

William & Mary Bill of Rights Journal

Volume 16 (2007-2008)
Issue 1 *Symposium: The Last Word? The
Constitutional Implications of Presidential
Signing Statements*

Article 4

October 2007

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Repository Citation

M. Elizabeth Magill, *The First Word*, 16 Wm. & Mary Bill Rts. J. 27 (2007),
<https://scholarship.law.wm.edu/wmborj/vol16/iss1/4>

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THE FIRST WORD

M. Elizabeth Magill*

Does the President get the last word in the legislative process when he issues a signing statement? Those angry about President Bush's December 2005 signing statement on the Detainee Treatment Act thought he did just that. Implying that the statute's prohibitions on cruel, inhuman, or degrading treatment would not apply in certain circumstances,¹ President Bush's statement provoked an outcry.² Critics claimed that the President did not have the political muscle to defeat the statute, so he instead announced that he would sometimes ignore it. Having the last word has its advantages.

But so does having the first word. Signing statements come at the end of the legislative process, but they also come at the beginning of the life of a law. President Bush's signing statement was controversial not only because it was the last word, but because his words mattered.³ In the absence of a definitive judicial interpretation of the statute, the signing statement would guide those in the executive branch who were bound to follow the law.

This Article, using signing statements as one example, analyzes the various tools available to Presidents to exert influence over actors in the executive branch. Signing

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¹ See Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, 41 WEEKLY COMP. PRES. DOC. 1918–19 (Dec. 30, 2005).

² See Elisabeth Bumiller, *For President, Final Say on a Bill Sometimes Comes After the Signing*, N.Y. TIMES, Jan. 16, 2006, at A11.

³ A recent Government Accountability Office (GAO) report seeks to measure the effect of presidential signing statements on subsequent agency behavior. See U.S. GOV'T ACCOUNTABILITY OFFICE, PRESIDENTIAL SIGNING STATEMENTS ACCOMPANYING THE FISCAL YEAR 2006 APPROPRIATIONS ACTS (2007), available at <http://www.gao.gov/decisions/appro/308603.pdf> [hereinafter GAO REPORT]. The GAO examined nineteen provisions out of 160 singled out by the President in his signing statements. *Id.* at 1. In each case the President issued a signing statement identifying some constitutional objection to a provision of a statute he signed, and the GAO investigated what the agency thereafter did with respect to the provision. *Id.* It found the following: In six cases, the agency did not implement the statute as written; in ten cases it did implement the statute as written; and in three cases the President's objection related to a provision of the statute that did not come into play. *Id.*

statements are notable because they permit the President to instruct subordinates *ex ante*. They are, that is, the “first word”—the first step in the process of turning laws into on-the-ground reality. But they are just one of many instruments Presidents can rely on to manage, direct, and supervise subordinate officials. To assert their will, Presidents can rely on the appointment power to place like-minded officials in key positions, conduct White House review of important proposed actions of subordinates, and, as signing statements illustrate, provide *ex ante* guidance to executive branch actors about how they should exercise their authority.

Whether these tools permit the White House to effectively control the bureaucracy is of interest in many quarters. It is of intense interest to Presidents and their staffs. They face a vast executive branch staffed by people who will not always do as the President would wish. Increasing presidential control over the bureaucracy is also the subject of intense debate among observers of the executive. Many have documented the fact of increased White House direction of the bureaucracy.⁴ Critics disagree over the wisdom of this development. Advocates of accountability applaud increased presidential efforts to control the executive branch.⁵ Critics fear that such accountability will displace agency professionalism and expertise with politics.⁶ For a politician to have a strategy for White House control, or for a critic to have a view about the wisdom of such control, it would be useful to know as a positive matter, which presidential tools are the most effective and which are least effective in achieving presidential wishes. This Article takes up that positive question. The agenda here is not normative; the Article takes no position on whether further Presidential control of subordinates is a good or bad thing. Instead, the Article takes the perspective of a White House seeking to effectuate its will and assesses the strengths and weaknesses of each of the strategies available to the President to assert control over the executive branch.

To do so, the Article identifies a variety of circumstances in which Presidents might worry about the actions of subordinates and examines presidential responses in order to assess their efficacy. The President can appoint key personnel; he can provide *ex ante* instructions; and he can review major agency actions *ex post*. These strategies are not equally effective. As this Article will show, the effectiveness of a given strategy depends both on the task assigned to the subordinate official and the nature of that official’s potential drift away from the White House. An important

⁴ See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3–11 (1995); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 965–68 (1997).

⁵ The most significant recent advocate is Dean Elena Kagan. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2319–46 (2001).

⁶ See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462–63 (2003); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987–89 (1997).

lesson of the analysis is that *ex ante* instructions, like signing statements, have some distinct advantages over *ex post* review in controlling certain kinds of discretionary actions by subordinates. In particular, *ex ante* methods of control could allow the White House to control exercises of discretion by subordinate actors that are difficult to control through *ex post* means. Some of the exercises of discretion that may be most effectively controlled by *ex ante* mechanisms are also generally immune from judicial review. In the absence of judicial control of these administrative actions, the President may be able to exercise particularly strong control over an agency.

I. PRESIDENTIAL DIRECTION OF SUBORDINATES AND ITS SCOPE

A. Delegation of Discretion to the Executive Branch

Some federal statutes, like the Federal Employer's Liability Act,⁷ largely regulate the conduct of private parties. Others, like the False Claims Act,⁸ regulate governmental conduct directly but require little governmental action to implement. But many statutes that regulate private conduct (the Clean Air Act⁹) or governmental conduct (the Detainee Treatment Act¹⁰) permit or require some governmental action to interpret or implement them. Executive branch actors are required or authorized to take steps in order to translate the legal command into on-the-ground consequences. The Department of Justice may be asked to interpret a federal statute that limits governmental agents' conduct. Or, agencies may be authorized or required to take a variety of actions. A statute may require an agency to promulgate a rule to implement the statute, to entertain applications for government benefits or licenses, to adjudicate disputes between private parties, or to bring enforcement actions against violators of the statute.

Presidents, of course, do not take most of these actions directly. Many statutes delegate authority to actors other than the President—such as the Attorney General, the Secretary of Health and Human Services, and others. But even when a statute delegates authority to the President, he relies heavily on others. Reliance on others surely has its advantages, especially when there are legions of them. That increases the number of tasks the President can perform, but it also presents a well-known problem: Those who implement the law may not do as the President would.

⁷ Federal Employer's Liability Act of 1908, ch. 149, 35 Stat. 65 (1908) (codified as amended in scattered sections of 45 U.S.C.).

⁸ False Claims Act, ch. 67, 12 Stat. 698 (1863) (codified as amended at 31 U.S.C. §§ 3729–31 (2000)).

⁹ Clean Air Act, ch. 360, 69 Stat. 322 (1955) (codified as amended at 42 U.S.C. §§ 7401–7642 (2000)).

¹⁰ Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified at 42 U.S.C.A. § 2000dd-0 (West Supp. 2007)).

Just ask Presidents. They have long complained about their inability to control the federal bureaucracy. Harry Truman lamented: "I thought I was the President, but when it comes to these bureaucracies, I can't do a damn thing."¹¹ He later predicted that his successor, Dwight Eisenhower, would become frustrated because "he'll say, 'Do this! Do That!' *And nothing will happen.*"¹² John F. Kennedy told a caller, "I agree with you, but I don't know if the government will,"¹³ and reportedly once lined up fourteen people in the Oval Office "to find out where his executive order stopped—because it never came out the other end."¹⁴ Richard Nixon bemoaned: "We have no discipline in this bureaucracy."¹⁵ Jimmy Carter once told the press, "Before I became president, . . . I realized and was warned that dealing with the federal bureaucracy would be one of the worst problems I would have to face. It has been even worse than I had anticipated."¹⁶

B. A Guide to Presidential Strategies to Control Subordinates

Do not feel too sorry for them. Presidents are hardly powerless. They have many tools at their disposal to control the bureaucracy. Power over personnel is first on the list. The President appoints and can remove, either at will or for cause, the most senior officials in the executive branch.¹⁷ That relationship generally makes appointees loyal to the President, and Presidents can and do rely on that relationship in all sorts of ways, both public and private.

Power over personnel is important, but Presidents have more at their disposal. Article II vests executive power in the President,¹⁸ authorizes him to demand the opinions of principal officers,¹⁹ and dictates that the President take care that the laws are faithfully executed.²⁰ Together these provisions provide a constitutional foundation for presidential supervision of those who implement statutes in the executive

¹¹ Burt Schorr & Andy Pasztor, *In Command*, WALL ST. J., Feb. 10, 1982, at 1 (internal quotations omitted).

¹² RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 10 (3d ed. 1990).

¹³ RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* 1 (1983).

¹⁴ Schorr & Pasztor, *supra* note 11, at 1.

¹⁵ THOMAS E. CRONIN, *THE STATE OF THE PRESIDENCY* 223 (2d ed. 1980).

¹⁶ Haynes Johnson, *Test*, WASH. POST, Apr. 30, 1978, at A3.

¹⁷ U.S. CONST. art. II, § 2, cl. 2. The President currently directly appoints 3,500 executive branch officials and may influence the appointment of around 2,000 additional officials appointed by cabinet members and agency heads. BRADLEY H. PATTERSON, JR., *THE WHITE HOUSE STAFF: INSIDE THE WEST WING AND BEYOND* 39 (2000).

¹⁸ U.S. CONST. art. II, § 1, cl. 1.

¹⁹ *Id.* art. II, § 2, cl. 1.

²⁰ *Id.* art. II, § 3.

branch.²¹ Presidents have issued all sorts of instruments—executive orders, signing statements, directives, memoranda—to direct these subordinate actors.²²

These presidential instructions come in all different forms, but because the form does not dictate the content or effect of the instruction, paying attention to the form is not the best way to understand the potential utility of these means of control. It is more useful to think of these mechanisms along two dimensions: Whether they are *ex ante* instructions or *ex post* review; and whether they are specific to a particular statutory provision or a general command that applies across a range of statutory obligations.

There are a wide variety of *ex ante* methods of presidential control. One such method is signing statements. Signing statements are specific, that is, they relate to particular pieces of legislation.²³ The President could offer a wide variety of views in such statements, including his view of the substantive meaning of ambiguous statutory provisions,²⁴ his view of how the statute should be implemented and enforced,²⁵

²¹ In a recent article, Peter Strauss helpfully identified a distinction between President as “overseer” and President as “decider,” arguing that the President should generally be understood to have the authority to oversee subordinates’ exercise of discretion but not to decide how that discretion will be exercised. Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 759–60 (2007). As will become clear, I am taking no position on this long-standing debate. Whatever the extent of supervisory capacity, I am interested in understanding which presidential control mechanisms are most effective to exercise that capacity.

²² There has long been a debate, stretching back to the nineteenth century, about the President’s ability to direct the exercise of discretion by subordinate executive branch officials. In the most recent phase of this debate, Dean Elena Kagan offered a defense of presidential directive authority based on an interpretive principle to be applied when a statute grants discretion to executive branch actors. See Kagan, *supra* note 5, at 2322–31 (defending directive authority grounded in statutory interpretation). Kagan argues that, in the usual case, such a statute should be read to permit the President to direct his subordinates’ exercise of discretion under the statute. *Id.* at 2327–28. She limits her argument to executive branch agencies. *Id.*

Dean Kagan’s strong and comprehensive defense of presidential directive authority revived interest in this long-standing question. Professor Stack, for instance, has challenged her argument. See Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 276–99 (2006). He points to the existence and long tradition of two sorts of statutes. Some grant discretion to executive branch actors and explicitly state that the agent will implement his mandate with the supervision of the President. *Id.* at 278–81. Other statutes that delegate to subordinates do not contain such provisos. *Id.* at 282–83. Any directive authority, Stack argues, only applies in the case where the statute explicitly grants the President the power to supervise, direct, and approve the subordinate’s action. *Id.* at 295–96. Professor Strauss’s recent article likewise revisits this question. See Strauss, *Overseer*, *supra* note 21.

²³ See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 313 (2006); Kagan, *supra* note 5, at 2293–96; Christopher S. Kelley, *The Unitary Executive and the Presidential Signing Statement* 41–42 (2003) (unpublished Ph.D. dissertation, Miami University) (on file with author), available at http://www.ohio.link.edu/etd/view.cgi?acc_num=miami1057716977.

²⁴ Signing statements often offer interpretations of statutory provisions, but they usually do so when the President indicates that the construction of the statute is necessary to avoid a

or, as Presidents in fact have frequently done, his view that certain provisions are or may be unconstitutional.²⁶ Signing statements are not only *ex ante*, they are penned at the start of executive branch action, before any other officials have begun to interpret or otherwise implement a statutory command. Signing statements are not alone in being *ex ante* instructions that are specific to a particular statutory obligation. The President issues memoranda and statements instructing executive branch officials to take certain actions.²⁷ Sometimes such directives or prompt letters come from the

constitutional problem. *See, e.g.*, Statement on Signing the Homeland Security Act of 2002, 38 WEEKLY COMP. PRES. DOC. 2092, 2093 (Nov. 25, 2002) (noting that new Director of the Office of Science and Technology, who according to statute is to be appointed based on the approval of the Office of Personnel Management, shall be appointed by the Attorney General, in order to construe the provision consistently with the Appointments Clause of Article II); Statement on Signing the Foreign Operations Appropriations Act of 2002, 38 WEEKLY COMP. PRES. DOC. 49, 50 (Jan. 10, 2002) (directing the Attorney General to coordinate implementation of statute requiring the release of classified information relevant to specified deaths abroad in a manner “consistent with my constitutional and statutory responsibilities to protect various kinds of sensitive information”); *see also* sources cited *infra* note 65.

²⁵ *See, e.g.*, Statement on Signing the Homeland Security Act of 2002, 38 WEEKLY COMP. PRES. DOCS. 2092, 2094 (Dec. 2, 2002) (directing that the new Office of International Affairs will carry out its functions “in close coordination with the Department of State and other relevant Government agencies”); *see also infra* notes 91–98 and accompanying text (discussing the Puyallup Tribe of Indians Settlement Act, June 21, 1989).

²⁶ *See, e.g.*, Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 1 PUB. PAPERS 226, 226–27 (Feb. 10, 1996) (directing the Attorney General not to enforce a provision of the Act which required the discharge of military personnel living with HIV, because the President deemed that provision unconstitutional); Statement on Signing the Telecommunications Act of 1996, 1 PUB. PAPERS 188, 190 (Feb. 8, 1996) (directing the Department of Justice to decline to enforce a provision of the Act that would have prohibited the transmission of abortion-related speech and information over the internet because the President believed the provision was unconstitutional).

²⁷ *See, e.g.*, Memorandum on Increasing Participation of Medicare Beneficiaries in Clinical Trials, 36 WEEKLY COMP. PRES. DOC. 1311, 1312 (June 7, 2000) (directing the Secretary of Health and Human services to revise Medicare program guidelines to cover the costs of clinical trials of new medications and medical treatments); Memorandum on the Safety of Imported Foods, 35 WEEKLY COMP. PRES. DOC. 1277, 1278 (July 3, 1999) (directing the Secretaries of Health and Human Services and the Treasury to adopt new standards for imported foods); Memorandum on Fairness in Law Enforcement, 1 PUB. PAPERS 906 (June 9, 1999) (directing the Attorney General and Secretaries of the Treasury and the Interior to collect and report statistics on racial profiling); Memorandum on Clean Water Protection, 1 PUB. PAPERS 857, 858 (May 29, 1999) (directing the Administrator of the EPA and Secretaries of Agriculture and the Interior to adopt new rules to enhance environmental protection of the nation’s waters); Memorandum on the Youth Crime Gun Interdiction Initiative, 2 PUB. PAPERS 1084 (July 8, 1996) (ordering the Secretary of the Treasury and Attorney General to undertake enforcement efforts to trace all guns used to commit crimes in cities in the United States); Statement Announcing a Series of Policy Initiatives on Nuclear Energy, 1 PUB. PAPERS 903, 904 (Oct. 8, 1981) (directing the Secretary of Energy to take a number of actions to promote the use of

Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA).²⁸ Although they have not generally been issued at the *very* beginning of the life of the law, these instructions too are usually specific to particular authority that the agency possesses.²⁹ As Dean Kagan richly described, President Clinton revitalized the directive method of executive branch supervision.³⁰

Not all *ex ante* instructions are specific. Some provide general instructions to agencies—identifying factors they must consider, processes they must follow, or both. Probably the most well-known of such instructions are embodied in the various executive orders promulgated over the years requiring agencies to engage in cost-benefit analysis in order to support their proposed and final rules.³¹ President Reagan,

nuclear power).

²⁸ U.S. GEN. ACCOUNTING OFFICE, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 50 (2003), *available at* <http://www.gao.gov/new.items/d03929.pdf> [hereinafter GAO, RULEMAKING]; *see, e.g.*, Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Claude A. Allen, Deputy Sec'y, Dep't of Health & Human Serv., and James R. Moseley, Deputy Sec'y, Dep't of Agric. (May 27, 2003), *available at* http://www.reginfo.gov/public/prompt/prompt_dietary_052703.pdf (urging the Departments of Agriculture and Health and Human Services to revise their *Dietary Guidelines* and *Food Guide Pyramid* to emphasize the benefits of reducing consumption of foods high in trans fatty acids and increasing consumption of foods rich in omega-3 fatty acids); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Armando Falcon, Jr., Dir., Office of Fed. Hous. Enterprise Oversight (OFHEO) (May 29, 2002), *available at* http://www.reginfo.gov/public/prompt/prompt_ofheo052902.html (requesting that OFHEO consider rulemaking to require Fannie Mae and Freddie Mac to disclose publicly the information that is required of publicly traded companies by the SEC); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Tommy G. Thompson, Sec'y, Dep't of Health & Human Serv. (Sept. 18, 2001), *available at* http://www.reginfo.gov/public/prompt/hhs_prompt_letter.html (prompting the FDA to explore regulations addressing the content of trans fatty acids in foods).

²⁹ *See* GAO, RULEMAKING, *supra* note 28, at 50; *see also* Kagan, *supra* note 5, at 2295, 2303–06. *See generally* John D. Graham, Paul N. Roe & Elizabeth L. Branch, *Managing the Regulatory State: The Experience of the Bush Administration*, 33 *FORDHAM URB. L.J.* 953 (2006) (describing from personal experience presidential management of federal regulation in the Bush White House).

³⁰ *See* Kagan, *supra* note 5, at 2293.

³¹ *See* Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007) (amending Exec. Order 12,866 in various respects) (issued by President George W. Bush); Exec. Order No. 12,866, 3 C.F.R. 638, 642–43 (1993) (ordering agencies to submit proposed and final regulations to OIRA for approval and establishing a yearly planning process to ensure that regulatory actions are consistent with presidential priorities) (issued by President Clinton); Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1981) (ordering agencies to prepare regulatory impact analyses describing the costs and benefits of regulation and placing OMB in a supervisory role over the regulatory process) (issued by President Reagan); Exec. Order No. 12,044, 3 C.F.R. 152 (1978) (ordering agencies to do cost-benefit analyses of proposed regulations and select the least burdensome of acceptable alternatives) (issued by President Carter).

in Executive Order 12,291, formalized and expanded this process, requiring agencies to conduct cost-benefit analysis of their rules and submit their analysis along with their proposed and final rules to OMB for approval.³² Although these requirements are ex ante instructions about what an agency must consider, they also establish one of the most important and salient instruments of post hoc review—White House review of proposed and final rules.

OMB has issued *many* other general instructions to agencies about how they should go about their business. Executive orders require most agencies to conduct a government-wide planning process, a process that is attuned to presidential priorities.³³ Other presidential orders set forth, ex ante, a variety of factors agencies must consider as they implement statutes.³⁴ For example, President Reagan ordered federal agencies to provide opportunities for consultation with state and local officials regarding planned federal programs,³⁵ and President Clinton ordered federal agencies to take steps to increase contracting with businesses owned by women and minorities.³⁶ And there are many more. OMB has instructed agencies how to handle information that they rely on³⁷ and how they should issue guidance;³⁸ it has established government-wide standards for peer review of scientific information used by agencies;³⁹ and it has attempted to establish government-wide standards for risk assessments conducted by agencies.⁴⁰

³² Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1981).

³³ See, e.g., Exec. Order No. 12,866, 3 C.F.R. 638, 642 at § 4 (1993); see Kagan, *supra* note 5, at 2288.

³⁴ See, e.g., Exec. Order No. 12,875, 3 C.F.R. 669 (1993) (elimination of unfunded mandates); Exec. Order No. 12,873, 58 Fed. Reg. 54,911 (Oct. 20, 1993) (environmental impact); Exec. Order No. 12,843, 58 Fed. Reg. 21,881 (Apr. 21, 1993) (environmental impact); Exec. Order No. 12,372, 3 C.F.R. 197 (1982) (federalism concerns); Exec. Order No. 11,821, 3 C.F.R. 926 (1971–1975) (impact of inflation); Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965) (use of non-discriminating government contractors). See generally Phillip J. Cooper, *By Order of the President: Administration by Executive Order and Proclamation*, 18 ADMIN. & SOC'Y 233 (1986) (discussing how executive orders imposing policies may conflict with existing administrative law); Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, 4 J.L. & POL. 483, 489–98 (1988) (explaining how executive orders serve as controlling directives for how members of the executive branch administer federal law).

³⁵ Exec. Order No. 12,372, 3 C.F.R. 197 (1982).

³⁶ Exec. Order No. 13,157, 65 Fed. Reg. 34,035 (May 23, 2000); Exec. Order No. 13,170, 65 Fed. Reg. 60,827 (Oct. 6, 2000).

³⁷ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452 (Feb. 22, 2002).

³⁸ Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

³⁹ Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664 (Jan. 14, 2005).

⁴⁰ U.S. OFFICE OF MGMT. & BUDGET, PROPOSED RISK ASSESSMENT BULLETIN (Jan. 9, 2006), available at http://www.whitehouse.gov/omb/inforeg/proposed_risk_assessment_bulletin

Ex ante methods of presidential control can thus be specific or general. The same is theoretically true of ex post methods of presidential control. The White House might conduct the equivalent of a performance review of a particular agency. But most ex post review of agency action is attentive to a specific proposed action. Reagan originally set forth the most important of these processes in the executive order just discussed.⁴¹ Details of that process changed, but Reagan's successors essentially embraced the process.⁴² Various forms of intra-branch coordination—at least those controlled by the White House—also serve a review function.⁴³ Control of agency litigation by various units of the Department of Justice likewise could be seen to serve a “review” function, because the department does not bring every case that an agency might like it to bring.⁴⁴ The Department of Justice is not, like OIRA, housed in the White House, but it nonetheless functions as a centralized reviewer. And some parts of the department are closely associated with the White House. The Solicitor General's office, for instance, has a monopoly on Supreme Court litigation on behalf of the government, and it certainly considers the views of the White House in important pieces of litigation.⁴⁵

C. The Limits of Presidential Direction

It is important to note that there are legal limits to these various presidential orders. In the absence of an unconstitutional law, the President may not direct executive branch officials to violate the law.⁴⁶ But, as any student of statutes knows, within the boundaries of the law there are many important discretionary choices to be made.⁴⁷

_010906.pdf. For the notice announcing the PROPOSED BULLETIN ON RISK ASSESSMENT, see 71 Fed. Reg. 2600 (Jan. 17, 2006).

⁴¹ Exec. Order No. 12,291, 3 C.F.R. 127 (1981). The effort actually began earlier with the “Quality of Life Reviews” of the 1970s. See Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 221–22 (1993).

⁴² Kagan, *supra* note 5, at 2285–86; see, e.g., Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

⁴³ For a description of one such occurrence, see *Sierra Club v. Costle*, 657 F.2d 298, 326–27 (D.C. Cir. 1981).

⁴⁴ See Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 563, 570 (2003).

⁴⁵ See *id.* at 567–68.

⁴⁶ *Myers v. United States*, 272 U.S. 52, 135 (1926); *Kendall v. United States ex. rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); see Kagan, *supra* note 5, at 2323; Stack, *supra* note 22, at 272–74; see, e.g., Exec. Order No. 12,291, 3 C.F.R. 127 (1981) (repeatedly limiting its instructions with the phrase “to the extent permitted by law”).

⁴⁷ As may be obvious by now, the focus here is legal authority arising from statutes, not the Constitution. As constitutional powers are delegated to the President himself, it seems clear that, if the President authorizes others to assist him in executing those powers, the President can direct others in their exercise.

The important and contested question is whether, and if so how, Presidents can *dictate* how a subordinate executive branch official exercises discretion delegated by statute to that official.⁴⁸ Relying on the Supreme Court's sanction of independent agencies in *Humphrey's Executor v. United States*⁴⁹ and some language in *Myers v. United States*,⁵⁰ some have argued that Presidents cannot direct the exercise of discretion delegated by statute to subordinate officials.⁵¹ Others, relying primarily on the Vesting Clause's grant of executive power to the President and the Take Care Clause, argue that discretionary authority delegated to subordinate officers is subject to the President's control.⁵² Dean Kagan recently defended limited presidential directive authority over executive branch agencies.⁵³ She argued that unless Congress indicates that the President cannot direct subordinate executive branch officials in their exercise of discretion, the President should be read to have such authority.⁵⁴

Whether, and if so how expansively, the President can direct the exercise of discretion delegated to subordinate officials is an important and interesting legal question. Even without knowing the answer to that question, however, it is clear that the President has some real ability to direct the exercise of discretion. First, as Professor Stack demonstrated, many statutes confer discretion to a subordinate official but go on to state that the official will implement the statute with the direction or supervision of, or in consultation with, the President.⁵⁵ In such cases the statute explicitly authorizes the President to direct the exercise of that discretion.

But even when statutes do not contain such provisos, Presidents can as a practical matter influence—if not control outright—what subordinate officials do by use of the powers that they unquestionably have. Presidents have the power to appoint, to supervise and coordinate, and to demand information from their subordinates. Even without the formal power to direct a subordinate's exercise of discretion, a President can accomplish a great deal with the use of these powers. To effect his will, the President need not *dictate* a result that the subordinate would oppose. The President can just provide “advice”—in a signing statement, a phone call, a meeting in the Oval

⁴⁸ See *supra* note 22 and sources cited therein.

⁴⁹ 295 U.S. 602 (1935).

⁵⁰ 272 U.S. at 135.

⁵¹ Pildes & Sunstein, *supra* note 4, at 24–25; Strauss, *Overseer*, *supra* note 21; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 605–08, 648–50 (1984); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 200–02 (1986).

⁵² Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1241–46 (1994).

⁵³ Kagan, *supra* note 5, at 2320.

⁵⁴ *Id.* But cf. Stack, *supra* note 22, at 267 (arguing that the President has the authority to bind subordinate executive branch officials only when the statute expressly grants that power to the President).

⁵⁵ Stack, *supra* note 22, at 276–81.

Office—about his preferred outcome and trust that usually the advice will be followed by the person he appointed.

II. UNDERSTANDING PRESIDENTIAL CONTROL STRATEGIES

With respect to the set of decisions that Presidents are legally and constitutionally permitted to influence, the President has a range of tools available to him. As developed in Part I, there are two general categories of instruments available to Presidents. One is reliance on loyal personnel and the exclusion of disloyal ones. The other category is various kinds of presidential orders. Such presidential orders should be understood along the two dimensions mentioned earlier. Some are *ex ante*, and some are *ex post*; some are generic, and some are specific. Should Presidents rely on all of these tools? Or should it depend on the circumstances? If so, which tools are most effective in what circumstances? This Part will answer these questions.

A. Agency Drift

To understand the utility of these various presidential control mechanisms, it is first important to consider why a subordinate executive branch official might not follow the President's wishes. That official, of course, may not know the President's wishes. But, if the President wants his will to be known, he can make it known in a variety of ways.

The other reasons officials might drift away from presidential preferences are more difficult to manage. Bureaucratic torpor is one—an agency that does little. Disagreement with the President is another. Such disagreement could be with respect to a variety of matters and also at any level of generality—about the overall priorities, the meaning of ambiguous statutory terms, the right policy choice among several that are plausible under the statute, or the process by which the agency should implement a statutory command. Last, the agency may sense pressure from some other actor(s)—say, a reviewing court or members of Congress—to take an action that is not consistent with what the President might wish. Congress funds the agency and drafts its statutes, hence agencies must attend to what members of Congress think. Courts review agency action on a regular basis and have developed a large body of legal obligations that constrain agency action.

B. White House Strategies

The President's ability to control executive branch activity depends both on the nature of the drift away from the White House as well as the task assigned to the agency. For example, if an agency is moribund, reviewing its actions will hardly suffice. If an agency is moving away from the President's agenda, appointing key

personnel may be the best way to influence the agency. If an agency's pattern of enforcement action is problematic, *ex ante* instruction may be the most effective strategy.

This Part identifies the reasons why an agency's activities may not be in line with the President's preferences and analyzes the effectiveness of each tool available to the White House to cure that drift. First, however, it discusses the President's power to appoint key personnel, which, in general, has systematic advantages and weaknesses across the whole range of agency behavior.⁵⁶

1. Power over Personnel

The power to appoint key personnel is one of the President's most important instruments for asserting his will over the executive branch.⁵⁷ New personnel appointed by the President might be able to tackle any problem; it is an across-the-board strategy. New personnel can revitalize a moribund agency. They can act pro-actively to establish priorities, policies, or enforcement strategies. They can stop action that has been making its way through the agency. If an agency flouts the President's will, new personnel can establish processes to force information to the top so that those policy-makers can control policy more effectively. No wonder that the President's power to appoint key personnel has long been viewed as one of the White House's most important strategies for asserting control over the vast federal bureaucracy.

But as a strategy for asserting control by the White House, the power over personnel does have some limitations. The across-the-board quality of new personnel is also its limitation. If the President could anticipate precisely what the potential conflicts between the agency and the White House might be, the President could perhaps choose personnel with those matters in mind. But Presidents cannot consider the nominee's view on every issue and cannot predict all of the issues that might arise at the agency. As a consequence, on a given issue, the President's personnel might not share the President's views on all important matters that arise in the course of the appointee's tenure. It is hard to believe that a President who appointed an FDA Commissioner at a time with no food safety issues would have thought very hard about his nominee's views on food safety. More likely, the President appointed the nominee for general loyalty and/or his views on the matter-of-the moment at the agency—matters that have a way of fading when circumstances change. None of this mentions the risk that White House staff fear: the risk that an appointee will “go native.”

Another important downside of relying on personnel is that, if the official is not acting in a way that pleases the President, removing the official can be costly. At the most practical level, firing a senior official disrupts the action that official oversaw

⁵⁶ The one exception to this is where the agency's task is adjudication, and the special considerations regarding personnel placement will be discussed there. *See supra*, notes 74-89 and accompanying text.

⁵⁷ U.S. CONST. art. II, § 2, cl. 2.

and directed. The departure, the search for a replacement, and the possible confirmation process can all divert attention from matters that the President would rather pursue. Removal of an official is also more constrained by political considerations than some other mechanisms Presidents can rely on to exert their control. White House staff can give instructions, make phone calls, or review what subordinate officials are doing under the radar screen. But firing an official—even if dressed up as a decision by the official to resign to “spend more time with family”—is both dramatic and public. Although in some cases there will be political benefits to firing a senior officials, in other cases the negative political consequences will be great.

Aside from control over personnel, which as a strategy has systematic advantages and disadvantages (except in the case of adjudication, which will be discussed below), a White House seeking to exert control over an agency has the option of *ex ante* instruction and *ex post* review. Consider the two problems the White House faces—a moribund agency or a wayward one—with the two strategies in mind.

2. Curing Bureaucratic Torpor

Torpor is difficult to overcome with any method. But one mechanism extremely unlikely to do much good is *review* of what the agency has done, as the OIRA review process is primarily set up to do.⁵⁸ A moribund agency is not initiating anything in the first place. “Review” of what comes out of the agency will not solve any problems.

Ex ante methods, by contrast, are more likely to be effective. A signing statement, prompt letter, or directive, all might push (force) the agency to act in the direction the President wants it to go, and such presidential pushes might strengthen the hand of the President’s appointees in their efforts to revitalize the agency. The strength and potential weakness of these mechanisms is that they are usually specific—“take this action or that action under this statute.” This narrows their range, and narrow interventions may not be what an agency suffering from torpor needs. But the narrowness also increases the likelihood that on that particular issue the President will get what he wants.

3. Taming a Wayward Agency

The White House may face a more multifaceted problem. Agencies may not be moribund. Their personnel might be energetic, but their energies may be directed in ways that the President does not like. An agency might not do as the President would wish either because those in the agency have their own interests that are different

⁵⁸ See Exec. Order No. 12,866, 3 C.F.R. 638 (1993) for details of the OIRA review process.

from the President's or because they are paying attention to the interests of some other "principals"—congressional committees, reviewing courts, regulated parties or beneficiaries—with interests that diverge from the President's.

These two reasons for agency disloyalty to the President are not necessarily distinct in practice. An agency may have developed its own agenda as a result of its own tunnel vision, but that vision could be shaped in part by paying attention to the views of important actors like congressional appropriators and reviewing courts. Whatever the source of the agency's drift, from the White House's perspective, the result is the same: the preferences of those in the agency may not align with the President's.

The source of the agency's drift, however, will affect the success of the White House's efforts to nudge the agency in the "right" direction. Where the difference between the agency and the White House is generated by those within the agency, the White House's efforts to control that agency will be more difficult because those in the agency may look for ways around the control exerted by the White House. But where the difference in preference between the agency and the White House is generated by those in the agency fearing retaliation from another principal, the President's effort to control the agency may actually protect the agency from those actors, providing cover when the agency is taken to task by those principals.

a. Hypothetical Statute: Five Agency Decisions

To see more clearly the advantages and disadvantages of each method of presidential control, imagine that Congress has passed and the President has signed a new statute that requires the FDA to overhaul the food labeling regime. Among other things, the statute requires the agency to devise new nutrition labels for packaged food products. This provision of the statute requires the agency first to issue legislative rules outlining a new nutrition label to appear on all covered food items. Some food products will be exempt from the requirements, however, and the statute requires the FDA to set up a system whereby food manufacturers can apply for permits to deviate from the required nutrition label. Finally, the statute authorizes the FDA to enforce the statute by seizing non-compliant food products and seeking civil fines against manufacturers whose food products do not display the proper label. Imagine too that there is some tension between a public health oriented FDA that is invested in nutrition labels as a strategy to combat obesity and a President who remains skeptical of the benefits (when compared to the costs) of nutrition labels.

In the course of implementing this statute, the agency will make many choices, and the President may wish to influence each of them. There are a set of choices about *priority setting* and *process* that the agency will make with respect to each statutory obligation and then there are the three statutory assignments: *promulgate a rule*; *establish an exceptions process*; and *enforce the statute*.

b. Priority Setting

The FDA will first need to determine where implementation of this statute and its parts fits within its overall priorities. This can be a subtle art and is not necessarily settled in any self-conscious priority setting process. An agency can “decide” to place a statutory command on the back burner, or it can do the opposite—pursue implementation of the statute at the expense of other priorities—simply by being imbued with a sense of urgency or not. It might delay its proposed rule. It might promulgate the rule but then be slow in establishing the exceptions process. It might aggressively pursue certain kinds of violators as it enforces the statute. Or it might not. Such agenda control gives the agency a great deal of power.⁵⁹

In the absence of an *ex ante* communication from the White House, all these decisions will be the province of the agency. *Ex ante* directions, however, could influence priority setting, at least in the direction of pushing the agency to pursue some task. Prompt letters, for instance, have often been aimed at agency priority setting.⁶⁰ The yearly planning process controlled by OIRA, outlined in its current form in Executive Order 12,866, is similarly an effort at influencing agency priorities,⁶¹

⁵⁹ Ronald Wintrobe, *Modern Bureaucratic Theory*, in *PERSPECTIVES ON PUBLIC CHOICE* 429, 431 (Dennis C. Mueller ed., 1997).

⁶⁰ See, e.g., Letter from John D. Graham, Adm’r, Office of Info. & Regulatory Affairs, to Michael P. Jackson, Deputy Sec’y, Dep’t of Transp. (Dec. 7, 2001), *available at* http://www.reginfo.gov/public/prompt/nhsta_prompt120701.html (encouraging the agency to give greater priority to modifying its frontal occupant protection standard); Letter from John D. Graham, Adm’r, Office of Info. & Regulatory Affairs, to Tommy G. Thompson, Sec’y, Dep’t of Health & Human Serv. (Sept. 18, 2001), *available at* http://www.reginfo.gov/public/prompt/hhs_prompt_letter.html (urging the FDA to give greater priority to issuing a rule on the content of trans fatty acids in foods); Letter from John D. Graham, Adm’r, Office of Info. & Regulatory Affairs, to John Henshaw, Assistant Sec’y, Occupational Safety & Health Admin. (Sept. 18, 2001), *available at* http://www.reginfo.gov/public/prompt/osha_prompt_letter.html (suggesting that OSHA give higher priority to promoting automatic external heart defibrillators); see also Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1277–80 (2006); Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1288–90 (2006). For a list of all prompt letters issued by the Bush administration, see General Services Administration, OIRA Prompt Letters, <http://www.reginfo.gov/public/jsp/EO/promptLetters.jsp> (last visited June 22, 2007).

⁶¹ Under Executive Order 12,866, all agencies must participate in a yearly planning process. 3 C.F.R. 638, 642 at § 4 (1993). Early in the process, heads of agencies must meet with the Vice President to “seek a common understanding of priorities and to coordinate regulatory efforts.” *Id.* § 4(a). Agencies must then prepare regulatory agendas listing all regulations under development or review, and regulatory plans for their most important and significant regulatory actions. *Id.* § 4(b)–(c). These plans must include, among other information, statements of the “agency’s regulatory objectives and priorities and how they relate to the President’s priorities.” *Id.* § 4(c)(A). These plans are submitted to the Administrator of OIRA who disseminates them to other agencies and reviews the plans for conflicts with the priorities of the President or

though it may be too big-picture to influence details of the implementation of a particular statutory command.

By contrast, after-the-fact "review" processes would not easily facilitate control of priority setting. To state the obvious, review is reactive. As noted already, such priority setting does not require an explicit act by the agency. Bureaucrats sometimes get what they want by being selectively efficient, that is, "being efficient at the things they want to do, and inefficient at those they do not."⁶² When there is no action, there is nothing to review. Even *if* the agency did explicitly engage in priority setting that determined how committed it was to a particular statutory mandate, at the moment that decision would not be subject to review by OIRA. General priority-setting is supervised by OIRA, but that is at a fairly high level of generality.⁶³ If the review process were reformulated to include this fine-grained level of priority setting, the White House might be overwhelmed. Perhaps, though, the White House could *stop* an agency from taking an action that did not fit within the President's priorities. But review processes alone could do little to prompt the agency to take action the President supports.

c. Process

A similar analysis applies to a set of discretionary decisions about the process that the FDA may also make as it implements the statute. In the absence of *ex ante* directions, the FDA will have a fair amount of control over the process by which it formulates the rules and establishes the tribunal that will determine whether food manufacturers will be exempt from the requirements. The agency would, of course, have to comply with the standard requirements like notice and comment when it promulgates the rules for the nutrition label or the tribunal, but the Administrative Procedure Act (APA) is silent on many important matters of process. For instance, it has nothing to say about the required process prior to proposing a rule or prior to establishing an administrative tribunal.⁶⁴ In the absence of contrary direction, the agency might or might not consult with others in the executive branch. It might or might not, consult with outside groups as it prepares to implement the statute.

Ex ante methods of presidential influence could probably control the process the agency follows. In a signing statement or directive, for instance, the President might require the FDA to consult with the Department of Agriculture as it formulates its

proposed regulations from other agencies. *Id.* § 4(c)(F)(3)(5). The Administrator of OIRA may advise the Vice President of such conflicts, who is then directed to consult with the heads of agencies with respect to their Regulatory Plans. *Id.* § 4(c)(F)(5)–(6). Additionally, the Administrator of OIRA chairs a working group of heads of agencies which meets at least quarterly to "assist agencies in identifying and analyzing important regulatory issues." *Id.* § 4(d).

⁶² Wintrobe, *supra* note 59, at 431.

⁶³ See Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

⁶⁴ 5 U.S.C. § 704 (2000).

nutrition labeling rules or to seek the input of particular outside groups.⁶⁵ By contrast, these agency decisions would be difficult to review *ex post*. Consulting, or not, with another agency, for instance, need not require explicit agency action, and even if the agency set forth its process in a rule, that rule would not, at present, be subject to OIRA review. Such rules could be, but again, the White House might be overwhelmed by such review, and in any event it would only have the ability to halt processes that it did not like, not prompt process reforms it would like.

d. Rulemaking

Consider now the agency's proposed and final rules on nutrition labels. There are many important choices to be made in such a rulemaking. The agency may have to interpret key terms in the statute; it certainly will have to make policy choices—for instance, choosing the best label from several plausible options. In the absence of prior instruction from the President, the agency will make these important choices in the first instance, and they would be subject to *post hoc* review by OIRA.

If the President in a signing statement or other *ex ante* advice offered an interpretation of a key statutory term or indicates his preferred policy choice, what would happen?⁶⁶ Perhaps the agency could ignore that advice, but that seems risky and therefore unlikely. Perhaps it could disagree with the advice, but that seems unlikely too. If the President offered an interpretation of a statute or his views on a policy choice in advance of the agency attempting to answer those questions on its own, it would seem most likely that the agency would follow the President's expressed view. In

⁶⁵ See, e.g., Statement on Signing the Homeland Security Act of 2002, 38 WEEKLY COMP. PRES. DOC. 2092 (Dec. 2, 2002) (creating the Office of International Affairs to carry out functions in coordination with Department of State and other relevant agencies); Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, 38 WEEKLY COMP. PRES. DOC. 1971 (Nov. 2, 2002) (directing the Attorney General to advise heads of executive agencies of statutory provisions requiring reports to Congress on nonenforcement of the law in keeping with the President's view of constitution and to direct that the provision will be interpreted in a manner consistent with the President's constitutional authority); Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2002, 38 WEEKLY COMP. PRES. DOC. 49, 50 (Jan. 10, 2002) (directing the Attorney General to coordinate implementation of statute within executive branch).

⁶⁶ Compare Kagan, *supra* note 5, at 2298–99 (arguing that overt presidential command can be a powerful tool for compelling an agency to comply with the President's wishes), with GAO REPORT, *supra* note 3, at 1 (reporting that of a sampling of nineteen provisions of the 2006 appropriations acts which were the subject of presidential concern expressed in signing statements, ten were implemented as written by federal agencies; six were not; and three were not triggered thus requiring no agency action), and Strauss, *The Place of Agencies in Government*, *supra* note 51, at 666 (suggesting that if an agency administrator failed to follow presidential advice, the President's only recourse would be to punish the agency administrator in some way thereby incurring whatever political costs were inherent to that action).

fact, it seems likely that the agency would do more than follow the President's lead. It would develop explanations for why those are appropriate choices, explanations that would be aimed at surviving judicial review. Through ex ante instruction, then, the President is likely to exercise powerful control over the agency's choices.

Ex ante instruction does, however, have downsides. Such "advice" commits the President to views early in the process of executive branch implementation. An advantage of early instruction is that it may prevent the agency from going somewhere that the President does not want it to go. The flip side of that advantage, however, is that the President becomes responsible for those instructions; he cannot deny responsibility for agency choices. In some cases, it may be in the President's interest to wait until the agency makes its choices, either because of the information that the agency may generate about the wisdom of various choices, or because that way the President can discern the political stakes associated with the agency's actions.

Compare the possibilities of ex ante control to the possibilities of ex post presidential control. Once the agency develops a proposed rule, that proposal will be reviewed by OIRA.⁶⁷ That process can be difficult for the agency as the President's budgeteers flyspeck the agency's proposals, reviewing the agency's legal interpretations and policy judgments embedded in its rule and the agency's justification for its rule.⁶⁸ It is no doubt true that this review—and the anticipation of this review as the agency prepares its proposals—may limit the agency's ability to choose its preferred option when that option conflicts with the White House's view.

Even so, the post hoc review process gives the agency some advantages. Most importantly, the agency acts first, setting the terms of the debate, at least initially. There are likely informational asymmetries between the agency and OIRA.⁶⁹ The agency knows the record better, knows the terms under which the review process will occur, and therefore may be able to defend its choices effectively. More than that, though, the process of review of agency proposals is *public*.⁷⁰ That complicates the

⁶⁷ Exec. Order No. 12,866, 3 C.F.R. 638, 646 at § 6(b) (1993).

⁶⁸ Bagley & Revesz, *supra* note 60, at 1281; Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 841–43 (2003). Data suggests that OIRA has become, over time, more likely to return a proposed rule to an agency for changes. In comparing review under the Clinton administration to review under the Reagan and George H.W. Bush administrations, Professor Croley noted that "[w]hile the Clinton OIRA focused on fewer rules, it required a change in a *much higher* percentage of the rules it reviewed." *Id.* at 851 (emphasis added). Under the current Bush administration, the "number of return letters and 'voluntary' rule withdrawals has also increased," leading to speculation that OIRA is now even more willing "to force an agency to go back to the drawing board." Bagley & Revesz, *supra* note 60, at 1281. *See generally* GAO, RULEMAKING, *supra* note 28 (noting increased use of public letters to prompt rulemaking).

⁶⁹ Wintrobe, *supra* note 59, at 431.

⁷⁰ *See* GAO, RULEMAKING, *supra* note 28, at 24–25. Both regulatory agencies and OIRA are required to identify to the public all substantive changes to rules between the drafts submitted to OIRA and the final rules and changes made at the suggestion or recommendation

process considerably. It means that the agency may be able to mobilize constituencies to support its proposals when they are reviewed by OIRA. This does cut both ways. The public nature of the process may also mobilize opponents of the agency's proposal. But the agency has some advantages because it decides what goes in the rules that will be reviewed by OIRA. A sophisticated agency may be able to play that public game very well. In the end, the public nature of the process may cut in favor of the White House's view or against that view; either way, it complicates the matter. The blank slate of the *ex ante* instructions looks superior from the perspective of a President trying to control an agency and willing to commit *ex ante*.

There is one other notable difference between *ex post* review and *ex ante* instructions. As presently constituted, *ex post* review by OIRA is more thorough. It mimics the process by which agency rules are written, defended, and, not coincidentally, reviewed in court if challenged. To survive judicial examination of their actions, agencies must arrive at reasonable interpretations of ambiguous statutes,⁷¹ and they must defend their policy choices as the product of reasoned decisionmaking.⁷² OIRA reviews these agency decisions based on reasons articulated by the agency. This process, at least formally, is governed by reasoned explanation of the choices made. By contrast, *ex ante* instructions, again as presently constituted, are much less thorough. They are declarative.⁷³ Presidents do not offer elaborate reasons or entertain and reject alternatives when they offer instruction to their subordinates. Courts require such explanations from agencies when they explain and defend the choices they have made in legislative rules.

Whether the "thoroughness" of White House supervision matters is unclear. As I have suggested, if a President offered a view on a statute's meaning or suggested his preferred policy choice before the agency began to make decisions under the statute, the most likely outcome is that the agency would follow those presidential "suggestions" and also supply reasons for those choices as it developed the rule. But it is possible—though unlikely—that the choices the President required would be considered unsupported by sufficient reasoning if challenged in court.

In the end, if a President hopes to exert control over an agency as it interprets statutes and makes policy choices in the course of rulemaking, the *ex ante* instruction strategy may have some advantages and at least a couple disadvantages when compared to the *ex post* review strategy. It is worth emphasizing that *ex post* and *ex ante* review are not substitutes for one another. The analysis here is not meant

of OIRA, as well as log of all contacts between OIRA personnel and parties outside of the executive branch. *Id.*

⁷¹ See *United States v. Mead*, 533 U.S. 218 (2001); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁷² See *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

⁷³ See *supra* note 68 and accompanying text.

to suggest otherwise; ex ante advice without ex post review might permit an agency to slip out from under the ex ante presidential command. A President seeking maximum control over an agency could rely on both strategies; that effort would be useful because the ex ante strategies overcome some of the possible shortcomings of the post hoc review process.

e. Adjudication

Designing a new nutrition label by legislative rule, however, is not the only task assigned to the agency by the hypothetical statute. Recall that the statute also requires the agency to establish a process for exempting food manufacturers from the required nutrition label. Such a process will determine the rights and duties of individual manufacturers, and as such, the agency will be engaged in adjudication. Various sources of law, including the Due Process Clause of the U.S. Constitution⁷⁴ and the Administrative Procedure Act (APA),⁷⁵ may constrain the agency's implementation of this statutory obligation.

The substantive obligation Congress assigned to the agency is an adjudicatory one, and as a result, the White House's ability to control the outcomes of individual decisions will be limited. Both statutes and the Due Process Clause place limits on control of the decisionmakers who adjudicate such claims. As a constitutional minimum, the decisionmakers must be impartial.⁷⁶ Under statutes and some regulations, some adjudicators are entitled to a decisional independence that is even more robust.⁷⁷ Under both sources of law, the White House cannot dictate the outcome of an individual adjudication.⁷⁸

⁷⁴ U.S. CONST. amend. V.

⁷⁵ Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

⁷⁶ *Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975) (“[A] fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness.” (internal quotations and citations omitted)); *Stone v. FDIC*, 179 F.3d 1368, 1376 (Fed Cir. 1999) (“It is constitutionally impermissible to allow a deciding official to receive additional material information that may undermine the objectivity required to protect the fairness of the process.”).

⁷⁷ For instance, the APA requires that administrative law judges (ALJ) be separated from those who investigate and prosecute in the agency, 5 U.S.C. § 554(d) (2000), but that is not required by the Due Process Clause. *Withrow*, 421 U.S. at 52 (“[O]ur cases, although they reflect the substance of the problem, offer no support for the bald proposition applied in this case by the District Court that agency members who participate in an investigation are disqualified from adjudicating.”); see also *Nash v. Bowen*, 869 F.2d 675, 680–81 (2d Cir.), *cert. denied*, 493 U.S. 812 (1989) (suggesting that requirements imposed on ALJs must be weighed against the potential infringement on the decisional independence of ALJs).

⁷⁸ *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993);

There are steps the White House might take to assert control over adjudication without violating the laws that protect the integrity of the adjudicatory process. There are two strategies. One is controlling personnel—either the adjudicators themselves or those who supervise them—and the other is by controlling the policy that the adjudicators implement.

Appointing the right people holds some promise for the White House, but it will be a less successful strategy than it would be in the context of agency development of legislative rules—where courts are more at ease with political influences on agency decisions.⁷⁹

The White House's ability to actually appoint the adjudicators will be quite limited. If Congress required the agency to rely on formal adjudication as it implements its statutory mandate,⁸⁰ such adjudications must be presided over by Administrative Law Judges (ALJs). ALJs have statutory protection of their independence⁸¹ and are specially selected and promoted according to a separate process governed by the Office of Personnel Management (OPM).⁸² Agencies themselves do not have much control over ALJs, nor does the White House. If the agency is not required to rely on formal adjudication, there may be a little more room for the White House to maneuver in influencing the choice of personnel. Non-ALJ adjudicators' selection and appointment are controlled by the agencies that employ them.⁸³ Even so, individual adjudicators are unlikely to be presidential appointees. The agency can select non-ALJ adjudicators, but it is possible that it could not consider a variety of factors, including

see also, Strauss, *Overseer*, *supra* note 21, at 710–11.

⁷⁹ *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984); *Sierra Club v. Costle*, 657 F.2d 298, 323 (D.C. Cir. 1981).

⁸⁰ An agency relies on formal adjudication when the relevant program or organic act “triggers” the formal rulemaking provisions of the APA or the agency’s act itself requires ALJs to preside over adjudications. *See* A GUIDE TO FEDERAL AGENCY ADJUDICATION § 3.01 (Michael Asimow ed., 2003).

⁸¹ *See* *Bowen*, 869 F.2d at 680–81 (holding that the Social Security reforms at issue did not violate the decisional independence of ALJs and the APA does provide for such decisional independence); *Ass’n of Admin. Law Judges v. Heckler*, 594 F. Supp. 1132, 1143 (D. D.C. 1984) (holding that ALJs are entitled to decisional independence, which might be violated by the procedures outlined in the Bellmon Review Program); A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 80, § 10.01 (“The APA and other sections of the United States Code also provide for a broad array of protections for the independence of ALJs.”). For a general overview of ALJs, *see id.*, §§ 10.01–10.10.

⁸² *See* 5 U.S.C. § 1305 (2000) (identifying OPM and Merit Systems Protection Board role in ALJ employment); *id.* § 5372 (outlining the pay structure for ALJs); *id.* § 7521 (authorizing actions for removal, suspension, reduction, and furlough of ALJs); *see also* A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 80, §§ 10.04–10.10; ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 240–42 (2d ed. 2001); Jeffrey Scott Wolfe, *Are You Willing to Make the Commitment in Writing? The APA, ALJs, and SSA*, 55 OKLA. L. REV. 203, 226 (2002).

⁸³ *See* sources cited *supra* note 82.

political affiliation.⁸⁴ Even if such adjudicators were political appointees, the Due Process Clause requires that they act as unbiased decisionmakers when they conduct adjudications.⁸⁵

Although there is limited White House ability to appoint adjudicators themselves, the White House could appoint senior agency officials and charge them with reforming the adjudicatory system at the agency. The Social Security Administration engaged in several widely-known efforts in this vein.⁸⁶ Former Attorney General Ashcroft's effort to "reform" the process of immigration adjudication is a more recent example of such a reform implemented by a political appointee.⁸⁷

These personnel strategies for controlling adjudication have important limits, and the White House may find the second strategy more fruitful: control the policies applied by adjudicators. Adjudicators must impartially determine the facts within

⁸⁴ See 5 U.S.C. § 2302(b) (2000) (prohibiting discrimination based on race, color, religion, sex, national origin, age, disability, marital status or political affiliation in federal personnel actions). *But see id.* § 2302(a)(2)(B) (excluding from the provisions of § 2302(b) appointees in "confidential, policy-determining, policy-making, or policy-advocating" positions, as well as any appointed positions that the President finds "necessary and warranted by conditions of good administration").

⁸⁵ U.S. CONST. amend V.

⁸⁶ Faced with a record backlog of cases in 1975, the Social Security Administration (SSA) implemented a number of reforms in its adjudication process. *See Nash v. Califano*, 613 F.2d 10, 12 (2d Cir. 1980). These reforms included a "Regional Office Peer Review Program" whereby supervisors and non-ALJ members of the SSA would review the work of ALJs outside of the normal appellate process and issue purportedly mandatory instructions regarding the proper length of hearings and opinions, proper amount of evidence required in cases, and the proper use of expert testimony. *Id.* Reforms also included a monthly production quota of decisions for ALJs; a "Quality Assurance Program" in which the agency made it known that an average fifty percent reversal rate was the acceptable rate that ALJs should conform to; and an "Employee Pool System" through which certain ALJ responsibilities, such as decision writing, were given to clerical or management personnel. *Id.* at 12–13. These practices were challenged as an invasion of the decisional independence of ALJs. *Id.* at 12. The Second Circuit ruled that the ALJs did not have proper standing but noted that, "good administration must not encroach upon adjudicative independence." *Id.* at 17. Again, in 1981, the SSA attempted to implement a review program to control its adjudicators. Under the Bellmon Review Program, the "SSA used its discretionary authority to select ALJs' decisions for review and to target ALJs with high grant-allowance rates for increased review." L. Hope O'Keeffe, Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591, 617 (1986) (internal citations omitted). In 1984, the D.C. District Court held that the Bellmon Review Program violated decisional independence of ALJs as protected by statute and the Constitution. *Ass'n of ALJs*, 594 F. Supp. at 1143. The court wrote that, if fully implemented, the Bellmon Review Program "could have tended to corrupt the ability of administrative law judges to exercise" their independence. *Id.*

⁸⁷ See Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 375–77 (2005).

their purview, but they are not entitled by law to set policy.⁸⁸ One well-established way that agencies have controlled adjudicatory outcomes is by adopting rules that either limit what is at issue in an individual adjudication or eliminate the need for adjudication entirely.⁸⁹ As long as such rules are consistent with the relevant statute and do not determine matters that must, under the Due Process Clause, be individually determined, this approach is permissible—for the agency, or for the White House. The trick would be to identify factors that can be decided by general rules and that limit adjudication or eliminate the need for it entirely.

To see the potential efficacy of such an approach, consider an example. Imagine that the nutrition labeling statute indicated that manufacturers will be exempt from the nutrition labeling requirement whenever it is not “practicable” to comply. A signing statement or directive from the White House might advise that, in the President’s view, it is not practicable for small businesses, defined as those with fewer than one hundred employees or \$1 million in revenue, to comply with nutrition labeling requirements. There is a question of how an agency would treat the President’s instruction, but it seems likely that, upon receiving such instruction, the agency would adopt a rule embracing that view of the meaning of practicable and grant blanket exemptions to businesses meeting the definition of “small” because there would be no need for a hearing. Just like an agency-generated rule of similar effect, as long as the rule is consistent with the statute, the agency rule that was provoked by the White House’s advice on the meaning of the statute would be effective.

Although a general *ex ante* instruction could control or limit the domain of adjudication in this way, adopting the same sort of general rule in an after-the-fact White House review of an adjudication would be on shaky legal ground. The problem is that an after-the-fact review would inevitably look like an attempt to direct the outcome of particular adjudications, in violation of constitutional and/or statutory guarantees of fair process.

f. Enforcement Priorities and Strategies

Once the rules are written and the exceptions process is in place, the FDA has another set of decisions to make. The FDA is authorized by statute to bring enforcement actions to seize products that do not comply with the FDA’s rules.⁹⁰ What if the agency, left to its own devices, would bring no enforcement actions or would only bring actions that are not in line with White House preferences? How effective would *ex ante* and *ex post* review mechanisms be?

⁸⁸ Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decision-making: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 493–95 (1990).

⁸⁹ See, e.g., *Heckler v. Campbell*, 461 U.S. 458 (1983); *Fed. Power Comm’n v. Texaco, Inc.*, 377 U.S. 33, 41 (1964); *United States v. Storer Broad. Co.*, 351 U.S. 192, 201–06 (1956); *Air Line Pilots Ass’n, Int’l v. Quesada*, 276 F.2d 892, 895–98 (2d Cir. 1960).

⁹⁰ 21 U.S.C. § 334 (Supp. II 2002).

The analysis may by now be familiar. Ex ante, the White House could have significant influence over an agency's enforcement priorities and its strategies. It could identify the priorities that should animate enforcement of the statute and those that should not. It could identify the best enforcement strategies of the underlying legal obligation. Without such instruction, these would otherwise be the agency's decisions in the first instance, based on whatever factors it considered relevant.

To see the potential appeal to Presidents of such an approach, consider the first President Bush's signing statement on the Puyallup Tribe of Indians Settlement Act, an act that settled water rights claims by a tribe through legislation.⁹¹ Under the *Winters* doctrine, Indian reservation treaties "should be interpreted to contain an implied reservation of sufficient water rights for the tribe to carry out the purposes for which its reservation was created."⁹² Indian water rights protected under this doctrine override state water law.⁹³ Thus, they must either be established as a consequence of litigation or as a result of a "negotiated" settlement that is approved by Congress and signed by the President.⁹⁴

One enduring question regarding Indian water rights claims, then, is whether it is superior to settle these matters through litigation or negotiated settlement. In 1989, President Bush's signing statement provided a variety of directions to the Department of Interior on this question:

Although the Administration favors negotiated settlements over litigation, careful attention must be paid when Federal taxpayers are asked to contribute substantially more than they might otherwise pay as a result of litigation involving the Federal Government's alleged breach of specific trust responsibilities.

The Administration expects to continue to work toward settlements of legitimate Indian land and water rights claims to which the Federal Government is a party. These efforts will recognize the importance of settling legitimate claims brought by tribes against States, private entities, and the Federal Government.⁹⁵

The statement concluded with the following, "In recognition of these difficulties, this Administration is committed to establishing criteria and procedures to guide

⁹¹ Puyallup Tribe of Indians Settlement Act of 1989, Pub. L. No. 101-41, 103 Stat. 83 (codified at 25 U.S.C. §§ 1773, 1773a-j (2000)).

⁹² *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 420 (1991); *see also Winters v. United States*, 207 U.S. 564, 577 (1908).

⁹³ *See Fort Mojave Indian Tribe*, 23 Cl. Ct. at 421.

⁹⁴ *See Puyallup Tribe of Indians Settlement Act of 1989*, 103 Stat. 83.

⁹⁵ Statement on Signing the Puyallup Tribe of Indians Settlement Act of 1989, 1 PUB. PAPERS 771, 772 (June 21, 1989).

future Indian land and water claim settlement negotiations, including provision for Administration participation in such negotiations.”⁹⁶

The President’s statement endorsed legislative settlement over litigation in the matter of tribal water rights claims, expressed concern about the cost of this particular settlement, and required the agency to adopt general criteria that would guide future settlement negotiations. Just to underscore the point, notice that in the absence of such presidential instruction, whether to litigate or negotiate and whether to adopt general criteria would, in the first instance, at least, be in the hands of the agency. The agency might not have chosen that path. Even if the comments contained in the signing statement originally came from the agency itself, the direction from the President undermined the efforts of others who might wish the agency to pursue another course.⁹⁷

The President’s instruction guided the agency’s behavior. In 1990, the Department of the Interior adopted its Criteria and Procedures, pointing to the signing statement:

It is the policy of this Administration, as set forth by President Bush on June 21, 1989 . . . that disputes regarding Indian water rights should be resolved through negotiated settlements rather than litigation. Accordingly, the Department of the Interior adopts the following criteria and procedures to establish the basis for negotiation and settlement of claims concerning Indian water resources.⁹⁸

Gone from this rendition of the President’s signing statement (perhaps not surprisingly) is the President’s concern about the cost of such settlements. Nonetheless, the agency read the signing statement to favor a certain kind of approach to water rights claims and, moreover, followed the direction to adopt the criteria and procedures, which were the standards under which it would conduct such negotiations.⁹⁹

Ex post, it would be more difficult for the White House to exert influence over such choices. As presently constructed, the OIRA review process does not apply to enforcement actions.¹⁰⁰ It could, perhaps, be re-formulated to review proposed enforcement actions, but it might be difficult to design such a system. White House reviewers would be overwhelmed if government lawyers sought approval for every enforcement

⁹⁶ *Id.*

⁹⁷ See Dep’t of the Interior, Working Group in Indian Water Settlements; Criteria and Procedures for Indian Water Rights Settlements, 55 Fed. Reg. 9223 (Mar. 12, 1990).

⁹⁸ *Id.* at 9223.

⁹⁹ *Id.* at 9223–25.

¹⁰⁰ Exec. Order No. 12,866, 3 C.F.R. 638, 641–44 at §§ 3(d), 6 (1993) (limiting OIRA review to “all regulatory actions, for both new and existing regulations,” where regulatory actions are defined as “any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation”).

action. Thus, OMB would need to design a review process that only triggered review of important enforcement actions, and it might be difficult to formulate the correct criteria that would include the important decisions but exclude the less important decisions. Even if such a process could be designed, the agency would have the advantages that it has in any ex post process: it defines the agenda by formulating the proposal; it has superior information; and it may be able to use the public nature of the process to pressure the White House to do what the agency would like. Better for the White House to try to head off such proposals in the first instance, through ex ante controls, than attempt to suppress them once proposed.

C. White House Strategies in Context

First, take stock. The White House has many tools at its disposal to influence actors in the executive branch. This analysis has shown that, of the strategies, controlling personnel may be a winning strategy to address any concerns that the White House may have, but it does have its limitations.

Ex ante instruction and ex post review likewise hold promise, but they have different strengths and weaknesses. Ex ante strategies can be used by the White House to direct agencies in a wide variety of ways—prompting action, setting priorities, establishing processes, setting policy and legal interpretation for both rulemaking and adjudication, and designing an enforcement strategy. The fact that ex ante strategies might address such a wide range of issues is an important benefit. But ex ante strategies have an important downside: they force the White House to commit to a position early on in the process of executive branch action.

Ex post review does not require the President to commit early in the process, and it is generally a more thorough review of proposed administrative action than ex ante instructions. On the other hand, it does not have the reach of ex ante direction—it can do little to cure agency torpor or misdirected enforcement strategy or priority-setting, for instance. More than that, the agency has certain advantages in the ex post process—agenda control, information asymmetry, publicity—that it may deploy to its advantage, and may not easily deploy when instructed by the White House in the first instance.

Perhaps the most significant conclusion of this analysis is the advantages of ex ante instructions. There is a voluminous and ever growing literature on OIRA's review of major rules by agencies.¹⁰¹ By comparison, ex ante strategies receive little attention. This is a true statement about the literature, and perhaps it reflects the world. Presidents, that is, may have yet to fully exploit the potential of this strategy of White House control.

But step back and the point is more significant. There are roughly three institutions that have the formal authority to control agencies in one way or another: the

¹⁰¹ See *supra* note 68 and accompanying text.

President, Congress, and the courts. This paper has only analyzed presidential controls, but sometimes, each institution closely supervises the agency. If an agency is developing a major rule, rest assured that members of Congress will be watching, OIRA will review the agency's proposed and final rule, and most likely, a court will entertain a challenge to the rule. The analysis here shows that *ex ante* controls are particularly useful in controlling certain kinds of agency actions, including priority setting and formulation of enforcement strategies. These important agency decisions, it turns out, are largely immune from judicial review.¹⁰² A President attempting to influence agency choices in an important legislative rule or an adjudication competes in some sense with the judicial review that may occur after the rule or order is published. Or, at least, presidential control is circumscribed by the fact of judicial examination and the parameters that that body of law imposes on an agency. But a President who can effectively control an agency's priority setting or its enforcement agenda faces no competition and no parameters from courts. Congress is still left standing, and it has many strategies to assert control over agencies, including the way agencies set priorities and formulate enforcement strategies. But, from the White House perspective, one less institutional competitor—especially one with a judicial cast of mind—may be a happy circumstance.

CONCLUSION

Whether White House influence over the exercise of discretion by subordinate actors is normatively a good thing is not the question this Article addresses. It may be, and it may not be. This Article has instead sought to uncover the systematic advantages and disadvantages of various means of White House control of subordinate actors in the executive branch. Understanding the logic of such strategies may help inform the normative analysis, but it does not supply a conclusion.

¹⁰² *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (agency allocation of funds from a lump sum appropriation is “‘committed to agency discretion by law’”); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (agency's decision not to initiate enforcement proceedings is “presumptively unreviewable”).