing Reilly of the error of his views." Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 224 n.28 (1993); see also Standards of Performance for New Stationary Sources; Municipal Waste Combustors, 56 Fed. Reg. 5488, 5497 (Feb. 11, 1991). Herz notes that EPA General Counsel Don Elliott later testified: "The final decision [regarding the incinerator new source performance standard] was very clearly made by Bill Reilly, rather than by the Council on Competitiveness." Herz, *supra*, at 225 n.28 (alteration in original).

393. *Tummino v. Torti*, 603 F. Supp. 2d 519, 544–47 (E.D.N.Y. 2009).

394. Stack, *supra* note 20, at 307.

395. See HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* 150 (1962) ("Everyone, including the presidential activists, seems to agree that 'the outcome of any particular adjudicatory matter is . . . as much beyond his [the President's] concern . . . as the outcome of any cause pending in the courts . . .'" (alterations in original) (quoting JAMES M. LANDIS, *REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT* 33 (1960))); Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 454 n.11 (1979) (noting "White House efforts to forbid staff interference with agency adjudication"); Kagan, *supra* note 7, at 2306; Emmette S. Redford, *The President and the Regulatory Commissions*, 44 TEX. L. REV. 288 (1965). ("The President and all other executive officials should avoid any ex parte statement or communication concerning the application of law or policy by commissions to particular concerns or individuals." (emphasis omitted)); Peter M. Flanigan, Memorandum, *Contacts Between the White House and the Independent Regulatory Agencies* (May 21, 1969), reprinted in *In re ITT Continental Baking Co.*, 82 F.T.C. 1188, 1191 (1973)). Although Calabresi and Yoo do not focus on agency adjudications, they note that during the Nixon Administration the Ash Council proposed abolishing most independent agencies and transferring adjudicative functions previously performed by them to an Administrative Court of the United States. CALABRESI & YOO, *supra* note 5, at 351.

396. *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1536 (9th Cir. 1993); see also text accompanying notes 154–66, *supra*.

Committee as a quasi-judicial adjudicatory body subject to the statutory restrictions that the APA imposes on such institutions” in order to “ensure the independence of the agency from presidential control.”<sup>397</sup> When the D.C. Circuit endorsed presidential involvement in regulatory decisions in *Sierra Club v. Costle*,<sup>398</sup> Judge Wald was careful to distinguish between presidential contacts with agency heads in informal rulemakings (the proceeding at issue there) and such contacts in formal adjudications, as the Ninth Circuit noted.<sup>399</sup> In *Sierra Club*, Judge Wald observed that even the most enthusiastic endorsement of presidential power over agencies in *Myers v. United States* was qualified with the statement that its reasoning did not apply to adjudications.<sup>400</sup>

In her account of President Clinton’s energetic efforts to influence agencies, Elena Kagan notes that the “only mode of administrative action from which Clinton shrank was adjudication.”<sup>401</sup> Kagan reports that Clinton was careful to ensure that he never attempted “to exercise the powers that a department head possesses over an agency’s on-the-record determinations.”<sup>402</sup> She stresses that her argument for inferring presidential directive authority from the regulatory statutes does not apply with respect to adjudication because of the fundamentally different nature of such proceedings and “the different purposes of participation in them.”<sup>403</sup> Citing the dictum in *Myers* noted above, Kagan concludes that in the adjudication context, “presidential participation in administration, of whatever form, would contravene procedural norms and inject an inappropriate influence into the resolution of controversies.”<sup>404</sup> This must “disallow the President from disrupting or displacing the procedural, participatory requirements associated with agency adjudication, thus preserving their ability to serve their intended, special objectives.”<sup>405</sup>

Yet, absent special procedural requirements specified in the underlying regulatory statute, agencies generally have substantial discretion in choosing between rulemaking and adjudication as a means for formulating and implementing regulatory policy.<sup>406</sup> Because adjudications cannot be

397. *Portland Audubon*, 984 F.2d at 1547–48.

398. 657 F.2d 298 (D.C. Cir. 1981).

399. *Portland Audubon*, 984 F.2d at 1545 (“In fact, while the *Costle* court recognized that political pressure from the President may not be inappropriate in *informal* rulemaking proceedings, it acknowledged that the contrary is true in formal adjudications.”).

400. *Id.* at 407 n.527 (D.C. Cir. 1981). Judge Wald noted that statement from *Myers* that “there may be duties of a quasi-judicial character imposed on . . . executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control.” *Id.* (quoting *Myers v. United States*, 272 U.S. 52, 135 (1926)).

401. Kagan, *supra* note 7, at 2306.

402. *Id.*

403. *Id.* at 2362.

404. *Id.* at 2363.

405. *Id.*

406. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (“[T]he Board is not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.”); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“[T]he choice made between

the subjects of presidential directive authority under any of the theories that support it, agencies can insulate themselves from presidential influence by choosing to set policy through adjudication. For example, the National Labor Relations Board did not conduct its first rulemaking until the late 1980s in part because agency officials wanted to insulate Board decisions from political pressures.<sup>407</sup> Many regulatory agencies like the EPA rely almost entirely on rulemaking to set policy,<sup>408</sup> but the fact that an agency could escape presidential directive authority simply by addressing an issue through adjudication undercuts the force of arguments for inferring directive authority from statutes that permit agencies to choose between rulemaking and adjudication.

#### CONCLUSION: DOES DIRECTIVE AUTHORITY MATTER?

Although it is unlikely that the debate over whether the President has the legal authority to dictate the substance of regulatory decisions entrusted by statute to agency heads ever will be definitively resolved, the view most widely accepted by scholars is that the President does not.<sup>409</sup> Claims by supporters of the unitary executive theory that presidential directive authority is constitutionally required have scant support in the constitutional text or relevant constitutional history. Arguments that presidential directive authority should be inferred as implicit in statutes granting authority for regulatory decisions to agency heads also conflict with the historical evidence. The assumption that prevailed when regulatory statutes were adopted was that the President did not have directive authority and the executive orders establishing regulatory review by OMB expressly disclaim such authority. The statutes themselves often divide decisionmaking responsibilities between agency heads and the President or specify circumstances under which the President can override agency decisions (mixed agency-President delegations). These factors, and historical practice since the dawn of the modern administrative state, provide strong support for the notion that the President lacks directive authority unless Congress expressly grants it to him.

Yet after four decades of experience with presidential oversight of rulemaking and three decades of OMB review programs, regulatory review

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proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.”).

407. WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 323 (3d ed. 2006); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 274–75 (1991).

408. *But cf.* Exec. Order No. 13,422, § 5(a), 3 C.F.R. 191, 193 (2008) (stating that agencies, “[i]n consultation with OIRA may also consider whether to utilize formal rulemaking procedures under 5 U.S.C. [ §§ ] 556 and 557 [the provisions of the APA governing formal adjudicatory proceedings] for the resolution of complex determinations”); *U.S. Chamber of Commerce Calls for Trial of Climate Science*, ENV'T NEWS SERVICE (Aug. 26, 2009) <http://www.ens-newswire.com/ens/aug2009/2009-08-26-091.asp> (reporting on petition to EPA by the U.S. Chamber of Commerce for formal adjudicatory hearing to determine whether emissions of greenhouse gases endanger public health or welfare under the Clean Air Act).

409. *See, e.g.*, Pierce, Jr., *supra* note 372, at 596–98; Strauss, *supra* note 372, at 759–60.

has now become an accepted feature of the modern administrative state. Recent administrations have been more active (and more successful) than ever in efforts to persuade agency heads to pursue policies desired by the White House. One important reason for their success is that these efforts now extend far beyond the OMB review process embodied in the executive orders. They include lobbying of agencies by greatly expanded White House staffs and policy “czars” not subject to Senate confirmation, and presidential directives telling agencies to address particular issues, while carefully disclaiming authority to dictate the outcome.<sup>410</sup>

For example, as Cary Coglianese writes about the Obama directive to reconsider the denial of the California waiver, “President Obama’s memorandum directing the agency was careful not to tell the EPA that it must reverse itself and grant California’s waiver request; instead it simply directed the agency to revisit the issue and take appropriate action.”<sup>411</sup> But as Coglianese points out, “[t]here was no doubt, however, that Obama wanted the waiver granted.”<sup>412</sup> Does this make the legal question of directive authority irrelevant? History suggests otherwise.

One of President Reagan’s first acts in office was to establish a Task Force on Regulatory Relief, chaired by Vice President George H.W. Bush.<sup>413</sup> The Task Force wrote to business leaders asking them to nominate regulations that should be relaxed or repealed, much like Congressman Darrell Issa’s committee is doing today in the newly Republican-controlled House.<sup>414</sup> After oil industry executives nominated EPA’s limits on lead in gasoline, the Reagan White House directed EPA Administrator Anne Gorsuch Burford to relax or repeal the lead limits. EPA was allowed to propose abolishing these regulations without conducting any cost-benefit analysis of them, on the grounds that the new Executive Order 12,291 requiring such analysis only applied to new regulations and not to the repeal of existing ones.<sup>415</sup> But when subjected to the notice-and-comment process for rulemaking under the APA, the proposal to repeal the lead limits generated such a public outcry, including a persuasive op-ed from President Reagan’s new friend, columnist George

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410. See Pierce, Jr., *supra* note 372, at 600 (“The transparent systematic control mechanisms used by OIRA to control the bureaucracy, however, are not now, and never have been, the most important means through which Presidents, and presidential subordinates who purport to be acting on behalf of the President, exercise control over the bureaucracy. Largely invisible ad hoc White House jawboning is now, and always has been, far more important in its impact on agency policy decisions.”); see also Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006) (an empirical study finding that EPA is lobbied by myriad White House staffers outside of the OMB review process).

411. Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 643–44 (2010).

412. *Id.* at 644.

413. Percival, *Checks Without Balance*, *supra* note 2, at 148.

414. *Id.*; Binyamin Appelbaum, *G.O.P. Asks Businesses Which Rules To Rewrite*, N.Y. TIMES, Jan. 5, 2011, at B1.

415. Percival, *Checks Without Balance*, *supra* note 2, at 187–89.

Will,<sup>416</sup> that the agency ultimately strengthened the lead limits. EPA later phased out all lead from gasoline, perhaps the greatest success story for public health in EPA history. Thus, even though Presidents have long sought to influence agency rulemaking priorities, the White House cannot legally dictate a particular regulatory outcome without the agency first considering evidence submitted during a notice-and-comment procedure. Agency heads ultimately may refuse to promulgate initiatives that would be contrary to the agency's statutory responsibility or else risk having them invalidated in court.

As a practical matter the absence of presidential directive authority means that Presidents must persuade agency heads when they want to influence regulatory decisions entrusted by law to them. Given the President's authority to remove at will the principal officers of executive agencies, it is easy for the President to persuade agency heads to do what he wants. However, as discussed in detail above, history demonstrates that removals have substantial political costs.<sup>417</sup> In the rare case where a presidential appointee so fundamentally disagrees with what the President wants that he refuses to comply, the absence of a legal entitlement to direct the appointee's action provides a useful check on presidential abuses of power, as this Article demonstrates.

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416. George F. Will, *The Poison Poor Children Breathe*, reprinted in *LAW AND THE ENVIRONMENT: A MULTIDISCIPLINARY READER* 109 (Robert V. Percival & Dorothy C. Alevizatos eds., 1997).

417. For a discussion of additional contemporary examples of the political costs of removals, including President George W. Bush's decision to remove seven U.S. attorneys, see Pierce, Jr., *supra* note 372, at 607–10.