

## PRESIDENTIAL POWER MEETS BUREAUCRATIC EXPERTISE

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How can presidential power aid the effective engagement of scientific or other expertise in the federal bureaucracy with a democratic process of policymaking? This enduring question has high salience today.<sup>1</sup> Given the myriad problems facing the United States and the priorities of the Obama administration, we are already seeing new regulatory initiatives that rest on fact and policy judgments to which many disciplines can contribute, for example the climate sciences, biology, engineering, and economics. Nevertheless, the critical judgments underlying new regulations will involve policy choices that must receive the support of political officers and the people themselves to be effective.

A prominent recent Supreme Court case raised several issues concerning this topic. In *Massachusetts v. EPA*, the State sued to force the Environmental Protection Agency (EPA) to regulate emissions of greenhouse gases (such as carbon dioxide) from new motor vehicles.<sup>2</sup> Massachusetts claimed that climate change caused by the gases would have various deleterious effects. The Clean Air Act provides that the EPA Administrator “shall by regulation prescribe” standards to control air pollutants from new motor vehicles “which in his judgment cause” pollution “which may reasonably be anticipated to endanger public health or welfare.”<sup>3</sup> Under the administration of George W. Bush, the EPA had declined to regulate these gases for two reasons. The Administrator first argued, contrary to a position taken during the Clinton administration, that the EPA lacked jurisdiction to ad-

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1 For a discussion of the relationship between science and the law, see generally DAVID L. FAIGMAN, *LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW* (1999); STEVEN GOLDBERG, *CULTURE CLASH: LAW AND SCIENCE IN AMERICA* (1994); SHEILA JASANOFF, *THE FIFTH BRANCH: SCIENCE ADVISERS AS POLICYMAKERS* (1990); Symposium, *Science in the Regulatory Process*, 66 *LAW & CONTEMP. PROBS.* 1 (2003).

2 549 U.S. 497 (2007). For analyses of the case, see generally Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 *SUP. CT. REV.* 51; Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming*, 102 *NW. U. L. REV.* 1029 (2008).

3 42 U.S.C. § 7521(a)(1) (2006).

dress climate change, because Congress had not intended to delegate this power to the Agency. Second, he argued that it would be unwise to regulate, because the cause and effect relationship between the gases and climate change had not been sufficiently established and because action by the EPA would conflict with the President's "comprehensive approach" to the problem. (That approach involved support for technological innovation, voluntary reduction programs, and further research, together with diplomatic efforts to persuade developing countries to reduce their emissions.)<sup>4</sup>

Before *Massachusetts*, the EPA's recitals would ordinarily have sufficed to prevent reviewing courts from forcing it to take any action. The Supreme Court had held that agency decisions not to take enforcement action were "presumptively unreviewable" because such decisions involve broad priority-setting considerations that courts are ill-suited to supervise.<sup>5</sup> Nevertheless, in a 5-4 decision written by Justice Stevens, the Court pressed forward. It rather unpersuasively distinguished the denial of a petition for rulemaking in this case from other kinds of nonenforcement decisions. Proceeding to the merits, it held that EPA did have jurisdiction over greenhouse gases. The Court then concluded that EPA's decision not to regulate was "arbitrary" and "capricious" under the familiar formulation of the Administrative Procedure Act.<sup>6</sup> Disparaging EPA's justifications as "a laundry list of reasons not to regulate," the Court ordered EPA to reconsider whether greenhouse gases endanger public health or welfare by contributing to climate change, and to "ground its reasons for action or inaction in the statute."<sup>7</sup>

The Court's unusually aggressive supervision of EPA in *Massachusetts* seems to be due to the majority's belief that the agency was ignoring its own scientific record, which pointed strongly in favor of regulation, in favor of presidential policies that did not directly answer the statutory command. Justice Stevens cited scientific studies such as those issued by the United Nations's prestigious Intergovernmental Panel on Climate Change for the conclusion that there was indeed every reason to believe that greenhouse gases accelerate climate change.<sup>8</sup> There was no visible deference to President Bush's conclu-

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<sup>4</sup> *Massachusetts*, 549 U.S. at 512-13.

<sup>5</sup> *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

<sup>6</sup> *Massachusetts*, 549 U.S. at 534. The Clean Air Act, 42 U.S.C. § 7607(d)(9)(A), incorporates the Administrative Procedure Act's standard for reviewing rulemaking, which is in 5 U.S.C. § 706(2)(A).

<sup>7</sup> *Massachusetts*, 549 U.S. at 533, 535.

<sup>8</sup> *Id.* at 507-09.

sions as reported by EPA. In essence, the Court was willing to prod the EPA to regulate based on its own view of the science of climate change, whatever the President might think. The Court never explicitly claimed that it was better situated than the President to make such a judgment, but its holding certainly implied such a view.

Unfortunately for the Court's intentions, it is one thing to order administrative action, and another to obtain it. (Knowledge of that difficulty is one reason courts are reluctant to require affirmative agency action.) For the nearly two years left in the Bush administration after *Massachusetts*, the EPA stalled until the clock ran out. It did not do so without some internal tensions, however.<sup>9</sup> In 2008, EPA Administrator Stephen Johnson again declined to regulate greenhouse gases, explaining that existing statutes were "ill-suited" to the task.<sup>10</sup> His conclusion appeared as a preface to a report by EPA's staff that actually supported regulation: he "was simultaneously publishing the policy analysis of his scientific and legal experts and repudiating its conclusions."<sup>11</sup> Obviously, the controlling opinion was that of President George W. Bush.

In his initial days in office, President Barack Obama promised to review the greenhouse gas issue and to act promptly as the facts warranted. It soon became clear that scientific analysis would be prominent in the new administration, and that a sense of urgency about addressing climate change would be present as well. Days after the inauguration, Obama's new EPA administrator, Lisa Jackson, instructed EPA's staff that "[s]cience must be the backbone for EPA programs."<sup>12</sup> The metaphor was apt—as I will discuss, scientific expertise can provide a framework for regulation, but policy fleshes it out. By April, she was ready to propose for public comment the endangerment finding that will trigger a new rulemaking for auto emissions, saying that the supporting science "compelling[ly]" supports the finding.<sup>13</sup> In June, the administration issued a general climate

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9 See David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1143 (2008) (describing the EPA's review of whether it had authority to regulate this area even after *Massachusetts*).

10 Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354 (July 30, 2008) (to be codified at 40 C.F.R. pt. 1).

11 Felicity Barringer, *2 Decisions Shut Door on Bush Clean-Air Steps*, N.Y. TIMES, July 12, 2008, at A1.

12 Memorandum from Lisa Jackson, Adm'r, to EPA Employees (Jan. 23, 2009), available at <http://www.epa.gov/Administrator/memotoemployees.html>.

13 Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,904 (Apr. 24, 2009) (to be codified at 40 C.F.R. pt. 1); see EPA, Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act (Oct. 4, 2009),

change report, concluding that harms from global warming are already present and are worsening.<sup>14</sup> A change of presidential administrations had produced a reversal of regulatory policy.

In the controversy over auto emissions, a President's powers to spur an agency forward or to hold it back had dramatic effect, as has judicial willingness to supervise and overturn agency conclusions of scientific fact and policy even when they obviously reflect presidential priorities. From a separation of powers standpoint, the absent player has been Congress, which has not amended the Clean Air Act to clarify whether and how EPA should address climate change. The controversy also demonstrated the fact that although judicial intervention can alter the policy landscape, the courts cannot actually form and implement new policy—only the two political branches can do that.

For the President, the greenhouse gas controversy poses a challenge: how can he use his constitutional powers to implement his own priorities in ways that fit the available scientific evidence and the existing statutes well enough to be safe from judicial overruling? Substantial legal uncertainty surrounds this question. After more than two centuries under our government, the President's supervisory powers over the branch that he heads remain murky, because the Constitution says so little about statutory administration. Fortunately, Steven Calabresi and Christopher Yoo have provided us an excellent historical treatment of the supervisory powers in *The Unitary Executive*. The book reveals a rich interplay between Presidents and Congress as the two political branches employ constitutional arguments as weapons in the contest for custody of their unruly offspring, the administrative agencies.

I write to argue that effective presidential management of federal regulation can occur without resort to the high stakes of constitutional dispute. Instead, the few constitutional rules that mark the boundaries of this field leave ample room for the development of political solutions to twenty-first century problems. With some adjustments that I will suggest, the subconstitutional techniques of administrative law can do the necessary work of providing a legal framework for the interaction of politics with science.

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<http://www.epa.gov/climatechange/endangerment.html>; see also John M. Broder, *E.P.A. Clears Path to Regulate Heat-Trapping Gases for First Time in the U.S.*, N.Y. TIMES, Apr. 18, 2009, at A15.

14 GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES (Thomas R. Karl et al. eds., 2009), available at <http://www.globalchange.gov/usimpacts>.

Any analysis of the intersection of expertise with regulation must begin with recognition that both of these terms are shorthand for very diverse and complex realities. Scientific techniques and cultures differ along lines of emphasis on theory (physics), experimentation (geology, biology), environmental application (engineering, mathematics), or social application (economics). Of course, any given discipline can mix these approaches. Just as kinds of expertise differ, so do agencies. Single-headed cabinet departments differ from each other and from the multi-member independent agencies. In addition, both scientists and regulators confront various outside influences. Scientists live in complex professional webs; regulators in complex governmental ones. Still, since analysis must begin somewhere, I will outline the worlds of the regulator and the scientist, focusing on the intersections between them that administrative law patrols.

### I. THE EVOLVING ROLE OF EXPERTISE IN THE BUREAUCRACY

Views of the role of expertise in government have gone through several stages in our history.<sup>15</sup> I will sketch the pattern in broad strokes. At first, all seemed simple. Andrew Jackson was famous for asserting that government needed no experts.<sup>16</sup> In Jacksonian America, when most federal employees were part-time customs or postal officers, his belief that anyone having normal gifts and good character could be a bureaucrat rang true. By the turn of the twentieth century, however, the Industrial Revolution had transformed the nation. Now the government took on complex tasks such as setting railroad rates and assuring the purity of food and drugs. An intellectual transformation occurred as well. The Progressive movement settled on the notion of expertise as the answer to many of the difficulties attending new kinds of government functions. Regulation would be performed by neutral experts in service of a unitary public interest.

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<sup>15</sup> For full exploration of the stages described in the text of this section, see generally RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 1.7 (4th ed. 2002); Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749 (2007); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975). For an analysis of the modern situation, see STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993).

<sup>16</sup> See Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1614 (2008) (quoting Jackson's annual message to Congress in which he stated, "I can not but believe that more is lost by the long continuance of men in office than is generally to be gained by their experience").

Unfortunately, this view was unstable because it posited a clean separation between expertise and politics that has never existed.

Just after another great pulse of regulation in the New Deal, the legal realists exploded the notion of apolitical expertise. After World War II, a new conception of administrative law arose to replace the faded Progressive vision. Now interest group pluralism would approximate the Madisonian machine for deriving a public interest from the clash of factions.<sup>17</sup> No one had decided, however, who should run that machine, and how it should be done.

These uncertainties became acute as regulation surged again in the 1970s with the creation of ambitious new fields of health and safety regulation. Before very long, each of the three federal branches asserted a distinct constitutional role in regulating the regulators. However, the decentralized nature of each of the branches prevented the formulation of consistent and coherent instructions to the regulatory agencies, which struggled as best they could to respond to the mixed signals they were receiving, while attempting to solve policy puzzles at the same time.<sup>18</sup>

Congress took the initial lead by enacting statutes that spurred the agencies forward to protect the public. Substantive statutory commands defining the new programs heightened the need for reliable scientific judgment and the need to define the relationship of expertise with policymaking. As Congress tinkered with the statutes over the years, it often added substantive complexity to policymaking by driving the agencies in directions that were not compatible with an understandable initial instruction to protect the public effectively.<sup>19</sup> Congress also proliferated administrative process in an attempt to manage the clash of private interests in search of the pluralist ideal. (Procedural reform is a frequent refuge of those disquieted about policy but unable to state better policy directly.) Added process opened agencies to more diverse outside influences, at the cost of slowing policymaking and making it more expensive.

Unfortunately, the internal organization of Congress fostered a gap between the substantive promises of the statutes and the agencies' capacity to carry them out. Congressional appropriations take

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17 The pluralist view is derived from the argument of *The Federalist No. 10* (James Madison).

18 For an overview of the structure of the three branches, see HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 33–55 (2006).

19 See, e.g., Jerry L. Mashaw, *Law and Engineering: In Search of the Law-Science Problem*, 66 *LAW & CONTEMP. PROBS.* 135, 135 (2003) (analyzing the “problems of integrating science and scientists into law and legal processes” by examining the applied science of engineering in the context of health and safety regulation).

place in a different set of committees from the substantive authorizations, with no mechanism to force coordination between them. Beginning in the 1980s, budget cuts undermined agency performance—to such an extent that it is now common to refer to the regulatory agencies as examples of “Hollow Government.”<sup>20</sup> Exacerbating the agencies’ practical difficulties is the uncoordinated nature of informal congressional oversight of regulatory performance, occurring as it does in multiple authorizing and appropriating subcommittees in both houses of Congress.<sup>21</sup>

As agencies promulgated new regulations in the 1970s, court challenges brought the federal courts into the fray. Able judges in the D.C. Circuit Court of Appeals, where much administrative litigation centers, searched for ways to test claims of agency expertise against both the wiles of lawyers who challenged the regulations and the critical insights that the judges themselves could bring to bear.<sup>22</sup> The court ensured that studies and data assembled by experts were exposed to public scrutiny and testing during the comment period for new rules. It also required agencies to respond to salient comments on this material and to comprehensively explain their resolution of issues of scientific fact and policy. Eventually, the court evolved an intrusive style of review that required the agencies to take a “hard look” at the substantive problems before them and that added new, judicially crafted administrative procedures to ensure fair treatment of affected interests.<sup>23</sup>

The Supreme Court intervened episodically to change the rules of the game, but not in a wholly consistent fashion. Sometimes the Court tried to preserve agency discretion. In *Vermont Yankee*, the Court upheld administrative procedural discretion by forbidding reviewing courts to impose procedures not required by statute.<sup>24</sup> In *Chevron*, the Court increased administrative discretion to decide issues of law by requiring reviewing courts to accept statutory interpretations by agencies if they did not contravene clear statutory com-

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<sup>20</sup> Mark L. Goldstein, *Hollow Government*, GOV'T EXECUTIVE, Oct. 1989, at 12, 12–13.

<sup>21</sup> For a full exploration of the myriad ways by which Congress influences law administration, see Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006).

<sup>22</sup> The most prominent case is *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc), *cert. denied*, 426 U.S. 941 (1976).

<sup>23</sup> PIERCE, *supra* note 15, § 7.4.

<sup>24</sup> *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978); see generally Stephen Breyer, *Vermont Yankee and the Court's Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978) (applauding the Supreme Court's reluctance to confine agency procedure in science policy decisions).

mands and were otherwise reasonable.<sup>25</sup> *Chevron* explicitly approved the kind of election-driven change of statutory interpretation that later occurred in the wake of *Massachusetts*.

Sometimes, however, the Court reduced administrative discretion, as in its *State Farm* decision endorsing strict hard look review of agency decisions of fact and policy.<sup>26</sup> The *State Farm* definition of the scope of review can be interpreted to contemplate an appropriate level of judicial restraint. It calls for a reviewing court to overturn agency action for arbitrariness “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>27</sup> Some federal courts, however, treated *State Farm* as a license to engage in very intrusive review. The *Massachusetts* decision epitomizes this version of the hard look style of review.

The thirteen courts of appeals have struggled to execute these various directives from the Supreme Court faithfully. They cannot do so with entire consistency, however, for the very reason that there are thirteen of them, each of which divides into a much larger number of panels of three to decide particular cases.<sup>28</sup> The resulting set of commands to any agency is incoherent. The agencies suffer most when hard look review of substantive policy decisions asks for “an unachievable level of scientific certainty,” a frequent enough result when generalist judges review specialized administrative records.<sup>29</sup>

The Supreme Court should take an early opportunity to confine the broad substantive implications of *Massachusetts*. It would be enough to call for adherence to the *State Farm* test as originally stated,

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25 *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see generally Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988) (arguing that *Chevron* maximized politically accountable presidential oversight of agencies).

26 *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); see generally Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177 (reading *State Farm* to endorse the doctrine).

27 *State Farm*, 463 U.S. at 43.

28 See Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193 (1992) (detailing the problematic effects of decentralized appellate courts reviewing the behavior of centralized administrative agencies); Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1105–06 (1987) (exploring the implications of judicial decentralization).

29 JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 91 (1990).

not as sometimes applied. The important point is to allow agencies to form policy within statutory limits, even in the presence of substantial conflict and uncertainty in the scientific record.<sup>30</sup> In other words, courts should give agencies the same kind of latitude in reaching fact and policy judgments as they do regarding statutory interpretation under *Chevron*.

Unhappily, there is a reason for variations in the stringency of judicial review that casts little credit on the federal judiciary. Empirical studies have shown a dismaying correlation between the judges' orientation toward regulation and the politics of the President who appointed them.<sup>31</sup> Again, *Massachusetts* is an example. The solution for this problem is simple—an appropriate level of judicial restraint—but hard to achieve.<sup>32</sup> Certainly, it would be in the enlightened self-interest of the judiciary to show more restraint, lest political retribution against the judges arise.<sup>33</sup>

In the 1970s, Presidents began taking an active role in managing regulation.<sup>34</sup> To the extent that this effort is effective, it gives the executive branch a good argument to counter activist judicial review: that agency policy reflects participation by the elected chief executive. The earliest initiative, and still the most prominent technique,

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<sup>30</sup> For critiques of *State Farm*, see CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 183 (1990) (stating that *State Farm* “entails a conception of politics as distinguishable from and in opposition to the required rationality of agency decision making”); accord Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 307 n.191 (2006) (noting the difficulties of determining the basis for an agency’s actions because after *State Farm*, agencies do not declare that the reason for their action is a change in administration).

<sup>31</sup> See generally Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008) (finding political commitments significantly influence the operation of hard look review in EPA and NLRB cases); Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100 (2001) (revealing strong, statistically significant evidence of ideological voting in the D.C. Circuit’s review of the health-and-safety decisions of twenty federal agencies between 1970 and 1996); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) (concluding that “ideology significantly influences judicial decisionmaking on the D.C. Circuit”); Cass R. Sunstein, et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) (confirming through aggregate data that the political party of the appointing President is a fairly good predictor of how individual judges will vote).

<sup>32</sup> Neither liberal activists nor conservative activists among the judges are likely to desist voluntarily, in part because that would leave the field to their opponents. In game theory, this is a prisoner’s dilemma.

<sup>33</sup> Although Congress is not likely to impeach activist judges, it can deny requests for added salary or resources, or limit the courts’ jurisdiction. Presidents, unfortunately, have an incentive to counter past nominations of activists by the other party with activists of their own.

<sup>34</sup> I discuss this presidential role *infra* Part V.

has been a series of executive orders that have required agencies to analyze their proposals carefully and to endure extensive consultation and jawboning from the President's own bureaucrats in his Office of Management and Budget (OMB). These executive orders have imposed a layer of economic analysis atop the various kinds of expertise already present in the administrative records assembled by the agencies. The differing kinds of expertise have coexisted quite uncomfortably.

Two other kinds of executive branch management of regulation have superimposed themselves on the executive order program. First, various executive officers, many of them located in one of the White House units, have contacted agencies ad hoc to supply their views about particular regulations. Second, President Clinton brought to prominence a practice that his successors have continued, of direct presidential intervention to spur an agency to take a particular policy initiative.<sup>35</sup> These three kinds of supervision are not likely to be wholly consistent. Consequently, from the standpoint of an agency, even the executive branch is not unitary in any functional sense. Instead, unless and until the President himself intervenes, various elements in both the presidential bureaucracy and the wider executive branch can be expected to push the agency hither and yon.

As the pace of federal regulation slowed markedly under pressure from these competing and conflicting commands from all three constitutional branches and from various segments in the private sector, many observers lamented the "ossification" of rulemaking.<sup>36</sup> Suggested remedies encompass the actions of all three branches: Congress should streamline both substantive commands and procedural requisites and should provide more money; the courts should ease substantive review of policy; the executive branch should reduce its supervision of particular policy decisions.<sup>37</sup> To date, not much has happened. As the millennium arrived, it seemed to many that there could be too much distrust of expertise, too much political manipula-

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<sup>35</sup> There were scattered earlier examples, such as President Reagan's announcement of an effort to aid domestic auto manufacturers, which led directly to the deregulatory effort that was overturned in *State Farm*. RONALD A. CASS ET AL., *ADMINISTRATIVE LAW* 198 (5th ed. 2006).

<sup>36</sup> See, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 *DUKE L.J.* 1385, 1386-87 (1992) (noting the "existing evidence of the ossification of informal rulemaking[,] . . . [the] consequences[,] . . . [its] causes[,] . . . [and] various ossification avoidance devices").

<sup>37</sup> See generally Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 *ADMIN. L. REV.* 59 (1995); Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 *TUL. L. REV.* 418 (1981).

tion of regulatory decisions, and too much judicial intervention. Postmodern malaise deepened and has not abated.

## II. WAYS OF THINKING

How shall we untangle this snarl? Let us revert to fundamentals by noting some differences between the ways that scientists and regulatory policymakers normally think. That exercise should allow us to isolate the real problems in their relationships that government structure and process must then address.

Consider a climate scientist, who speaks with direct authority on topics that he or she has covered in direct investigation and reported in the usual peer-reviewed places. A fundamental value among scientists is to confine claims to the evidence. Because professional punishment awaits unsupported claims, scientists tend to err on the side of understatement. Yet even a distinguished and prolific scientist can cover only fragments of a field through direct investigation. Beyond projects performed personally, a scientist possesses a far broader range of knowledge acquired through reading papers of students and colleagues, attending conferences, and engaging in myriad casual exchanges within the discipline. Strictly speaking, this extended knowledge has not been tested by personal investigation and outside review, but it is real and is very difficult for anyone outside the scientific community to acquire, especially quickly.

A concrete example may be useful. A colleague of mine who is a geochemist in the University of Colorado's Institute of Arctic and Alpine Research has examined many an ice core in Greenland and has read widely about the ice caps and the signs that they are melting rapidly. He is a true expert on these matters, with a strong claim to deference from the rest of us. On the critical question of causation of the melting, though, he confesses that he begins to stray from his direct knowledge. He can note correlations with the rise in global carbon dioxide levels and can reasonably conclude that the correlations are strong enough to be probative. Yet others may contest his inferences on the basis of specialized or general knowledge about which he has no unique insight. At this point, our geochemist engages the wider community, which is partly composed of other scientists (physicists, statisticians, etc.) and partly of citizens and politicians who must decide what to do about climate change.

When scientists enter the public arena, they encounter temptation to abandon professional discipline and engage in "stealth issue advo-

cacy,” the importing of policy arguments into ostensibly scientific discourse.<sup>38</sup> Two powerful incentives may combine to produce this behavior. One is passion, the scientist’s devotion to the subject matter of his or her career and to convictions developed after much time and effort. The second is employment, the tendency to serve the interests of one’s employer (an agency, a private company’s research arm, a think tank with an agenda). Researchers who are employed by universities may be free of these employment-based influences, because most universities lack an admitted agenda favoring particular scientific theories.

Two additional limitations hamper the contributions of scientists to policymaking. First, because scientific knowledge is specialized, it “ordinarily provides too narrow a base for the instrumental judgments that an intelligent policy would require.”<sup>39</sup> Thus, the very focus that allows scientific inquiry to seek excellence limits its usefulness as a guide to broader questions. Second, policymakers must always be wary of conventional wisdom within any field. Dominant opinion can deter needed theoretical innovation. The familiar notion of “paradigm shift” holds that dominant theories fend off incremental change until they are overthrown entirely.<sup>40</sup> For example, in geology, theories of continental drift were objects of derision until a series of discoveries allowed the theory of plate tectonics to become today’s conventional wisdom.

Alas, it seems that scientists are human. We cannot simply trust but must continuously test them. Distrust of some scientific analysis has reached sufficient levels to produce the derisive term “junk science.” A considerable body of literature—and some court decisions and legislation—address and try to forestall reliance on junk science.<sup>41</sup> Near the end of the Clinton administration, Congress enacted two related statutes to address the problem. First, the Shelby Amendment authorized use of the Freedom of Information Act to obtain data by publicly funded research studies.<sup>42</sup> Second, the Data Quality Act required the OMB to issue guidelines to agencies to

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38 ROGER A. PIELKE, JR., *THE HONEST BROKER: MAKING SENSE OF SCIENCE IN POLICY AND POLITICS* 4 (2007).

39 Douglas Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 274 (2010) (quoting ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 337 (1989)).

40 The classic discussion is contained within THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

41 *See generally* Symposium, *supra* note 1, at 3 (presenting several articles discussing *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and the role of science in judicial decisions).

42 Pub. L. No. 105-277, 112 Stat. 2681 (1998).

“maximiz[e] the quality, objectivity, utility, and integrity” of information they disseminate.<sup>43</sup> OMB must also require the creation of “administrative mechanisms” to allow affected persons to obtain correction of agency-held information. There have been unsuccessful attempts to bring litigation over the validity of scientific findings under the Data Quality Act.<sup>44</sup> Disputes under the Act should be left within the administrative process, and not allowed to furnish a basis for judicial review separate from the testing process that already occurs during review of a final agency regulation, lest opportunities to stall the policy process be increased.

These statutes responded to perceptions that agencies have engaged in a “science charade,” in which they exaggerate the role of science in supporting regulations that actually depend on policy decisions.<sup>45</sup> The statutes may, however, ill fit their ostensible purposes, since the underlying problem is not usually that scientific studies are bad, but that their findings are used inappropriately to support policy conclusions.<sup>46</sup> Certainly the statutes have given interests opposed to federal regulation a new weapon to contest the bases for proposed rules. This creates the potential to improve the scientific basis for regulation, but it adds substantially to the cost and delay in rulemaking processes.<sup>47</sup>

The Bush administration also initiated a controversial “peer-review” process within the Federal Government.<sup>48</sup> There were complaints that the process would slow regulation in return for little gain in its reliability, considering that most scientific investigation already undergoes peer review as it is being generated and that studies held by agencies are already tested extensively in the rulemaking process. Also, agencies that engage in technical rulemaking have science advi-

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43 Paperwork Reduction Act, 44 U.S.C. § 3516(a) (2006); Pub. L. No. 106-554, 114 Stat. 2763, 2763A-153 to -154 (2000).

44 *See Salt Inst. v. Leavitt*, 440 F.3d 156 (4th Cir. 2006) (holding that the Act did not create a legal right to information or its correctness published by the National Heart, Lung and Blood Institute).

45 For an analysis of the phenomenon, see Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613 (1995).

46 Wendy E. Wagner, *The “Bad Science” Fiction: Reclaiming the Debate over the Role of Science in Public Health and Environmental Regulation*, 66 LAW & CONTEMP. PROBS. 63 (2003) (arguing that many administrative reforms using “methodologically unsound” science can “cause significant damage to already crippled administrative processes”).

47 CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* 78–101, 101 (2005) (describing how the Bush Administration has tried “to prevent the public from understanding the gravity of the climate situation [by] sowing confusion and uncertainty” as to the reliability of scientific research).

48 Wagner, *supra* note 46, at 95–96.

sory boards to review and evaluate the information the agency receives.<sup>49</sup>

Regulatory policymakers do not think like scientists and cannot afford to do so. Time and legislation press them for answers that scientists cannot give. In the face of uncertainty, a scientist characteristically wants to perform more studies, in an endless approximation of the truth. Modern statutes, however, are impatient and precautionary. As in the *Massachusetts* case, they typically call for regulation of risks that “may endanger” the public health and welfare, or a similar formulation.<sup>50</sup> The statutes try to forestall harm that is not certain to occur at all, and that in any event would occur years in the future. If regulation waited until the citizenry suffered clear harm, much preventable harm would have been incurred and irreversible forces might ensure that yet more harm will occur. Climate change is the starkest example of this difficulty.

The time horizons of regulators are further compressed by the practical reality of election cycles. Election rhythms of two or four years leave little room for longer run uncertainties about cause and effect in the natural world. This raises the ultimate question: “Can democracy survive complexity?”<sup>51</sup> We cannot tell the answer—it lies somewhere beyond the next election cycle.

The consequence of this regulatory posture is that much modern policy is formulated under conditions of substantial or extreme uncertainty about the scientific facts. For example, regulation often considers prohibiting small doses of a substance that is toxic in high doses, but for which the dose-response level is unknown at the levels under consideration.<sup>52</sup> The overriding question is: how risk-averse should our society be? Scientists can offer guidance but not answers to that question. Their studies may support inferences of danger, and their general knowledge and experience may produce a valuable feel for the issues. At the end of the day, though, the central issue is a political value choice, involving as it does major resource commitments from society and major tradeoffs among affected interest groups.

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49 See JASANOFF, *supra* note 1, at 79–83 (describing some of the problems with the regulatory peer review process).

50 *Massachusetts v. EPA*, 549 U.S. 497, 530 (2007).

51 THOMAS L. FRIEDMAN, *HOT, FLAT, AND CROWDED: WHY WE NEED A GREEN REVOLUTION—AND HOW IT CAN RENEW AMERICA* 406 (2008) (quoting Stanford climatologist Stephen Schneider).

52 The standard example is the benzene controversy, litigated in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980).

A regulator, like a scientist, is not without predictable biases in making value choices. Many career civil servants try to serve the general public by achieving their agency's statutory missions.<sup>53</sup> This is certainly a laudable trait, but it contains the inherent disadvantage that the regulators see and pursue only the limited set of goals that their agencies are assigned. Hence bureaucrats may pursue their statutory missions at excessive cost to society as a whole.<sup>54</sup> That is why all three branches oversee the agencies so constantly and suspiciously. Hence, the distortion of judgment that attends focusing on particular tasks hampers both scientists and regulators, even though their approach to the problems before them differs in other ways. If an agency's policymakers disagree with the agency's scientists (as in the wake of *Massachusetts*), a creative tension results that may foster better policy through argument and mutual learning. If all are in harmony, it will be up to outsiders to test the agency's conclusions to prevent a tendency for "groupthink" to produce what we might call "junk regulation."<sup>55</sup>

In this complex mix of fact, inference, policy analysis, and law, the boundary between expertise and politics remains indistinct, as it always has been. There are, however, better and worse ways of drawing the boundary. Let us turn to the relative contributions of constitutional and administrative law doctrines to the boundary project.

### III. THE APPOINTMENTS POWER

I begin with the power of nomination or appointment of officers because that is where each new administration begins, and because the power to choose those who execute the laws has far greater practical importance than do powers to direct or remove them.<sup>56</sup> (That is,

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53 STEPHEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* (2008). For an exploration of the gap between aspirational views of government service and the reality of life in the civil service, see PAUL C. LIGHT, *A GOVERNMENT ILL EXECUTED: THE DECLINE OF THE FEDERAL SERVICE AND HOW TO REVERSE IT* 131–62 (2008).

54 For a study contradicting this conventional wisdom, see Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006).

55 The concept of groupthink is from IRVING L. JANIS, *VICTIMS OF GROUPTHINK* (1972), and *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FASCOS* (2d ed. 1982); see also CASS R. SUNSTEIN, *GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE* (2009) (finding that Democratic and Republican appointees become more partisan in their voting patterns when they sit with like-minded individuals).

56 For good general treatments of the appointments power, see MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2000); DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* (2008); and DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS*

if political appointees are sufficiently attuned to the administration's priorities, a light touch on the reins will guide them. If not, even the spurs may not work.) The Appointments Clause requires that principal officers be nominated by the President and confirmed by the Senate; inferior officers may be appointed by the President alone, the heads of departments, or (sometimes) the courts.<sup>57</sup> It is clear that Congress may not vest the power to appoint executive officers in itself.<sup>58</sup> This rule maintains the formal separation between the two branches that is required by the Incompatibility Clause because it is crucial to fostering the Madisonian competition between them.<sup>59</sup>

Notwithstanding this clear constitutional line, Calabresi and Yoo demonstrate that throughout our history Presidents have found it necessary to wrestle with Congress (and especially the Senate) for practical control of the appointments power. It turns out that the Senate's check of confirming principal officers soon tended to grow into a power to tell Presidents whom to nominate. Senatorial capture of the nomination power is most notorious concerning judges in the lower federal courts. That loss of power indirectly undermines the President's capacity to execute the laws because of its effects on judicial review of regulations. To the extent that it blurs the partisanship of nominees, however, it is beneficial. Senatorial capture is less evident concerning officers in the President's cabinet, who are generally regarded as his to select. Still, the need to satisfy senatorial factions whose support is needed for legislation may cause a President to select a less favored nominee to appease senatorial appetites. The practice varies for other federal regulators, depending mostly on whether they serve in an independent regulatory commission, in which case Congress claims a special right to participate in nomination. The result is an executive branch that is far less unitary in its selection than Presidents would prefer.

Not surprisingly, this practical diminution of the President's appointments power has led to corrective efforts. Since 1981, Presidents have pushed successfully to increase both the number and pro-

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OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997 (2003).

57 U.S. CONST. art. II, § 2.

58 *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that congressional leaders did not have the constitutional power to appoint members of the Federal Election Commission).

59 U.S. CONST. art. I, § 6. This is the Madison of *The Federalist No. 51*. See generally Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 228 (2007) (noting that Madison thought it was important to do more than clearly delineate a separation of powers between branches; members of departments must have “constitutional means and personal motives” to keep the branches separate).

portion of political appointees in the agencies.<sup>60</sup> Equally important, White House involvement in selection of administrators has become routine. These changes attempt to promote a more unitary policy outlook within the executive, as added layers of the President's supporters struggle to control the career bureaucracy below them while fending off the pressures of oversight by Congress and other outsiders. The resulting shift of power has been away from congressional or party control of patronage and toward presidential selection of persons committed to the President's own agenda.

Every gain comes at some cost. Economists emphasize the universal presence of "agency costs," the tendency of any agent (e.g., a cabinet head) to diverge from exact implementation of instructions from the principal (e.g., the President). The existence of this "slack" cannot be eliminated, and adding new layers of subordinates increases it. The danger, then, is that what was intended to be a chorus becomes a cacophony. This danger explains why the practice of "thickening" the layers of political appointees dismays some public administration scholars, who lament the loss of clean, simple lines of command.<sup>61</sup> By increasing the numbers of political appointees in the executive branch, Presidents have also increased their own managerial responsibilities as they try to implement coherent policies. Ironically, one presidential response to this managerial problem is further thickening to control the expanded apparatus of political appointees. As I will discuss, President Obama immediately appointed several policy "czars" to superintend the agencies.

Centralized supervision of the appointment process can even extend into the supposedly apolitical realm of bureaucratic experts as new agency staff or external advisors can be chosen for their known outlook (for example, believers in or debunkers of global warming). Conformity of outlook that is shared between politicians and experts tends to stifle the dialogue that is necessary for development of sound policy. Thus, political conformity can produce unitary policy, but it risks closed-mindedness or even "groupthink." The recent Bush administration came the closest in memory to turning the cadre of political appointees into a phalanx of conformists. Signals that loyalty to the stated or presumed priorities of the President took precedence over inconvenient facts reduced agency costs and the flow of needed information at the same time.

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60 See generally Barron, *supra* note 9, at 1097 (noting the "politicization of the national bureaucracy").

61 PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 61-95 (1995).

The Bush administration was justifiably condemned for the efforts of political officers to suppress or manipulate judgments of scientists or other experts.<sup>62</sup> In 2008, the Union of Concerned Scientists (UCS) petitioned Congress to protect “scientific freedoms,” including freedom “to conduct their work without political or private-sector interference” and “to candidly communicate their findings to Congress, the public, and their scientific peers.”<sup>63</sup> The most prominent example of the behavior that UCS condemned concerned efforts to muzzle a distinguished NASA climate scientist, James Hansen, by a young political appointee who possessed far more zeal than judgment or knowledge.<sup>64</sup> Regardless of whether Hansen is right or wrong, I think we should know his views. Anyone can then respond to them, and no one will think Hansen speaks for the administration if a simple disclaimer is made. A change in administrations will not automatically cure this problem. It is perfectly possible to substitute liberal zealots for the conservative ones in agency corridors.<sup>65</sup>

One simple check on this tendency toward manipulation would be to assure that the views of experts in nonpolitical positions are freely available to Congress and the public. Political officers would then remain free to disagree with dissenting experts, but they would have to do so openly, and the public could judge the debate. Everyone understands the need for the political appointees in an administration to toe the official line, but I think the power to compel conformity need not and should not extend to expert staff. The Obama administration made an early and generalized commitment to transparency,<sup>66</sup> but has yet to extend the principle to this level of specificity.

Is the executive branch so constitutionally unitary that it must speak with a single voice? Calabresi and Yoo recount a controversy dating from the early Republic about independent executive branch

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62 For criticisms of the Bush administration’s attempts to distort scientific findings, see MOONEY, *supra* note 47; see also SETH SHULMAN, *UNDERMINING SCIENCE: SUPPRESSION AND DISTORTION IN THE BUSH ADMINISTRATION* (2006).

63 Union of Concerned Scientists, 2008 Statement: Scientific Freedom and the Public Good, [http://www.ucsusa.org/scientific\\_integrity/abuses\\_of\\_science/scientific-freedom-and-the.html](http://www.ucsusa.org/scientific_integrity/abuses_of_science/scientific-freedom-and-the.html). The petition was signed by more than 15,000 scientists, including over fifty Nobel Laureates, [http://www.ucsusa.org/scientific\\_integrity/solutions/big\\_picture\\_solutions/prominent-statement-signatories.html](http://www.ucsusa.org/scientific_integrity/solutions/big_picture_solutions/prominent-statement-signatories.html).

64 See generally MARK BOWEN, *CENSORING SCIENCE: INSIDE THE POLITICAL ATTACK ON DR. JAMES HANSEN AND THE TRUTH OF GLOBAL WARMING* (2008).

65 See John M. Broder, *Behind the Furor Over a Climate Change Skeptic*, N.Y. TIMES, Sept. 25, 2009, at A19, for a story about claims that a climate change debunker on the EPA staff was muzzled by political superiors.

66 See Memorandum of January 21, 2009, 74 Fed. Reg. 4685 (Jan. 26, 2009).

communications with Congress, for example from the Treasury Department.<sup>67</sup> This history reveals an episodic pattern of direct communications from executive staff to Congress, accompanied by fairly regular assertions by their superiors that it ought to stop. Modern practice dates from 1972, when OMB Circular A-19 called for all executive branch testimony and other direct communications to Congress to be controlled by OMB.<sup>68</sup> The Circular has generally been effective, although members of Congress grumble about it regularly and leaks undermine it.

Recent disputes about direct agency communications with Congress have concerned statutory inspectors general in the agencies, who are charged to report misconduct directly to Congress as well as to their executive agencies.<sup>69</sup> The executive has complained that requiring these direct communications is unconstitutional, but the inspectors general remain in place and issue their reports. From this inconclusive history, I do not infer a matured presidential constitutional power to control communications outside the executive branch down to the nonpolitical levels. Moreover, the value of political accountability that underlies theories of the unitary executive suggests caution about the adoption of constitutional postulates that restrict the very flow of information that is needed to make accountability real and not merely formal. For example, the dispute between political and professional staff in the EPA that arose in the wake of the *Massachusetts* decision illuminated a controversy about scientific fact and policy that the public should have a chance to evaluate.

Effective policy dialogue requires both an informed speaker and an intelligent listener. From the 1970s to the 1990s, Congress had an institutional capacity to receive and evaluate expert advice from the agencies and other sources, the Office of Technology Assessment (OTA).<sup>70</sup> The OTA provided high quality bipartisan assessments of

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67 STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 85 (2008). This controversy related to important issues about the unitariness of the executive, because it was part of a dispute about separating the sword and the purse within the executive branch. *Id.* at 134.

68 *Id.* at 348. See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, CIRCULAR NO. A-19 (1979), available at [http://www.whitehouse.gov/omb/circulars\\_a019/](http://www.whitehouse.gov/omb/circulars_a019/).

69 Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978); CALABRESI & YOO, *supra* note 67, at 366–67. See generally PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* (1993) (examining the role of inspectors general and the legal issues surrounding their duties).

70 BRUCE BIMBER, *THE POLITICS OF EXPERTISE IN CONGRESS: THE RISE AND FALL OF THE OFFICE OF TECHNOLOGY ASSESSMENT* (1996) (examining the relationship between experts and elected officials through a study of the interactions between the OTA and Congress).

technical policy issues to members of Congress. It was abolished at the behest of Speaker of the House Newt Gingrich, who preferred to form his own views unguided by anyone (except the ever-present lobbyists, presumably).<sup>71</sup> This was an extremely shortsighted and counterproductive step. Congress should restore the OTA to help it evaluate the myriad scientific policy disputes that will suffuse future regulation. The volume of available materials is simply far too great for digestion and evaluation by any single congressional committee or its staff.

#### IV. THE REMOVAL POWER

The President's constitutional power to remove subordinate executive officers occupies center stage in *The Unitary Executive*. In unitary theory, a plenary removal power confirms the President's core powers to select his subordinates and to direct their execution of the laws. The stakes appear to be high, because it may be that only a fully unitary executive can form and execute coherent and consistent policy. Even an elegant theory, however, must fit the facts, and this one does not.

For four reasons, I do not think a strong unitary theory is either necessary or desirable. First, the executive branch has never been unitary in fact, and never will be. The Washington administration (the very model of unitariness in modern nostalgia) contained the warring Hamilton and Jefferson, whom an often exasperated Washington soothed and managed as best he could. In modern times, every President still struggles mightily to control his own immediate subordinates, to say nothing about the vast and remote bureaucracy. The practical issue is not whether the President should assure that the executive branch is unitary as a whole, but rather *where* and *how much* he should try to unify it. A theory of plenary removal power is overdetermined as a way to address this issue.

Second, for good reasons the modern Supreme Court has not accepted the unitary version of the removal power. The Court's current test is that removal restrictions are valid unless they "impede the President's ability to perform his constitutional duty."<sup>72</sup> Since this test just restates the underlying constitutional issue, it is essentially uninformative. Its announcement in a case approving independent prosecutors who might threaten the President's own continuation in of-

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<sup>71</sup> MOONEY, *supra* note 47, at 49–66.

<sup>72</sup> *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

vice (as one of them later did) suggests that there are few limits to congressional restrictions on removal. I do not favor a minimalist view of presidential removal power, for reasons that need not detain us.<sup>73</sup> It is enough to say that I do perceive good functional reasons for restricting plenary presidential removal of members of some of the independent regulatory agencies. For example, Presidents should have to justify removal of those who control our money supply (the Federal Reserve), or regulate federal elections (the Federal Election Commission), or regulate mass communications (the Federal Communications Commission).

Third, Congress has certainly never accepted a unitary theory of presidential removal. Instead, it has busily legislated various restrictions on removal for principal and inferior officers and for employees. As Calabresi and Yoo demonstrate, Presidents have regularly objected to these restrictions for unitary reasons. But as Calabresi and Yoo deny, Presidents have effectively acquiesced in many of them. Presidents have signed many statutes containing removal restrictions, do not regularly remove members of the independent agencies, and are quite cautious about intervening in policymaking by these agencies. Presidential grumbling about independent administrative functions should not be mistaken for a general declaration of war against them, a step that is never in the President's best interests. Why not? Because every President wants to gather enough political power to accomplish his main policy goals, and a retreat on a minor issue of removal may allow a broader advance under other statutory powers. Warring with Congress on a matter more of principle than of power is not a formula for presidential success.

Fourth, as my last assertion implies, constitutional definitions of the removal power simply do not matter very much to the conduct of our government. For the politics of removal often overwhelm constitutional theory. For decades, Presidents of both parties quailed before the politically untouchable J. Edgar Hoover, their nominal junior subordinate. A cabinet member who has a political base may be insulated from removal, whatever the level of presidential irritation he or she causes (Hillary Clinton is quite safe). On the other hand, a President may have to relinquish the services of a deeply trusted but tarnished subordinate, whatever his reluctance (Alberto Gonzales had to go). Probably the best protected single independent officer of all is the Chair of the Federal Reserve, but I do not doubt that if Ben Bernanke fails spectacularly enough in attempting to manage the

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<sup>73</sup> Interested readers may consult BRUFF, *supra* note 18, at 411–49.

current economic crisis, President Obama could force him from office.

These observations about the politics of removal suggest that within limits, Presidents are more likely to tolerate than to remove balky or ineffective subordinates. Threats of dismissal and vigorous purges are not preferred supervisory tools for any good manager, especially in government. Firing someone you had earlier selected invites criticism of your own judgment. In the executive branch, another position must often be found for a subordinate who is to be eased out (an ambassadorship, perhaps?). And most important, for any principal officer a substitute must be found who can survive confirmation by a possibly aroused Senate. At the least, the replacement process invites unwelcome congressional oversight and criticism of the administration. It is often better to muddle along.

For all these reasons, the constitutional power of removal, whatever its formal extent, dwells in the shadows of operational government. That does not mean that it is unimportant, however. Understandings about removal do guide analysis of the President's directive power, which is not specified in the Constitution. At this point statutory relationships between the President and administrators become pertinent. Most regulatory statutes assign responsibility for implementation to subordinate administrators rather than to the President directly. The relationship between the President and an agency head is then derived from the residual removal power. This approach is indirect because the Constitution says so little about statutory administration.

There are, however, two pertinent provisions in Article II that imply what I believe is a sound view of the fundamental nature of presidential supervision of administrators. First, the President's constitutional duty to "take Care that the Laws be faithfully executed" is phrased in the passive, implying strongly that subordinates will do the actual implementation of statutes.<sup>74</sup> Similarly, the presence of the clause allowing the President to "require the Opinion, in writing" of agency heads on subjects "relating to the Duties" of their offices implies that when Congress places a statutory decision in the hands of a subordinate administrator, that officer and not the President must decide, subject of course to presidential oversight.<sup>75</sup>

The controversy between President Andrew Jackson and Secretary of the Treasury William Duane over removal of federal funds from

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<sup>74</sup> U.S. CONST. art. II, § 3.

<sup>75</sup> *Id.* § 2.

the Bank of the United States, which Calabresi and Yoo recount in detail, is consistent with this relationship.<sup>76</sup> Nothing in that episode suggests that Jackson thought he could take the statutory decision into his own hands. Jackson was free, like any President, to specify the decision he preferred, and to remove a cabinet officer who could not accept that decision. Jackson made his desire clear, Duane resisted on legal grounds, and Jackson fired him. The senatorial check on confirmation of a successor then opened the statutory issues to a quite contentious public debate, providing the accountability that is at the heart of the thesis advanced by Calabresi and Yoo.

The Duane episode reveals why the issue of presidential power to command administrative decisions has produced so much confusion, even within the executive branch.<sup>77</sup> Quite simply, the question of a constitutional directive power has never been answered by the courts because it is never presented to them. Presidents do not ordinarily have to direct their principal subordinates to take particular actions—a suggestion will do. The action is then taken and justified in the name of the subordinate, masking the President's influence.<sup>78</sup> No articulation of constitutional power occurs. If there is enough resistance to impel a directive, there may be enough to force a removal, as Jackson discovered. Even when there is a removal, the legal effect of the President's initial directive never needs resolution. The President does not execute the statutory action himself; rather, he seeks a replacement who will do so. Once a more compliant officer is confirmed (Roger Taney in the bank case), that officer takes responsibility for the statutory action. The President remains in the background.

Thus, the President's power to command subordinate officers, like his power to remove them, dwells in the constitutional shadows. Unlike the removal power, however, directives are in daily use, albeit with enough distance from statutory implementation to leave the ultimate constitutional questions unresolved. Let us turn, then, to the ways that Presidents conventionally manage regulatory policymaking.

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76 CALABRESI & YOO, *supra* note 67, at 105–22; for my own, similar version of this episode, see BRUFF, *supra* note 18, at 457–59.

77 CALABRESI & YOO, *supra* note 67, at 88–89, reveals the dithering that has occurred.

78 The leading case explaining and accepting this relationship is *Sierra Club v. Castle*, 657 F.2d 298 (D.C. Cir. 1981).

## V. THE DIRECTIVE POWER

When federal agencies entered the brave new world of health and safety regulation after 1970, Presidents soon realized that the high political stakes that were involved merited their attention. Yet the complexity and uncertainty of any given rulemaking frustrated effective supervision by the relatively small staff in the White House, to say nothing of their capacity to oversee the mass of all emerging regulations. The initial response has remained the dominant one: Presidents issue executive orders that require agencies to perform cost-benefit analyses of their regulations and to submit the regulations and the analyses to the OMB for a process of review and consultation.<sup>79</sup> President Reagan's order, issued in 1981, has been the model for its successors, which have added detail and altered some emphases within the same basic framework. Congress has never directly authorized (or forbidden) the program, although it did create the Office of Information and Regulatory Affairs (OIRA) within OMB to administer it.<sup>80</sup> OIRA consists of a professional staff of economists and other policy analysts, with a political appointee who is confirmed by the Senate at the top.<sup>81</sup>

The executive order program is an important tool for Presidents to convey their overall regulatory values to the bureaucracy. Over the years, it has become regularized, largely open, and professional in tone. It fosters useful dialogue between agency experts and the President's staff in OIRA. Nevertheless, it has important limitations. It prescribes general principles, not particular outcomes; its focus on

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79 The executive order programs have generated a large literature, including some empirical analyses. See generally PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW 511–39 (2d ed. 2005); CHARLES TIEFER, THE SEMI-SOVEREIGN PRESIDENCY: THE BUSH ADMINISTRATION'S STRATEGY FOR GOVERNING WITHOUT CONGRESS 61–88 (1994) (regarding Bush 41); James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851 (2001) (Reagan through Clinton); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989) (Reagan); Stephen Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003) (Reagan through Clinton); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986) (Reagan administration program); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (Clinton); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161 (1995) (Clinton). For discussion of cost-benefit analysis, see THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991); CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION (2002).

80 Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified in scattered sections of 40 U.S.C., 44 U.S.C., and 50 U.S.C.).

81 OIRA's website is <http://www.whitehouse.gov/omb/inforeg/>.

economic analysis gives it a deregulatory cast; and it improves rules at the margin rather than impelling large revisions of priorities and programs.

By 2009, the legality of the program appears to be beyond serious question. Presidents can cite their constitutional duty to assure the faithful execution of the laws and their explicit power to require opinions from administrators. The executive orders routinely contain a caveat that they command action only to the extent permitted by law, acknowledging that statutory limits to administrative discretion are controlling. Overall, the program at least qualifies for Justice Robert Jackson's "zone of twilight" of presidential power that is neither authorized nor forbidden by pertinent constitutional and statutory provisions.<sup>82</sup> By now, there is a respectable argument that Congress has acquiesced in the program, which has operated in a roughly similar fashion under Presidents of both parties for almost thirty years.

The executive order program reveals that the world of presidential supervision of agency action has evolved substantially since Andrew Jackson confronted William Duane. Today, instead of a clash of titans, we usually have friction between bureaucracies. Even—or especially—in the modern world, there is reason to preserve a simple chain of command between the President and the administrators in whom statutory decisions rest, as a recent controversy reveals. The second President Bush issued Executive Order No. 13,422, which both increased the gatekeeping role of the regulatory policy officers within the agencies who administer the executive order program, and appeared to detach them somewhat from supervision by the administrators.<sup>83</sup> The ultimate risk was that discretion vested by statutes in the agencies would shift into the White House bureaucracy.<sup>84</sup> President Obama rescinded this executive order soon after taking office,<sup>85</sup> and was right to do so. The existence of these officers as contact points for both OIRA and other White House officers is beneficial,

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<sup>82</sup> BRUFF, *supra* note 18, at 108–09.

<sup>83</sup> Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007). *See generally* Michael Hissam, *The Impact of Executive Order 13,422 on Presidential Oversight of Agency Administration*, 76 GEO. WASH. L. REV. 1292 (2008) (analyzing the changes that Executive Order 13,422 made and noting, among other observations, that under the order the White House will have a gatekeeper in each agency).

<sup>84</sup> *See President Bush's recent amendments to Executive Order 12866: Hearing on Exec. Order 13,422 Before the Subcomm. on Investigations and Oversight of the H. Comm. on Science and Technology*, 110th Cong. 1–2 (2007) (statement of Peter L. Strauss, Betts Professor of Law, Columbia Law School) (expressing concern that Executive Order 13,422 changed the President's role in regulatory planning from that of an overseer to that of a decisionmaker).

<sup>85</sup> Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009).

but their subordination to the chain of command in their agency needed restoration to ensure that the entire agency's point of view (including that of expert staff) would be considered in policymaking. Any agency's disparate elements come together to form official policy only at the level of the administrator. The opportunity to reach and state statutory policy is a prime responsibility of any agency head, and must not be diluted. And if White House push comes to presidential shove, it is the administrator who should communicate the views of the staff to the chief executive.

Recent Presidents have overlain the OIRA program with occasional directives of their own to agencies to commence particular rulemakings. President William Clinton personally announced that the Food and Drug Administration (FDA) would regulate tobacco advertising to children, and took political credit for the final rule.<sup>86</sup> President George W. Bush issued some directives, with less publicity than his predecessor employed. For example, he asked the Secretary of Health and Human Services to implement regulations on the privacy of medical records that had been inherited from the Clinton administration, but to recommend "appropriate modifications to the rule."<sup>87</sup> The agency complied without formally mentioning presidential participation in the change.

The Bush administration also employed a new tool that was implemented by OIRA, the "prompt letter." This was "a public request by OIRA, to a regulator, that a rulemaking be initiated or completed, that information relevant to a regulatory program be disclosed to the public, or that a piece of research or analysis relevant to rulemaking be conducted."<sup>88</sup> The letters were used in a variety of contexts, for example food labeling and workplace safety. They were a salutary way for the administration to communicate priorities to the regulators.

In the first weeks of his presidency, Barack Obama issued a series of policy instructions to federal regulatory agencies. Obama's brief memoranda to the agencies were appropriately restrained. In each case, he "requested" an agency to pursue a particular rulemaking un-

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86 Kagan, *supra* note 79, at 2282–83. For critiques of the Clinton program, see Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI-KENT L. REV. 987 (1997); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI-KENT L. REV. 965 (1997).

87 Statement on Federal Regulations on Privacy of Medical Records, 37 WEEKLY COMP. PRES. DOCS. 611–12 (Apr. 16, 2001). The resulting regulation is at 67 Fed. Reg. 53,182 (Aug. 14, 2002).

88 John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 460 (2008) (citations omitted).

der its statutes, but in no case did he direct any outcome for the agency to reach. First, he asked the EPA to reconsider a Bush administration denial of a requested waiver for California and other states that would have allowed state emission standards for new motor vehicles to be more stringent than federal standards.<sup>89</sup> He also asked the Secretary of Transportation to speed the promulgation of new automobile fuel economy standards.<sup>90</sup> And he requested the Secretary of Energy to issue new appliance energy efficiency standards.<sup>91</sup>

Specific directives, such as those by Presidents Clinton, Bush, and Obama, can overcome the ossification of rulemaking and galvanize agency action on particular topics. They are a way for Presidents to cut through the complex web of relationships with public and private entities that any agency inhabits and give it a direction to follow.<sup>92</sup> I think these directives are surely within presidential powers when they select priorities from the vast statutory menu and set a general policy direction. Within our government, the President is in the unique position of ensuring that a “mass of legislation” be executed.<sup>93</sup> Setting priorities for the executive branch and spurring new initiatives are core presidential responsibilities.

There are, however, two legal risks to avoid. Both of these risks have presented enduring problems for the executive order programs.<sup>94</sup> First, a particular directive can induce a violation of statutory limits. President Clinton’s tobacco initiative had exactly that effect. The FDA had long taken the view that it had no jurisdiction over tobacco. Clinton impatiently overrode the FDA’s caution, and the Supreme Court struck down the regulation on the jurisdictional ground.<sup>95</sup> Under its *Chevron* doctrine, the Court defers to agencies’ interpretations of their statutes unless they are contrary to clear statutory limits or otherwise unreasonable. In the tobacco case, the Court invoked the first exception. In *Massachusetts*, the Court considered the President’s position to be both illegal and unreasonable. Thus, in crafting their administrations’ legal policies, Presidents should also respect the knowledge and experience that agency lawyers possess.

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89 State of California Request for Waiver Under 42 U.S.C. 7543(b), the Clean Air Act, 74 Fed. Reg. 4905 (Jan. 28, 2009).

90 The Energy Independence and Security Act of 2007, 74 Fed. Reg. 4907 (Jan. 28, 2009).

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

92 For the complexities of these webs, see EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* (2005).

93 The quotation is from *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 688 (1952) (Vinson, C.J., dissenting).

94 See generally Bruff, *supra* note 79.

95 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

The second legal risk is the dictation of policies that are not supported by the administrative records to which the government's experts contribute. Any final administrative implementation of a statute requires careful analysis of issues of fact, policy, and law, to which both staff experts and political appointees in the agencies can contribute. Short-circuiting that process can produce ill-considered or even illegal decisions. Thus, dictating a particular agency action is fundamentally different from initiating a rulemaking process that will have a general direction but not a preordained outcome.

There are also policy risks. First, unless the President is quite sparing about the number of these directives he issues to a particular agency, the chronically underfunded regulatory agencies may find themselves overwhelmed, unable to meet their normal statutory responsibilities.<sup>96</sup> Second, every presidential action carries various White House communications in its wake. This followup activity can generate conflicting or incoherent commands to agencies.

Whether or not the President becomes personally interested in a rulemaking, executive officers from the White House or from other agencies may offer their views. Some of this activity occurs in routinized forms of interagency review. Ad hoc participation also occurs. For example, various White House officers have intervened sporadically in important rulemakings to inject their views outside the OIRA process.<sup>97</sup> Therefore, a President who wishes to coordinate federal regulatory policy must first coordinate the activities of both his own staff and the heads of all the agencies.

In modern times, Presidents oversee a White House bureaucracy of substantial proportions. Recently, the Executive Office of the President has ranged from 1500–1900 persons, while the White House Office within it has had about 400–500 persons.<sup>98</sup> Of course, these numbers do not count the cabinet departments and the various executive and independent agencies they regulate. A President who wants to control the executive branch must first master his own staff, the cabinet, and a cloud of other regulators. Clearly, the President

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<sup>96</sup> For a case involving delayed regulation due to many kinds of conflicting oversight, some of it from the executive branch, see *Public Citizen Health Research Group v. Chao*, 314 F.3d 143 (3d Cir. 2002).

<sup>97</sup> See 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) (reviewing White House contacts with the EPA by the Bush 41 and Clinton administrations).

<sup>98</sup> See The American Presidency Project, Size of the Executive Office of the President (E.O.P.), <http://www.presidency.ucsb.edu/data/eop.php>; see also U.S. Office of Personnel Management, Federal Employment Statistics, <http://www.opm.gov/feddata/html/2008/november/table2.asp>.

must set his own administrative priorities clearly before he can set anyone else's.

The creation of new White House officials carrying regulatory portfolios in the Obama administration is an attempt to provide overall coordination for policymaking. Adding a new bureaucratic layer of "czars" does have the potential to bring interested agencies into agreement on overall policy and to assure presidential endorsement of the choices made. If these czars can coordinate both the agencies and other elements of the White House bureaucracy, then the President will need to control only the czars themselves. Nevertheless there remain the legal and policy risks outlined above; these risks may be exacerbated by an added level of executive branch oversight. Above all, the czars must leave the responsibility to make regulatory decisions where the statutes place it, in the agency heads.

Since the job description for czar appears nowhere but in the President's mind, there is a special opportunity to use these officers to improve the engagement of regulation with expertise. An officer who lacks line responsibility for a particular statutory portfolio but who has the duty to coordinate policy broadly can seek input from a wide range of sources. These can include experts of various kinds from inside and outside the government, without regard to the constraints that inhere in focused regulatory programs. Since the czars are not likely to be experts themselves, however, it remains necessary to test the information and opinion that flows in. The simple way to do that is to forward the material to the agency or agencies responsible for considering it in their programs.

## VI. CONCLUSION

For the President personally, my analysis suggests concentrating on a few critical tasks. First, he should exercise his constitutional power of appointment to select regulatory officers who understand and appreciate the boundary between expertise and policy and the potential for valuable contributions across the boundary. Second, he should free the government's experts who are not in political positions to communicate their views on science and policy to Congress and the public generally. Third, he should limit the number of prompting directives that he issues to regulators to a few crucial issues for which new priorities need to be set. Fourth, to coordinate federal policy he should focus on working with relatively few officers in sensitive positions—his czars, the senior White House staff, and the heads of rulemaking agencies. A single person could do that much.

For me, the foregoing outline of basic supervisory relationships suffices to portray an executive branch that is unitary enough both to serve the apparent purposes of the Constitution and to promote the kind of dialogue between specialist and generalist that meets the nation's need for sound policy.