

# THE EMPTINESS OF DECISIONAL LIMITS: RECONCEIVING PRESIDENTIAL CONTROL OF THE ADMINISTRATIVE STATE

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*The heads of administrative agencies exercise authority delegated directly to them through legislation. To what extent, then, may presidents lawfully direct these agency heads to carry out presidential priorities? A prevailing view in administrative law holds that, although presidents may seek to shape and oversee the work of agency officials, they cannot make decisions for those officials. Yet this approach of imposing a decisional limit on presidential control of the administrative state in reality fails to provide any meaningful constraint on presidential power and actually risks exacerbating the politicization of constitutional law. A decisional limit presents these problems because the concept of a decision in the governmental setting lacks precision, failing to provide a coherent line between permissible oversight and impermissible decisionmaking. A decisional limit also cannot in practice be enforced against either presidents or agencies. Presidents have available to them four easy strategies, each documented in this Article, that allow them ready escape from legal criticism that they have overridden agencies' autonomy in violation of any purported decisional limit. Instead of continuing to invoke an unworkable standard that only invites unhelpful politicization of constitutional law, legal scholars would do well to invoke the virtues of a bright-line rule in this particular setting and favor a rule that requires agency officials to sign off, literally, on agency actions before they can take effect. Such a formal "signature limit" will serve to constrain presidential power but will do so by avoiding the unnecessary risks that a decisional limit poses to law's legitimacy.*

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## INTRODUCTION

Many of today's most salient controversies over presidential authority center on the President's power over the administrative state. Can a president properly make recess appointments of the heads of agencies during short breaks in congressional business?<sup>1</sup> Do decisions to defer enforcement of statutory provisions violate the President's obligation to "take care that the laws are faithfully executed"?<sup>2</sup> Against the backdrop of questions like these lurks a still deeper and persistent question that lawyers, legal scholars, and public officials have heatedly debated over at least the last several administrations: to what extent may presidents legally direct the heads of agencies to carry out presidential priorities when exercising powers delegated by statute expressly to the agency heads?

With respect to this larger question, no one seriously disputes that presidents possess the authority and responsibility to oversee what agencies do. Nor does anyone contest the President's legal power to remove, at will, the heads of executive branch agencies (at least those whose appointments are not protected by statutory "good cause" limits).<sup>3</sup> The real debate over

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1. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560, 2573 (2014).

2. See U.S. CONST. art. II, § 3. The Obama Administration's delay in compliance requirements under the Affordable Care Act and the Administration's efforts to offer certain kinds of relief from immigration enforcement gave rise to heated controversy and considerable litigation. See generally Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715 (2016); Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753 (2016).

3. See MARSHALL J. BREGER & GARY J. EDLES, *INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS* 144 (2015) ("The President may plainly remove certain officials, such as Cabinet secretaries, and other 'officers of the United States'

presidential directive authority concerns a president's ability to compel the head of an agency to take action consistent with the President's wishes. Adherents to the theory of the unitary presidency argue that the "Constitution gives presidents the power to control their subordinates."<sup>4</sup> Others who approach the question from the standpoint of statutory construction have argued that a president presumptively holds the power to direct agency officials absent clear statutory language to the contrary.<sup>5</sup> By contrast, other scholars have concluded that, even when not specifically precluded by statute, presidents "cannot dictate to an agency head" what actions to take.<sup>6</sup> Such directive power, it is suggested, poses grave dangers to modern democratic governments.<sup>7</sup> Professor Bruce Ackerman, for example, has raised worries about extremist Presidents who "will use their White House staff to give the bureaucracy marching orders to implement their charismatic visions," leading agencies to "refuse to defer to expert assessments of the facts, or traditional understandings of the law."<sup>8</sup>

As a bulwark against these legitimate concerns, legal scholars have argued for placing a decisional limit on presidential involvement in actions by administrative agencies—that is, a limit on the extent to which Presidents can actually make or dictate the decisions that agencies are authorized by statute to make.<sup>9</sup> Professor Robert Percival, for example, has

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for no reason and without explanation."); *see also id.* at 144–51 (reviewing legal limitations on removal authority when statutes require a showing of good cause).

4. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 4* (2008); *see also id.* at 420–27; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *YALE L.J.* 541, 581 (1994); Saikrishna B. Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 *YALE L.J.* 991, 991 (1993).

5. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2251, 2384 (2001) (defending presidential directive authority on statutory grounds and arguing for its legality because "Congress generally has declined to preclude the President from controlling administration in this manner").

6. Cass R. Sunstein, *The Myth of the Unitary Executive: Presidential Power from Washington to Bush*, 7 *ADMIN. L.J. AM. U.* 299, 306 (1993).

7. *See generally* BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010); Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 *HARV. J.L. & PUB. POLICY* 227, 227 (1998).

8. ACKERMAN, *supra* note 7, at 38.

9. The specific use of the term "decisional" in this context appears to owe its origins to Professor Peter Strauss. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *COLUM. L. REV.* 573, 595 (1984) (arguing that "statutes place decisional authority in the agencies"). However, even when this precise terminology is not used, the underlying concept of a decisional limit is widely accepted. *See* Kagan, *supra* note

argued that, although the Constitution affords the President “enormous power to influence [administrators’] decisions, it does not give him the authority to dictate substantive decisions entrusted to them by law.”<sup>10</sup> Professor Peter Strauss has advanced the view that the Constitution authorizes Presidents only to serve as “overseers” of administrative agencies, not to become the “deciders.”<sup>11</sup> Strauss’s elegant articulation of a

5, at 2250 n.8 (characterizing as “generally accepted” the view that presidents cannot displace agency decisions); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 24–25 (1995) (describing as “the conventional view” the notion that “the President has no authority to make [an agency] decision himself, at least if Congress has conferred the relevant authority on an agency head”). For more recent use of “decisional” phraseology, see, for example, Nina A. Mendelson, *Another Word on the President’s Statutory Authority Over Agency Action*, 79 FORDHAM L. REV. 2455, 2465 (2011) (referring to presidential “directive or decisional authority”); Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1994–97 (2015) (describing limitations on presidential authority as marking the confines of a “decisional allocation”).

10. Robert V. Percival, Essay, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 966 (2001); see also Robert V. Percival, *Who’s in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2488 (2011) [hereinafter Percival, *Who’s in Charge?*] (arguing that “even if the President has unfettered removal authority over the heads of non-independent agencies . . . this removal power does not imply the power to control decision making entrusted by law to agency heads”).

11. See Peter L. Strauss, Foreword, *Overseer, or ‘the Decider’? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704–05 (2007) [hereinafter Strauss, *Overseer or Decider?*] (noting that the “President’s role . . . is that of overseer and not decider”). Professor Strauss’s influential article builds on and comports with a rich collection of other seminal scholarship of his on the President’s role in administration and executive branch policymaking. See, e.g., Strauss, *supra* note 9; Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 977 (1997). Undoubtedly informed by that body of scholarship, other legal scholars have similarly advocated a decisional limit on presidential authority over the administrative state. See, e.g., PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 159 (2009) (“The elected President still exerts powerful influence over each agency, but final decision making authority on matters that the Constitution allows Congress to regulate would rest in those agencies to which our elected Congress delegates decision making authority.”). Professor Strauss, though, has been described as the “leading contemporary defender” of the distinction between permissible presidential oversight and impermissible presidential decisionmaking on matters for which Congress has delegated authority to administrators. Stack, *supra* note 9, at 1994–95; see also Wendy E. Wagner, Essay, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2060 (2015) (observing that Professor Strauss is “leading the parade” of “institutional architects” who have thought about how to structure presidential oversight

distinction between the President as an overseer and decider resonates well with the tenor of recent presidential politics. After all, President George W. Bush famously portrayed himself as “the decider” atop the Executive Branch.<sup>12</sup> Even though then-Senator Barack Obama, as a presidential candidate, spoke more deferentially about the extent of Presidents’ executive authority, over the course of his administration President Obama also exhibited a strong commitment to presidential control over executive branch agencies.<sup>13</sup> Consider only a few of President Obama’s actions:

- Toward the end of his first term in office, President Obama surprised environmentalists—not to mention, apparently, the EPA Administrator<sup>14</sup>—by opposing the promulgation of new ozone air quality standards, a proposal which the EPA promptly withdrew.<sup>15</sup>

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of agency experts). Still earlier scholarship, of course, expresses a similar understanding of the law. See, e.g., Reginald Parker, *The Removal Power of the President and Independent Administrative Agencies*, 36 IND. L. REV. 63, 64 (1960) (noting that when “a statute vests functions in an administrative body or officer other than the President, that agency and not the President is the bearer of the powers concerned”).

12. In a widely reported news conference held in April 2006, President Bush declared: “I listen to all voices, but mine is the final decision . . . I read the front page, and I know the speculation. But I’m the decider, and I decide what is best.” *Bush: ‘I’m the Decider’* Rumsfeld, CNN (Apr. 18, 2006), <http://www.cnn.com/2006/POLITICS/04/18/rumsfeld/>.

13. On the campaign trail in 2008, then-candidate Obama said during a town hall dialogue in Lancaster, Pennsylvania: “I taught constitutional law for ten years. I take the Constitution very seriously. The biggest problems that [we’re] facing right now have to do with George Bush trying to bring more and more power into the Executive Branch and not go through Congress at all, and that’s what I intend to reverse when I’m President of the United States of America.” *Obama 2008: Bypassing Congress Unconstitutional; I’ll Reverse It*, YOUTUBE (Feb. 13, 2014), <https://youtu.be/a3IWq3CXHyc>; Mike Miller, *Obama in 2008: ‘I Intend to Reverse’ George Bush’s Power Grab, Work with Congress*, INDEP. J. REV. (2013), <http://www.ijreview.com/2014/02/114994-obama-2008-intend-reverse-george-bushs-power-grab/> (last visited Oct. 4, 2016).

14. See, e.g., John M. Broder, *Re-election Strategy Is Tied to a Shift on Smog*, N.Y. TIMES (Nov. 16, 2011), <http://www.nytimes.com/2011/11/17/science/earth/policy-and-politics-collide-as-obama-enters-campaign-mode.html> (indicating that EPA Administrator Lisa Jackson “did not see coming . . . a rare public rebuke [by] the president”).

15. See Letter from Cass R. Sunstein, Administrator of the Office of Information and Regulatory Affairs, to Lisa Jackson, Administrator of the EPA, (Sept. 2, 2011), [https://www.whitehouse.gov/sites/default/files/ozone\\_national\\_ambient\\_air\\_quality\\_standards\\_letter.pdf](https://www.whitehouse.gov/sites/default/files/ozone_national_ambient_air_quality_standards_letter.pdf) (“The President has instructed me to return this rule to you for

- Using the slogan “We Can’t Wait,” the Obama Administration widely touted its executive efforts to promote job growth following the Great Recession, instead of waiting “for an increasingly dysfunctional Congress to do its job.”<sup>16</sup>
- When the Department of Health and Human Services (HHS) faced controversy over whether employer health coverage under the Affordable Care Act should be required to cover contraceptives, the President delivered a major announcement from the White House about what HHS would do.<sup>17</sup>
- In late 2014, President Obama announced controversial immigration reforms that he claimed to “have the legal authority to take as President,” but which, according to Republican members of Congress, exceeded his legal authority.<sup>18</sup>

Throughout his second term, President Obama time and again publicly declared that he had a “pen” and a “phone,” a mantra aimed at conveying that he was willing to take policy action even in the face of congressional inaction and stalemate.<sup>19</sup> The Obama Administration, in short, was no

reconsideration. He has made it clear that he does not support finalizing the rule at this time.”). For further discussion, see *infra* notes 87–92 and accompanying text.

16. *We Can’t Wait*, THE WHITE HOUSE, <http://www.whitehouse.gov/economy/jobs/we-cant-wait> (last visited Oct. 4, 2016); see also Cary Coglianese & Christopher Carrigan, *The Jobs and Regulation Debate*, in DOES REGULATION KILL JOBS? 5–6 (Cary Coglianese, Adam M. Finkel, & Christopher Carrigan eds., 2013) (describing some of President Obama’s executive actions intended to stimulate employment growth).

17. See Barack Obama, *Remarks by the President on Preventive Care*, THE WHITE HOUSE (Feb. 10, 2012, 12:15 PM), <https://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care>.

18. Barack Obama, *Remarks by the President in Address to the Nation on Immigration*, THE WHITE HOUSE (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>. For criticism of these reforms by Republican members of Congress, see, for example, Seung Min Kim, *Senate GOP files Supreme Court brief against Obama’s immigration actions*, POLITICO (Apr. 4, 2016, 7:58 PM), <http://www.politico.com/story/2016/04/senate-gop-supreme-court-obama-immigration-221536>.

19. President Obama has said, “I am going to be working with Congress where I can to accomplish this, but I am also going to act on my own if Congress is deadlocked . . . I’ve got a pen to take executive actions where Congress won’t, and I’ve got a telephone to rally folks around the country on this mission.” Tamara Keith, *Wielding a Pen and a Phone, Obama Goes it Alone*, NPR (Jan. 20, 2014, 3:36 AM), <http://www.npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone>. For additional examples of presidential assertion of authority over agencies in Obama Administration initiatives

exception to the modern trend toward an “administrative presidency,”<sup>20</sup> and early actions by President Donald Trump signal that exertions of presidential authority over administrative agencies will continue—if not even be taken to new extremes.<sup>21</sup> Subsequent presidencies are unlikely to step back from active presidential interest and involvement in the work of administrative agencies, ensuring that the legal limits constraining presidents in their efforts to influence the administrative state will remain among administrative law’s most vital questions.

Although presidents from both parties have repeatedly engaged in what looks like, to any reasonable outside observer, clear decisional control over actions taken by appointees, they manage rather easily to honor any

concerning gun violence and the implementation of health care reform, see Bagley, *supra* note 2; Eric Bradner & Gregory Krieg, *Emotional Obama Calls for ‘Sense of Urgency’ to Fight Gun Violence*, CNN (Jan. 5, 2016, 8:17 PM), <http://www.cnn.com/2016/01/05/politics/obama-executive-action-gun-control/>.

20. See, e.g., Cary Coglianese, *The Administrative President*, REGBLOG (Jan. 21, 2013), <http://www.regblog.org/2013/01/21-coglianese-administrative-president.html>. The term “administrative presidency” dates back forty years to the work of political scientist Richard Nathan, who argued that Presidents significantly influence domestic policy by focusing their efforts on shaping the direction of bureaucratic action. See Richard P. Nathan, *The “Administrative Presidency,”* 44 PUB. INTEREST 40, 40 (1976). See generally RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* (1983).

21. In his acceptance speech at the 2016 Republican National Convention, candidate Trump stated notably that he *alone* could fix the nation’s problems, providing one indication of his support for a strong, unitary vision of presidential power. See, e.g., Yoni Appelbaum, *‘I Alone Can Fix It’*, THE ATLANTIC (July 21, 2016), <http://www.theatlantic.com/politics/archive/2016/07/trump-rnc-speech-alone-fix-it/492557/>. In just the first week following his inauguration, President Trump issued a series of executive directives aimed at administrative agencies on topics including climate change, health care insurance, and immigration, raising serious public alarm over his quick embrace of command-style authority, sometimes without even any serious review and input from officials at the relevant agencies. See, e.g., Peter Baker, *Travelers Stranded and Protests Swell Over Trump Order*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/politics/white-house-official-in-reversal-says-green-card-holders-wont-be-barred.html>; Henry F. Carey, *Sultan Donald Trump? How the President Places Himself Above the Law*, NEWSWEEK (Jan. 29, 2017, 11:10 AM), <http://www.newsweek.com/sultan-donald-trump-president-above-law-548680>; Michael D. Shear & Ron Nixon, *How Trump’s Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/politics/donald-trump-rush-immigration-order-chaos.html>; Brady Dennis & Juliet Eilpern, *Trump Administration Backs Off Plan to Scrub Climate Pages from EPA Website*, WASH. POST (Jan. 25, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/01/25/trump-administration-backs-off-plan-to-scrub-climate-pages-from-epa-website/>.

purported decisional limits on their authority over agencies. The ability of presidents to comply with such an asserted limit on directive authority, while simultaneously still effectively controlling their political appointees, reveals a major weakness in any argument for placing a decisional limit on presidential control. The kind of overseer–decider distinction that demarcates such a limit is in actuality quite easy for Presidents to honor—while still permitting them effective decisional control over agency action. The overseer–decider distinction is both unclear in application and unenforceable, making it, as a practical matter, of virtually no consequence in the everyday power struggles between the White House and administrative agencies.<sup>22</sup> Even assuming the distinction could be sustained as a matter of constitutional interpretation, it is hard to imagine the judiciary enforcing it. Presidents can readily achieve their goals—and in that sense function as deciders—without ever crossing the amorphous decisional line in the sand.

Recognizing that an attempt to impose a decisional limit on presidential control only tilts at windmills does not deny that law in general can affect behavior, nor need it signal any retreat from administrative law’s core aspiration to “succeed in applying the constraints of law to the world of politics.”<sup>23</sup> Such recognition also does not dispute that Congress can authorize only administrators, and not presidents, to take governmental action.<sup>24</sup> Rather, the very important need for effective administrative law and statutory limits on governing authority itself provides a key reason to resist the current way that a decisional limit on presidential authority has been conceived. The murkiness of a purported overseer–decider

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22. See Pildes & Sunstein, *supra* note 9, at 25 (“In practice . . . the distinction between presidential influence and command might be thin indeed.”).

23. Strauss, *Overseer or Decider?*, *supra* note 11, at 713.

24. To be clear, I do not take issue here with the idea that there can be legal limits on presidential involvement in domestic policy matters, especially when matters have been expressly delegated to agencies. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”). For example, as I discuss further in Part IV, I assume that presidents cannot fire cabinet officials and then start to sign rule documents or take other actions themselves when the statutory authority for such action rests with the cabinet officials, not with the President. Rather, my focus here is on the *form* of the limit being conventionally based on some *decisional essence*, drawn on the basis of a completely opaque line between “overseeing” and “deciding.” Hence, I refer throughout to my target as “decisional limits.” In Part IV, I introduce the more promising way to draw the limit, based on a formalist, bright-line rule about whose signature is required to effectuate administrative action.

distinction not only makes this decisional limit ineffectual, but it also makes entirely foreseeable that partisans will mask their ideological objections as legal ones—thus weakening, rather than strengthening, the legitimacy of law. The incomprehensibility of an overseer–decider limit makes it weak as a matter of law, which, within an intensely political climate, actually risks undermining administrative law by unnecessarily politicizing claims about it and thereby also diminishing the respect the law needs to help to sustain its behavioral force.<sup>25</sup> Precisely because it is anybody’s guess where the line between permissible oversight and impermissible decisionmaking lies, Republicans will continue to criticize Democratic presidents for crossing the line—as they vociferously did when Barack Obama was President—while Democrats will continue to criticize Republicans—as they did vociferously when George W. Bush was President.<sup>26</sup> When House Speaker John Boehner reminded President Obama that, in addition to a pen and a phone, “he also has a Constitution and an oath of office that he took,”<sup>27</sup> the Speaker sounded much like Democrats did during the Bush Administration, a time when Republicans were largely silent about presidential control.<sup>28</sup> When a legal doctrine so predictably becomes invoked in partisan ways, the Constitution comes to serve as a rhetorical football in a highly polarized ideological game. The law’s legitimacy, in turn, suffers.<sup>29</sup>

Of course, the risk of political exploitation of malleable legal principles can never be avoided altogether. In certain areas of law, and even on other questions of administrative law, such a risk should be taken—at least where

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25. See Cary Coglianese & Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry of Norms of Executive Power*, 164 U. PA. L. REV. 1871 (2016) (reporting empirical research indicating that the invocation of an overseer–decider standard in situations involving presidential involvement in administrative affairs diminishes public legitimacy over legal decisions); see also James L. Gibson & Michael J. Nelson, *Testing Positivity Theory: What Roles do Politicization and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?* 5 (2016) (unpublished manuscript) (finding that the Supreme Court suffers a loss of legitimacy when it becomes “politicized”) (on file with author).

26. For a general discussion of differing reactions in the Bush and Obama years, see Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 643–44 (2010).

27. Keith, *supra* note 19.

28. Many Republicans appear to have returned to silence yet again in the opening days of the Trump Administration. See, e.g., Russell Berman, *Congressional Republicans Suddenly Lose Interest in Executive Overreach*, THE ATLANTIC (Jan. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/01/republicans-trump-executive-orders/514547/>.

29. See Coglianese & Firth, *supra* note 25, at 1908–09.

there are realistic chances that an otherwise plastic standard might yield some beneficial behavioral effects.<sup>30</sup> Yet when the conceptual basis for a legal distinction is far from clear (as I will show in Part I of this Article is the case with decisional limits), and where there is no evident countervailing practical or legal value to that distinction, it would be better to abandon the reliance on it as a source of law. This is especially so when such a murky distinction would be invoked in a context that is highly politicized, as inter-branch disputes inevitably are.<sup>31</sup>

Disavowing the overseer–decider distinction as a matter of law, which I argue lawyers and legal scholars should do, does not render critics of presidential overreach mute; political protest and moral criticism will always remain.<sup>32</sup> As for the law, the better and more meaningful approach to presidential overreach is to embrace a highly formalistic doctrine, one not as prone to ideological contamination and one which still serves the broader purposes underlying the dysfunctional overseer–decider distinction. Such a solution lies with a bright-line rule based on the formal signing of documents, an approach which adherents of decisional limits presumably already accept and yet which offers considerable advantage in terms of clarity and an ability to resist unhelpful politicization and the weakening of law’s legitimacy.<sup>33</sup> In the end, legal protection against presidential overreach may well never be entirely sufficient, but the best doctrinal approach in this setting will not come from incoherent decisional limits; rather, it will take the form of a clear, formal rule that demands that each administrator signs off, literally, on all agency actions delegated to that official.

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30. The balancing test used in procedural due process analysis in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), comes to mind as a possible example where a standard (rather than a rule) could be beneficial.

31. For concerns similar to those expressed in this Article about decisional limits on presidential directive authority, formal rules would tend to be preferable to more malleable standards when applied to separation-of-powers questions more generally. Cf. Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765, 807 (2016) (“In high-stakes and high-volume domains, capacity limits constrain a Court motivated to enforce constitutional limits to do so in the form of categorical rules that cleanly insulate most government action from constitutional challenge.”).

32. Sometimes these political and moral objections may even be based on strong norms that, even if not legally binding, are nevertheless viewed by government officials as obligatory. Cf. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1189–94 (2013).

33. See *infra* Part IV.

## I. WHAT DOES A DECISIONAL LIMIT MEAN?

No one disputes that the President serves as the head of the Executive Branch, and no one seriously argues that a president is above the law. In the realm of “ordinary” or “conventional” administration of domestic affairs, Presidents are as bound as anyone to adhere to federal statutes.<sup>34</sup> But when Congress grants authority to an administrative agency to take governmental action, does that mean the agency head alone decides whether and how to take that action? Or does a grant to an agency within the Executive Branch imply that the agency must exercise its statutory responsibility subject to presidential supervision? Actions carried out by subordinate officials do, after all, fall under the President’s leadership and constitutional responsibility, and the public will hold presidents accountable for actions of subordinate officials.<sup>35</sup> But as a legal matter, what does presidential “control” of administrative action mean? What is the precise nature and scope of a president’s permissible influence over the Executive Branch on domestic policy matters?

These are the motivating questions underlying a long tradition of legal scholarship in administrative law. For many scholars, the answers to these questions hinge on something like the overseer–decider distinction that Professor Strauss has so expressively advanced. As the one official constitutionally vested with “*the* executive power” of the federal government, the President clearly has a role to play supervising the Executive Branch, if for no reason other than to ensure that laws are “faithfully executed.”<sup>36</sup> But when a statute expressly grants an administrative agency the authority to act, the President’s role must be limited, according to the standard view, to “that of overseer and not decider.”<sup>37</sup>

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34. The quoted adjectives are from Peter Strauss, *Overseer or Decider?*, *supra* note 11, at 708–09. Like Strauss, I am focused on situations in which Congress has assigned a duty or granted authority to an agency, but where the agency still has discretion in how it acts. Such discretionary responsibilities can be distinguished from what the Supreme Court has called “ministerial” duties. See *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838). They can also be distinguished from actions that are purely discretionary or political. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803). I am chiefly concerned with the actions in between the ministerial and discretionary extremes, or what Professor Strauss has aptly called “the vast middle ground that is the home of administrative law.” Strauss, *Presidential Rulemaking*, *supra* note 11, at 977.

35. See U.S. CONST. art. II, § 3; see also Coglianese & Firth, *supra* note 25, at 1873.

36. U.S. CONST. art. II, §§ 1, 3 (emphasis added).

37. Strauss, *Overseer or Decider?*, *supra* note 11, at 705.

The argument for such a decision-based distinction appears to be grounded in constitutional interpretation, statutory interpretation, and a normative concern about the accumulation of power in the presidency. The principal constitutional argument calls attention to two provisions—one each in Articles One and Two of the Constitution—that acknowledge that officials other than Presidents have their own “duties.”<sup>38</sup> The statutory argument follows an *expressio unius* logic: by authorizing specific secretaries or administrators to act, statutes should be read to exclude authorization to presidents because Congress could have (and sometimes has) granted decisional authority to presidents instead.<sup>39</sup> Limiting the presidential role to oversight when statutes only authorize agency action also purportedly protects against presidents wielding “unchecked individual power,” as agency administrators retain ultimate—and in principle, independent—decisionmaking authority.<sup>40</sup> True, Presidents can still remove administrators, but removal and the process of confirming a replacement imposes political costs that serve to constrain that exercise of presidential power.<sup>41</sup>

What should we make of the argument for a decisional limit? For many observers, its persuasiveness probably depends, in the first instance, on their views of the optimal configuration of presidential power, normatively and constitutionally, in relation to the other branches of government.<sup>42</sup> I take

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38. U.S. CONST. art. II, § 2 (noting, with regard to “the executive Departments,” the “Duties of their respective Offices”); *id.* art. I, § 8 (granting Congress power “to make all Laws which shall be necessary and proper for carrying into Execution” both the enumerated legislative powers as well as “all other Powers vested . . . in any Department or Officer”).

39. See Kagan, *supra* note 5, at 2328 (noting reliance by those who deny general presidential directive authority on “the hoary principle of ‘expressio unius est exclusio alterius’—to include one thing is to exclude another—to justify the equation of silence with denial”). For an influential argument against presumptive directive authority that relies on the fact that Congress has sometimes expressly given decisional and directional authority to the President, see Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006).

40. Strauss, *Overseer or Decider?*, *supra* note 11, at 759.

41. See, e.g., Stack, *supra* note 40, at 295 (“Firing typically has a much higher political cost to the President than (successfully) directing an official’s exercise of discretion.”). Some scholars have even suggested that the political constraints on presidential overreach are greater than any provided by law. See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* 15 (2010) (arguing that “law does little to constrain the modern executive . . . whereas politics and public opinion do constrain the modern executive”).

42. For contrasting normative views of presidential power, compare, for example, ACKERMAN, *supra* note 7, at 4 (describing a powerful presidency as “a serious threat to our constitutional tradition”), with, for example, WILLIAM G. HOWELL & TERRY M. MOE,

no position here on that broader normative debate; rather, I want to focus attention on whether distinguishing between *deciding* and *overseeing* can serve as *any* meaningful legal constraint on presidential power. In other words, I accept for analysis the underlying assumption of those who argue for a decisional limit, namely that presidential control of the administrative state should be constrained. I am interested in whether a decisional limit can realistically help to achieve whatever level of presidential authority might be optimal. If the proper calibration of authority depends on presidents acting as overseers rather than decisionmakers, then we should examine carefully what that distinction means and how it might possibly work.

I begin this analysis by noting the semantic and conceptual plasticity of a decisional limit. Under the prevailing argument for such a limit, presidents may properly take action that can be described by a broad range of verbs. For example, presidents may permissibly “supervise,”<sup>43</sup> “guide,”<sup>44</sup> “consult,”<sup>45</sup> “coordinate,”<sup>46</sup> and engage in “oversight”<sup>47</sup> of other officials in the Executive Branch. When those other officials are exercising discretion afforded to them by statute, however, presidents purportedly may not “direct,”<sup>48</sup> “command,”<sup>49</sup> “control,”<sup>50</sup> “decide,”<sup>51</sup> or engage in “policymaking.”<sup>52</sup> Yet as this variety of terms shows, the distinction embedded in a decisional limit is far from self-evident. In ordinary discourse, outside the context of presidential–agency relations, some of the terms used for permissible conduct are synonymous with, or at least entail, the very terms used to characterize impermissible conduct. *Overseers* also direct, as they often do when they serve on corporate boards of *directors*. Mountain climbing *guides* make decisions for the clients in their care. In almost every organization of any size, *supervisors* issue *commands*. Indeed, supervisors would presumably not be doing their jobs if they were not

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RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT AND WHY WE NEED A MORE POWERFUL PRESIDENCY (2016) (advancing reform agenda “that moves presidents to the center of the policy process”).

43. Strauss, *Overseer or Decider?*, *supra* note 11, at 709 n.66, 718.

44. *Id.* at 709 n.66.

45. *Id.* at 712, 717, 737–38.

46. *Id.* at 717–18.

47. *Id.* at 709 n.66, 712, 737, 759; *see also id.* at 697, 759 (“oversee”).

48. *Id.* at 709 n.66.

49. *Id.* at 709 n.66, 712, 715, 738, 757.

50. *Id.* at 702, 718, 728, 752. *But see id.* at 709 n.66 (suggesting that when control is only “general” it might sometimes differ from directing or deciding).

51. *Id.* at 709 n.66; *see also id.* at 740 (“decisions”).

52. *Id.* at 737.

trying to *direct* and *control*. Consider supervisors who tell their cleaning staffs to “scrub the floors”; they have *decided* that the floors should be cleaned and that such cleaning will take priority over other tasks.

If the actual language characterizing overseers and deciders is itself far from clear, it is hard to see how anyone can know whether a president is acting properly.<sup>53</sup> One person’s responsible, proactive presidential *overseer* will be another person’s meddling, overbearing *decider*. The distinction is further complicated by the fact that political appointees may be already inclined to take many actions fully consistent with their President’s preferences. In cases of agreement between administrators and presidents, the overseer–decider distinction underlying an alleged decisional limit makes no difference whatsoever. No matter how overbearing they may be, supervisors who tell their custodial staffs to scrub the floors have not become the deciders when their staffs already planned to complete this task anyway.

Another complication is that presidents can also get their way merely through consultation. Administrators may choose to follow their President’s wishes after White House staff members provide substantively persuasive information. When administrators are simply persuaded by presidents that following their wishes is the best course of action for advancing their agencies’ respective missions and the overall public interest, the overseer–decider distinction again does not matter. Whatever it may actually mean for a president to be a decider, providing information or expressing a view is not the same as making the decision.<sup>54</sup> This is significant because, as political scientist Richard Neustadt noted long ago, much of what in reality constitutes presidential power amounts to the power to persuade.<sup>55</sup>

Adherents of decisional limits do, of course, recognize that Presidents can still get their way by acting as overseers. What, then, could they possibly have in mind by distinguishing *oversight* from *decisionmaking*? Perhaps Presidents become deciders when they persuade their political

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53. Others have called attention to similar line-drawing difficulties concerning influences on official decisionmaking in other contexts, such as with decisionmaking by prosecutors. See, e.g., Sara S. Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 414 n.257 (2009). For empirical evidence showing the difficulties of discerning decisionmaking, see Coglianese & Firth, *supra* note 25, at 1883–87, 1903–05.

54. See *Sierra Club v. Costle*, 657 F.2d 298, 407 (D.C. Cir. 1981) (distinguishing the mere existence of a face-to-face meeting between the President and EPA officials from an “effort to base the [EPA] rule on any ‘information or data’ arising from that meeting”).

55. See generally RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* (1980).

appointees, not by providing information and reasons, but by resorting to making threats or promises of rewards.<sup>56</sup> Threats—whether express or implied—could conceivably encompass a broad range of negative consequences, including refusing to support appointees on policy issues or on budgetary negotiations with Congress, leaking negative news about appointees, and outright dismissing them (or, more likely, demanding their resignation). Rewards plausibly include inviting the appointees to White House events and photo-ops, supporting them on policy issues important to appointees, augmenting budgetary requests, and even providing future assurances of political support after appointees leave the administration.

But if the mere availability of threats and rewards is what distinguishes deciders from overseers, then that criterion sweeps far too broadly. Rewards and threats are incentives, and incentives are essential parts of all principals' efforts to *oversee* their agents.<sup>57</sup> The mere fact that Presidents can deploy incentives seems hardly enough, by itself, to make a President “the decider.”

Admittedly, one could imagine a President engaging in unseemly and decidedly repugnant threats, such as bribery or blackmail—incentives that would clearly go out of bounds. If a President were to threaten punitive measures sufficient to place an administrator under duress, such as threatening an administrator with serious bodily harm, then that President would have crossed a sacrosanct line. But the line would not be the overseer–decider line. The President would have crossed the line demarcating criminal conduct from lawful behavior, a line that has been properly drawn for reasons entirely independent of the concerns underlying the debate over presidential directives. The overseer–decider distinction would not be doing any of the conceptual or normative work in such an instance. If it means anything at all, the overseer–decider distinction addresses a debate over presidential orders—not violence.

Outside of criminal acts, the threat to remove an agency head is probably the most serious threat that any president can wield in the

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56. For analytic purposes, the difference between a threat and a reward is not crucial here. Indeed, the promise of a reward could be viewed simply as a special kind of threat, namely a threat that, if the appointee does not act in a certain way, the reward will be denied. Cognitively, of course, people do react somewhat differently to a loss of something they currently possess than the denial of a comparable gain.

57. For a discussion of principal–agent relationships, including the role of incentives in managing these relationships, see generally John W. Pratt & Richard J. Zeckhauser, *Principals and Agents: An Overview*, in *PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS* (1985).

administrative context.<sup>58</sup> But surely even a threat of removal would never place an administrator under the level of coercion necessary to establish that the President effectively had become the decider. Removal hardly rises to the level of duress in criminal law, which usually requires a threat of death or “grievous bodily injury.”<sup>59</sup> Quite the contrary, not only do courts accept Presidents’ removal authority, but such power is often thought to be a desirable mechanism for channeling presidential control of administrators by those who think Presidents should not become deciders.<sup>60</sup> Professor Strauss, who otherwise advocates a decisional limit on presidential involvement in administrative matters, nevertheless accepts that “the President could assure the faithful execution of the laws . . . through removal of one who failed to follow his directions.”<sup>61</sup> Whatever it is that might make any president the decider must therefore be something other than the nature of the incentives wielded by the President.

Perhaps the overseer–decider distinction hinges instead on administrators’ motivations for deferring to presidential preferences against their own. If an administrator was *motivated* by a president’s preferences or actions rather than by the substantive, policy merits implicated by the action to be taken, then maybe that would make the President the decider.

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58. Removal is a serious threat in that it directly affects an appointee’s employment and pursuit of professional or policy goals. That said, given the costs to the President of removal, in terms of needing to secure Senate confirmation for a replacement, in practice such threats will likely have limited credibility to them. Cf. Jonathan L. Entin, *Synecdoche and the Presidency: The Removal Power as Symbol*, 47 CASE W. RES. L. REV. 1595, 1595 (1997) (arguing that “the power to remove has limited real-world significance”).

59. See, e.g., Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1340–41 (1989) (explaining that “death and grievous bodily injury are the only two types of threatened harm that unambiguously exculpate a coerced actor”). In the criminal law context, even when a defendant faces a mortal threat, the excuse of duress does not negate the defendant’s agency; rather, it remains the case that “the coerced actor *chooses* to violate the law.” *Id.* at 1359–60. It would clearly be inconsistent to treat Presidential threats far less serious than those needed to meet the test of duress in the criminal law as nevertheless sufficient to do what even the excuse of duress does not do, namely to negate agency, and thereby to make the President the decider rather than the coerced administrator.

60. See, e.g., *Myers v. United States*, 272 U.S. 52, 134 (1926) (“The imperative reasons requiring an unrestricted power [for the President] to remove the most important of his subordinates.”).

61. Strauss, *Overseer or Decider?*, *supra* note 11, at 705–06. If the threat of removal were deemed to create a condition of true duress, Professor Strauss would certainly not have emphasized that “The right to remove and the authority to decide are not to be conflated.” *Id.* at 708.

Yet if the overseer–decider distinction hinges on what goes on inside the head of an administrator, this all but guarantees that the overseer–decider distinction will have no practical consequence, as motivations cannot be observed and they can be easily masked. Furthermore, since at least the *Morgan* litigation of the late 1930s, courts have noted that in reviewing administrative action “it is not the function of the court to probe the mental processes of [administrators].”<sup>62</sup> In *Citizens to Preserve Overton Park v. Volpe*,<sup>63</sup> the Supreme Court affirmed that “inquiry into the mental processes of administrative decisionmakers is usually to be avoided” absent “a strong showing of bad faith or improper behavior.”<sup>64</sup> The D.C. Circuit Court, in *Sierra Club v. Costle*,<sup>65</sup> noted that “presidential prodding” might affect agency decisions but “in a way the courts could not police.”<sup>66</sup>

Even if the motivational effects of presidential prodding could be observed and policed, undoubtedly what would be observed most often would be a variety of rather benign, possibly even laudable, motivations for administrators to follow their Presidents. Political appointees who feel personal loyalty toward their Presidents, perhaps even out of gratitude for their appointments, naturally can be expected to respond to presidential requests or expressions of preference.<sup>67</sup> An administrator might also accept a moral obligation to defer to the President because of a principled belief that the President holds greater democratic accountability, having won a national election that the administrator did not.<sup>68</sup> Presidents who elicit loyalty and gratitude, however, are not necessarily deciders. “There is a difference,” Professor Strauss has aptly observed, “between ordinary respect and political deference, on the one hand, and law-compelled obedience, on the other.”<sup>69</sup>

It is this notion of “law compelled obedience” that in the end appears to be the only plausible conceptual basis for the overseer–decider distinction. Namely, the idea that a president’s order to an administrator *legally*

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62. *Morgan v. United States*, 304 U.S. 1, 18 (1938); see *United States v. Morgan*, 313 U.S. 409, 422 (1941) (noting that the “integrity” and “independence” of the administrative process must be respected by not subjecting administrators to judicial questioning).

63. 401 U.S. 402 (1971).

64. *Id.* at 420.

65. 657 F.2d 298 (D.C. Cir. 1981).

66. *Overton Park*, 401 U.S. at 408.

67. Strauss, *Overseer or Decider?*, *supra* note 11, at 702.

68. *Cf.* Kagan, *supra* note 5, at 2334 (noting that Presidents “are the only governmental officials elected by a national constituency in votes focused on general, rather than local, policy issues”).

69. Strauss, *Overseer or Decider?*, *supra* note 11, at 704.

obligates that administrator to follow it, simply because it comes from the President, even though the administrator exercises authority expressly delegated to the administrator by statute. It is that notion of legal duty that the debate over presidential directive authority ultimately implicates. But what does the notion of legal duty provide by way of demarcating permissible oversight activity by a President and impermissible decisionmaking? It would seem that if the President orders the head of an agency to take action, and the agency head has a legal duty to obey, then the President has presumably become the decider in the eyes of the law. Of course, such a view of what makes a president a decider is circular; it begs the question of what constitutes a legally binding presidential order.<sup>70</sup> The answer, presumably, would be any order that makes the President the decider, not an overseer. But if acting as a decider is not lawful, then there can never be an order that imposes any such legal obligation and thus would violate the decisional limit. The overseer–decider distinction, in other words, still performs no meaningful conceptual work in defining limits on presidential authority.

Rather than providing a justification for a decisional limit, any invocation of the notion of law-compelled obedience to distinguish between permissible presidential oversight and impermissible decisionmaking is at best merely another way of restating a conclusion that presidential orders do not impose legal obligations on the heads of agencies. It does not advance our understanding of what presidential actions would exceed a decisional limit. We can, then, move past the conceptual emptiness of the overseer–decider distinction and instead explore what leverage the notion of law-compelled obedience might provide in practice in seeking to place limits on presidential control.

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70. Some readers may be prompted to entertain weighty jurisprudential questions about the essence of law and what distinguishes it from other kinds of social norms and other factors shaping human behavior. Such questions are important but are broader than my point here. My claim is not about the essence of law but rather about the value of relying on a distinction between oversight and decision given the inherent conceptual difficulty of drawing any meaningful line. In that regard, the question begged by invoking law-compelled obedience is still the question of what distinguishes oversight from decision. Under the conventional decisional-limit account, Presidents who *decide* create no legal duty for administrators to obey, while Presidents who *oversee* also create no legal duty to obey.

## II. DECISIONAL LIMITS IN PRACTICE

A legal obligation is often taken to mean a duty enforceable by a court.<sup>71</sup> Yet I do not read anyone in the debate over directive authority to suggest seriously that the courts should step in to enforce presidential directives. It would be a remarkable intrusion of the Judicial Branch into the inner workings of the Executive Branch if presidents were to seek and be able to obtain court orders compelling their own subordinates to follow presidential orders. For this reason, courts would almost certainly eschew intervening on behalf of a president in order to compel an appointed officer to do what the President had ordered. More fundamentally, why would a president ever pursue such litigation in the first place?<sup>72</sup> Seeking a judicial remedy would only make a president look weak—if not downright, well, silly.

Presidents also need not go to the trouble and time to seek a judicial order—assuming it could even be obtained—because they can just remove recalcitrant subordinates.<sup>73</sup> Presidents who might even begin to contemplate suing their own appointees have already surely lost enough confidence in those individuals and their loyalty to want to keep them in office. Moreover, judicial action would likely prove to be a seriously unattractive practical remedy for Presidents in such circumstances. Litigation would take much longer to yield any outcome than would an outright dismissal, and any outcome would be uncertain, as the President could still lose in court. Suing one's own subordinate would also

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71. For a recent comprehensive argument that law inherently depends on the enforceability of norms, see FREDERICK SCHAUER, *THE FORCE OF LAW* (2015).

72. Private litigation is not, as a practical matter, any meaningful source of constraint. Most executive orders specifically disavow the creation of any judicially enforceable right. Furthermore, the empirical evidence on executive orders confirms the absence of judicial intervention. According to the most comprehensive study, at most only about 1% of all executive orders issued from 1942 to 1998 had ever been subjected to any judicial challenge, with the President's order affirmed 83% of the time. See WILLIAM HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 154, fig. 7.2 (2003). Moreover, these cases raised issues other than the ones about administrative obedience or decisional limits that are relevant here.

73. This is the case for most administrators of executive agencies. BREGER & EDLES, *supra* note 3. It is not so clearly the case for administrators for whom removal is subject to a showing of good cause. To the extent that removal is conditioned upon such a showing, a legal issue could conceivably arise over whether an administrator's mere failure to follow a presidential order provides a President with sufficient cause to remove. If litigated, a court might be confronted in this context with the question of whether such an administrator faced a legal duty to obey a presidential order.

undoubtedly generate political costs for a president not dissimilar to those of removing an official altogether.<sup>74</sup> For all of these practical reasons, if no others, it should be clear that in this context law-compelled obedience cannot be taken to mean court-compelled obedience.

Yet even if the notion of a legal duty in this context does not imply any realistic judicial remedy, perhaps legal duty here still matters if it means that adherence to a presidential order provides an agency with a reason for

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74. It has been suggested that if an agency issues a rule when the President has ordered it not to, that the rule is *ultra vires* and cannot be enforced by the courts against private entities. David B. Rivkin, Jr., *The Unitary Executive and Presidential Control of Executive Branch Rulemaking*, 7 ADMIN. L.J. AM. U. 309, 320 n.61 (1993). Again, it is hard to imagine a president tolerating what would in all likelihood be a quite open defiance of an executive order. A formal executive order is a last resort. If a president (or more realistically, a member of his White House staff) has tried making phone calls, holding meetings in the Oval Office, or other less formal means to get an administrator to retreat from a rule, and if the administrator is still sufficiently defiant that the President feels compelled to issue an executive order and hope the courts will accept an *ultra vires* claim, then the President must necessarily feel strongly that a rule should not be issued. If the President feels so strongly, then why not just remove the defiant administrator instead of taking a chance on what the courts may or may not decide? Indeed, the administrator would likely feel compelled to resign—or the President might ask for resignation rather than removal. As a thought experiment, the reader might wish to consider what would have happened had EPA Administrator Lisa Jackson decided to issue ozone standards in 2011 in the face of public opposition by President Obama to the agency doing so. *See supra* notes 14–15; *infra* notes 95–101 and accompanying text.

Now, it could be supposed that situations may arise where an administrator agrees with a President that a rule should not be issued, but the administrator faces a clear statutory obligation to issue the rule. Imagine a statute like the Clean Air Act that says the administrator must issue a rule when it finds doing so to be necessary to protect public health, but where the President orders the administrator to adopt rules only with positive net benefits shown by an economic analysis estimating both public health benefits and costs to industry. Assume the administrator finds that a particular rule is required to meet public health protection as directed in the statute, even though the rule's costs would be far greater than the health benefits. The administrator may well agree with the President that it would be better not to issue the rule, but the administrator may also correctly conclude that the statutory provision requires the adoption of the rule. If the administrator were to defy a presidential order and issue the rule, a court finding in such a case that the rule was *ultra vires* owing to the presidential order would also necessarily come into direct conflict with the terms of a statute. A presidential order cannot give a president authority to invalidate rules that administrators have a statutory obligation to adopt. Any revocation of a rule under such circumstances would therefore presumably be itself *ultra vires*. In reality, of course, an administrator will in all likelihood resign or be fired before creating such a predicament over any politically salient policy.

its action that would withstand arbitrary and capricious review under the APA.<sup>75</sup> After all, one might not unreasonably imagine that if the Constitution imposes a legal duty on an administrator to obey a presidential order over domestic policy matters, then relying on that order should certainly provide an agency with a sufficient reason to withstand judicial scrutiny under the arbitrary and capricious test.<sup>76</sup> Perhaps in this way the overseer–decider distinction can effectively be “enforced” by the courts exercising arbitrary and capricious review, should they accept presidential orders as reasons for agency action.<sup>77</sup>

Despite this possible way that statutory review under the APA relates to the question of limits on presidential control, the legal analysis demanded by the APA’s arbitrary and capricious test is really aimed at a different question altogether: namely, whether an administrator may rely on obedience to a presidential order to withstand arbitrary and capricious

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75. 5 U.S.C. § 706 (2012). This view is suggested by a separate opinion by Justice William Rehnquist in the *State Farm* case, where he argued that a change in the occupant of the White House would provide “a perfectly reasonable basis” for an agency decision. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part). The *State Farm* majority did not endorse Justice Rehnquist’s view, relying instead on a test for the arbitrary and capricious standard that emphasized solely expert reasoning about facts, evidence, and technical analysis. *Id.* at 43–46 (majority opinion). For elaboration of courts’ emphasis on technocratic reasoning by agencies under the arbitrary and capricious standards, see Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 5, 19 (2009) (discussing “how prevalent *State Farm*’s focus on evidence, facts, and expertise has become” in judicial decisions under the arbitrary and capricious standard); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 97 (2008) (explaining how the Supreme Court’s recent decision in climate change litigation affirmed *State Farm*’s emphasis on agency reasoning based on “information, scientific uncertainty, and the costs and benefits of acquiring further information” to the exclusion of reasoning based on “the President’s priorities”).

76. This is itself a point of some debate among administrative law scholars and judges. At least a few commentators and jurists could be read to suggest that a presidential order provides a sufficient reason to withstand arbitrary and capricious review, although the more widely accepted view is that by itself it does not.

77. For example, Percival suggests that “agency decisions reached at the behest of White House officials are likely to be more vulnerable to legal challenges [under the arbitrary and capricious standard] than are other regulations because regulatory review [by the White House] often emphasizes factors that are not made relevant by the underlying regulatory statute.” Percival, *Who’s in Charge?*, *supra* note 10, at 2535.

review.<sup>78</sup> Considering the import of presidential orders for arbitrary and capricious review purposes actually does rather little to answer the broader question of how to constrain presidential involvement in agency affairs. This is so for at least two reasons.

First, the answer to the APA question of whether administrative obedience provides a sufficiently nonarbitrary justification for agency action will depend on what is the exact legal duty created by a presidential order.<sup>79</sup> A presidential order could potentially provide a sufficient reason for agency action if an administrator has a legal duty to follow that presidential order. But presumably, any legal duty in this context would only be for an administrator to follow an otherwise lawful order (or to follow only those presidential orders that can lawfully be followed). Thus, circularity begins to reemerge. Answering the APA question calls first for answering the separate question of whether presidential orders impose legal duties on administrators; the APA does not provide the answer to the latter question.<sup>80</sup> We are no farther along in determining when an administrator faces a legal duty to follow a presidential order. The APA simply cannot help in answering that question.

Second, because presidents are bound to follow constitutionally valid statutes, presidential orders over domestic policy matters cannot trump clear statutory provisions.<sup>81</sup> Accordingly, it would not be lawful for an administrator to rely solely on obedience to a presidential order as a reason for action if either a substantive statute or the APA requires something else. Where an administrator's discretion is constrained by statute, even procedurally, the administrator could be said to owe no duty to follow a presidential order if doing so would contravene the statute. As the APA can constrain an administrator just as much as any other substantive statute, even an administrator who is obligated to obey a presidential order could also be obligated to obey an APA requirement that separate reasons, grounded in evidence, be provided to justify agency action.

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78. See 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

79. See *supra* Part I.

80. See *supra* note 41 and accompanying text.

81. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution.").

There is yet another way to see how the question of what constitutes a sufficient reason for agency action under the APA is separate from the question of what defines the overseer–decider line. Even if we assume that a presidential order does *not* impose on an administrator any legal obligation to obey, it still does not necessarily follow that it would be arbitrary and capricious for an administrator to justify an action solely on the basis of such an order. After all, a presidential order could conceivably always provide a *reason* for an agency action. Consider an agency that must choose between two policy alternatives, both having equally sound factual support and both falling within the bounds of discretion afforded the agency by the statute, but each possesses competing normative arguments. If one alternative is favored by the President, then it is hard to see why it would be arbitrary for the administrator in such a circumstance to choose the alternative supported by the democratically elected President. Such an approach might well be quite reasonably grounded on a principled account of democracy.<sup>82</sup>

The key takeaway is that the issue of whether a presidential order imposes on an administrator a constitutionally based legal duty is neither necessarily nor logically resolved by, or dependent upon, the answer to the separate question of whether obeying such an order will satisfy a statutorily based legal duty that the administrator act reasonably.<sup>83</sup> Determining whether a presidential directive imposes a legal obligation on an administrator does not necessarily resolve the question of what an administrator must do to meet the arbitrary and capricious standard under the APA. Even if a presidential order entails law-compelled obedience, there remain strong arguments that it still cannot provide a reason for action that meets APA standards; however, there also remain strong arguments that a presidential order could provide a sufficient reason, even if it does not entail law-compelled obedience.<sup>84</sup> The APA, in short, simply does not resolve the core issue. The arbitrary and capricious standard speaks to the obligation an agency has for justifying its decisions—not

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82. Justice Rehnquist suggested just such a reasoning in his concurrence in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57–59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (emphasizing that a change in presidential administrations is “brought about by the people casting their votes”).

83. See *infra* note 126.

84. Justice Rehnquist’s separate opinion in *State Farm*, for example, does not hinge on a conclusion that obedience to a presidential order is legally mandated. *State Farm*, 463 U.S. at 57–59 (Rehnquist, J., concurring in part and dissenting in part); See also Watts, *supra* note 75, at 32–45 (discussing various benefits for allowing presidential influence to count as a justification for agency action under the arbitrary and capricious standard).

whether it has an obligation to obey a presidential order. The standard is intended to ensure that agencies are considering evidence, entertaining policy alternatives, and selecting appropriate criteria when reaching their decisions.<sup>85</sup> It is not intended to cabin presidential authority.

As a practical matter, taking a firm stance against obedience-as-a-reason under the APA probably offers no more constraint on presidential control than does trying to hold the line between decider and overseer. As long as what a president is ordering is capable of being defended—that is, as long as there are some sensible reasons for it, or at least as long as such reasons can be constructed—then requiring reasons beyond obedience provides no bulwark against presidential tyranny. To be sure, there may at times be some agency decisions where the “real” empirical or existential reason for agency action may be political posturing or other self-interested motivations, reasons that, if cited by the agency, would not withstand judicial muster. It may be that an administrator at times really takes certain actions solely because a president tells her to do so.<sup>86</sup> But the arbitrary and capricious test does not require the agency to provide true psychological explanations as reasons; it demands policy or moral justifications, and these can be and are constructed even when psychological explanations for agency action might be inadequate by themselves for sustaining judicial review.

Although this may sound like the arbitrary and capricious test calls for or permits deception, it need not be construed as any more unseemly than what it takes for judges to fulfill their obligation to provide reasoned

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85. See *State Farm*, 463 U.S. at 43 (“An agency rule would be arbitrary and capricious 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, [or] offered an explanation for its decision that runs counter to the evidence before the agency . . .”).

86. Robert Percival acknowledges that “It is extremely rare . . . that parties seeking judicial review of agency action will be able to prove that the President or his staff overrode an agency head’s decision.” Percival, *Who’s in Charge?*, *supra* note 10, at 2535. But he also claims “it is not impossible.” *Id.* In support, he cites an EPA rulemaking that, following involvement by the White House Council on Competitiveness, failed to ban incineration of lead acid batteries. Percival writes that the Council “was so proud of its rejection of EPA’s proposed ban on incineration . . . that it publicly boasted it had vetoed EPA’s decision.” *Id.* To his credit, Percival acknowledges in a footnote that, when reviewing the EPA action, the D.C. Circuit could not determine that the EPA did not make the final decision to reject the incineration ban. *Id.* at 2536 n.392. In fact, Percival refers to testimony subsequently offered by the EPA General Counsel that the decision had in fact been made by the EPA Administrator. *Id.* For related discussion on how easy it always remains for administrators to claim they have made the decision, see *infra* Part III.

opinions explaining their judgments. As legal realists long ago revealed, judges' obligation is not to explicate the true psychological explanations for their decisions, but rather to articulate reasons of a principled sort that are capable of some degree of abstraction.<sup>87</sup> Moreover, seldom if ever are judicial or administrative decisions only justifiable on impermissible grounds. Typically, decisions are grounded in a mix of psychological explanations as well as multiple legal and policy reasons.<sup>88</sup> As long as an agency's decision makes sense for one of the latter kinds of reasons, it can withstand scrutiny under the arbitrary and capricious test, even if there may be other (less reasoned) forces at work. For example, in opposing the EPA's revisions to new ozone standards in the fall of 2011, President Obama may well have found it politically expedient to have the EPA put off those new ozone standards until after the 2012 elections, but there also existed nonpolitical, policy reasons for delaying a change in such standards.<sup>89</sup> It was precisely those reasons that the President and the EPA administrator publicly offered (and perhaps also privately believed) for withdrawing the ozone rule.<sup>90</sup>

Under the assumption that reasons other than obedience, and explanations other than psychological ones, must be offered in order for an agency action to withstand arbitrary and capricious review, we can now see that loyal obedience to a presidential order entails, as a practical matter, more than just taking the ordered action. When a president gives an administrator an order, obeying it loyally, as a political and moral matter let alone a constitutional one, will entail not only following the order but also providing a sufficiently independent policy rationale for doing so that will not readily subject the agency to a judicial remand following arbitrary and capricious review. In other words, true loyalty and obedience not only require an administrator to carry out a presidential order, but also to carry it out in a way that will successfully achieve the order's underlying objectives. The obedient administrator therefore not only carries out the

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87. See, e.g., Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357 (1925).

88. See, e.g., LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013).

89. See *supra* notes 14–15 and *infra* notes 98–102 and accompanying text.

90. See CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* 27 (2013) (“I have referred, for example, to the president’s decision not to support finalizing the Environmental Protection Agency’s ozone rule. The decision was made on the merits. Contrary to published reports, it was not motivated by politics.”).

President's wishes but also finds a way to defend them.<sup>91</sup>

This full sense of what obedience means in practice makes clear how much of a lawyerly hypothetical it would be to ask what a court should do if an agency head were voluntarily to admit, point blank, "I only did this because the President ordered me to do so." Assuming that mere obedience is not a sufficient justification under the APA, then making a bald, "the President made me do it" statement will not be obedient. Such statements only undermine presidents rather than support them. Realistically speaking, one must ask how many administrators would accept a *legal duty* to obey their respective presidents—that is, accept that against all other evidence that they must do what their presidents have said—but then would also follow through in such a way as to undermine their agencies' ability to sustain their actions in court. In the end, even when it is clear, or ought to be clear to everyone, that obedience is probably the truest or strongest motivating reason for an administrative action, the faithful administrator can and still will easily act in a way that disavows that the President was the decider, simply by offering another explanation for the administrator's decision.

The upshot is that the notion of a decisional limit on presidents is as empty in practice as it is conceptually. If it is a limit based on a notion of law-compelled obedience, then that understanding of what "law compelled" means must be a rather curious one, as it is not judicially enforceable. When administrators are faced with a presidential order, they face no court mechanism lurking in the background that can be used by the President to enforce that order. Even the arbitrary and capricious standard of review under the APA does not help explain whether an administrator has a legal duty to obey a president's order.<sup>92</sup> Although it might seem that the Supreme Court's rejection of presidential preference as a sufficient reason to withstand arbitrary and capricious review might in practice reinforce the notion of a decisional limit that constrains presidential action, APA review is actually orthogonal to the question of the legal obligation that adheres to a presidential order.<sup>93</sup> Yes, the APA does hold implications for how an administrator should explain and justify agency actions, but if an administrator has a constitutional duty to obey a presidential order, then obedience would presumably dictate complying with that order as well as

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91. Cf. Pildes & Sunstein, *supra* note 9, at 28 ("The heads of executive agencies are unlikely to say that presidential command has overridden agency judgment, rather than that presidential input has made for a more informed agency decision.")

92. See *supra* notes 74–75.

93. See *supra* note 73.

providing some other reason to justify it. Given the ready availability of other reasons, as a practical matter, any concept of legal duty that apparently underlies a decisional limit brings forward nothing that looks like legal compulsion of any meaningful kind.

### III. EASY LEGAL ESCAPES

The actual practice of presidential leadership and White House staff engagement with agencies supports this analysis of the emptiness of a decisional limit grounded in the rejection of a legal duty of an administrator to obey a president's order. That practice reveals that administrators have available to them a ready supply of persuasive arguments, on the merits, long before appeals to obedience to the President should ever need be invoked. As a result, even under the supposed decisional limit, a supply of public-regarding arguments and reasons are likely to be well at hand for any administrator to use when intending to follow a President's preferences. Furthermore, if an administrator responds affirmatively to a President's preferences, even if only because "the President said so," the conceptual and practical problems with the purported decisional limits doctrine make a series of easy escapes available to both presidents and administrators. At least four such escape strategies—all fully legal—can be readily identified and illustrated with recent examples. These four easy legal escapes mean that presidents can have whatever impact they will have on administrators' actions, even to the point of effectively deciding what the agency will do, without ever running afoul of an alleged decisional limit. The ready availability of these easy workarounds only reinforces the conclusion that a decisional limit is, practically speaking, devoid of meaningful practical import.

#### A. *We Speak*

Presidents and administrators can deploy collective rhetoric to characterize their actions, making responsibility for decisionmaking sound as if it has been shared. For example, standing with the Secretary of Health and Human Services at his side, President Obama used "we speak" throughout his announcement about a change in policy about whether religious institutions would be required to provide health coverage for contraceptive services:

Today, *we've reached a decision* on how to move forward. Under the rule, women will still have access to free preventive care that includes contraceptive services—no matter where they work. So that core principle remains. But if a woman's employer is a charity or a hospital that has a religious objection to providing contraceptive services as part of their health plan, the insurance company—not the hospital, not the

charity—will be required to reach out and offer the woman contraceptive care free of charge, without co-pays and without hassles.<sup>94</sup>

Other times, the decision may be characterized as one made by the “Administration,” which is another way of collectivizing decisionmaking. Using the same example from the controversy over the contraceptive coverage rule, a rule that ultimately would need to be adopted by the Secretary of Health and Human Services, President Obama’s press secretary explained: “I think that we decided, the administration decided . . . that we need to provide these services that have enormous health benefits for American women, and that the exemption that we carved out is appropriate.”<sup>95</sup>

Such rhetoric may well accurately describe how the participants themselves experience the decisionmaking process, as one where everyone is working together as a team. Indeed, decisionmaking across government is almost always a collective enterprise. For this reason, “we speak” rhetoric will seldom be disingenuous; however, it will also tend to mask any exertion of presidential control that might be said to have crossed the ineffable overseer–decider line. A decision that “we” made together is not the same as a president dictating an outcome to a reluctant but merely obedient administrator.

### B. The President Requests

It is quite easy for Presidents to make clear what they expect their political appointees to do when it comes to domestic policy matters, such as rulemaking, without explicitly commanding those appointees to adopt a rule.<sup>96</sup> Presidents can simply “request” that agencies take the desired action.

President Obama’s surprising, and controversial, decision in 2011 to oppose an EPA revision to the nation’s ambient air quality standard for ozone provides a good example.<sup>97</sup> At the beginning of 2010, the EPA proposed tightening its standards for ground-level ozone, or smog. By July 2011, the EPA announced it had initiated the “final step” in its rulemaking process by submitting the draft final rule to the White House Office of

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94. Obama, *supra* note 17 (emphasis added).

95. Jay Carney, *Press Briefing*, THE WHITE HOUSE (Feb. 6, 2012, 1:24 PM), <https://www.whitehouse.gov/the-press-office/2012/02/06/press-briefing-press-secretary-jay-carney-262012>. For a related discussion of the practice of President Clinton announcing decisions made by his Administration, see Kagan, *supra* note 5.

96. See Coglianese, *supra* note 26, at 643–44.

97. See *supra* notes 14–15 and accompanying text.

Information and Regulatory Affairs (OIRA) for review. The agency confidently reported that following that final step, the “EPA will finalize its reconsideration” and that “we look forward to finalizing this standard shortly.”<sup>98</sup> But in September 2011, President Obama issued a statement announcing the conclusion of the OIRA review process and his opposition to the EPA standards revision, using the language of “request”:

After careful consideration, *I have requested that Administrator Jackson withdraw* the draft Ozone National Ambient Air Quality Standards at this time. Work is already underway to update a 2006 review of the science that will result in the reconsideration of the ozone standard in 2013. Ultimately, I did not support asking state and local governments to begin implementing a new standard that will soon be reconsidered.<sup>99</sup>

On that same day, OIRA Administrator Cass Sunstein sent a letter to EPA Administrator Jackson reiterating that the President had decided “to return this rule to you for reconsideration,” as “he does not support finalizing the rule at this time.”<sup>100</sup> Sunstein further wrote that “we believe that the draft final rule warrants your reconsideration” and that “I am requesting, at the President’s direction, that you reconsider the draft final rule.”<sup>101</sup> Interestingly, Sunstein’s contrast of “request” and “direction” in the same sentence suggests that the President had directed his White House subordinate (Sunstein), but that he was not asserting the same directive authority over his EPA Administrator (Jackson). Yet in reality there was no practical difference.

Both Sunstein’s letter and the President’s statement exhibited impeccable legal draftsmanship, as one would have expected, in that they hewed to the asserted decisional limit imposed by the conventional understanding of the overseer–decider distinction. Nevertheless, the President achieved everything that he would have achieved had he or his OIRA Administrator written that the President had *directed* the EPA Administrator to withdraw the rule. The use of language that complied with the decisional limit appeared in no way to blunt the behavioral force of the President’s action. There was no ambiguity about what the EPA Administrator needed to do.

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98. *Regulatory Actions: Ozone Standards, “EPA Updates Status of the Ozone Reconsideration”*, EPA (July 26, 2011), <https://web.archive.org/web/20111129130544/http://www.epa.gov/air/ozonepollution/actions.html>.

99. Barack Obama, *Statement by the President on the Ozone National Ambient Air Quality Standards*, THE WHITE HOUSE (Sept. 2, 2011), <https://www.whitehouse.gov/the-press-office/2011/09/02/statement-President-ozone-national-ambient-air-quality-standards> (emphasis added).

100. Sunstein, *supra* note 15.

101. *Id.*

As a result, the same day President Obama's statement and OIRA Administrator Sunstein's letter were released, Administrator Jackson issued a statement that she would be reconsidering the revised standards. According to press accounts, Administrator Jackson and the rest of her EPA staff had been stunned and blindsided by the announcement.<sup>102</sup> Moreover, some press accounts asserted a linkage between the President's actions and his desire to protect his prospects for reelection.<sup>103</sup> Nevertheless, the entire matter was handled in compliance with any purported decisional limitation on presidential authority over administrative action.

### C. *The President Concurs*

Presidents can also effectively direct their political appointees when they publicly announce their support for, or their opposition to, certain policy outcomes under the purview of their agencies. President Obama deployed this strategy in his statement on the ozone standard when he said he "did not support" having the EPA revise the standard at that time.<sup>104</sup> In connection with the HHS contraceptive coverage rule, President Obama's press secretary, Jay Carney, made one of the more candid efforts to employ this kind of framing, stating: "I want to make clear that the President's—or the Secretary's decision, and the President concurs with it, is that this coverage needs to be available to all American women."<sup>105</sup>

Interestingly, press accounts of the White House deliberations over the contraceptive coverage rule make clear that there were highly divergent views among administration officials, prompting the President to make the ultimate decision in February 2012 to go forward with a narrow exemption for religious institutions.<sup>106</sup> As suggested by the White House press

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102. See Robin Bravender, *Obama Blindsides Enviro and EPA*, POLITICO (Sept. 2, 2011, 6:02 PM), <http://www.politico.com/news/stories/0911/62586.html>; Theo Emery, *EPA Smog Rule Rejection Stirs Anger at White House*, BOSTON.COM (Sept. 2, 2011, 5:02 PM), <http://archive.boston.com/2011/09/02/blogsmog/corfTMjmVTHupUenUNeM3N/story.html>.

103. See Broder, *supra* note 14.

104. See *supra* note 99 and accompanying text.

105. *Press Briefing by Press Secretary Jay Carney*, THE WHITE HOUSE (Feb. 6, 2012, 12:39 PM), <http://www.whitehouse.gov/the-press-office/2012/02/06/press-briefing-press-secretary-jay-carney-262012>; see also *supra* note 17 and accompanying text..

106. N.C. Aizenman, Peter Wallsten & Karen Tumulty, *White House Compromise Still Guarantees Contraceptive Coverage for Women*, WASH. POST (Feb. 10, 2012), [https://www.washingtonpost.com/politics/white-house-to-announce-adjustment-to-birth-control-rule/2012/02/10/gIQArbFy3Q\\_story.html](https://www.washingtonpost.com/politics/white-house-to-announce-adjustment-to-birth-control-rule/2012/02/10/gIQArbFy3Q_story.html); Helene Cooper & Laurie Goodstein, *Rule Shift on Birth Control Is Concession to Obama Allies*, N.Y. TIMES (Feb. 20, 2012),

secretary, the core policy choice was the President's decision: "I think that the decision to exempt churches and houses of worship . . . represents an effort to find [a] balance [between respect for religious beliefs and provision of women's health services], and [President Obama] believes he found the appropriate balance."<sup>107</sup> Still, it was much safer, at least in terms of raising concerns about the President exceeding any decisional limit, to *concur in* the decision of the HHS Secretary. Hence, the next day press secretary Carney emphasized that "the President understands these concerns [about religious liberty]. That's why he agreed with the approach that Secretary Sebelius took, which sought that appropriate balance."<sup>108</sup>

#### D. The Signer-as-Decider

A final strategy is to treat the signing of a legal document as the decision, so that as long as the administrator, and not the President, signs the document, the decision is made by the administrator. This is formally correct—and, as I will show in the next and final part of this Article, it constitutes a sensible way (indeed, the only sensible way) of operationalizing a general limit on presidential authority over administrators. A signer-as-decider view makes coherent, for example, the EPA's position following a dispute over an earlier revision to its ozone standards in 2008, under the Bush Administration. That earlier dispute arose between the EPA and OIRA over what are called the "secondary" ambient ozone standards, which are intended to provide protection for a range of environmental effects broader than just threats to public health.<sup>109</sup>

The EPA submitted a draft version of secondary air quality standards to OIRA. For the first time in its history, the EPA planned to make the secondary standard for ozone different from the primary standard. OIRA,

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<http://www.nytimes.com/2012/02/11/health/policy/obama-to-offer-accommodation-on-birth-control-rule-officials-say.html>.

107. *Press Briefing by Press Secretary Jay Carney*, THE WHITE HOUSE (Feb. 7, 2012, 1:59 PM), <http://www.whitehouse.gov/the-press-office/2012/02/07/press-briefing-press-secretary-jay-carney-272012>.

108. *Press Briefing by Press Secretary Jay Carney*, THE WHITE HOUSE (Feb. 8, 2012, 1:11 PM), <http://www.whitehouse.gov/the-press-office/2012/02/08/press-briefing-press-secretary-jay-carney-2812>.

109. For an overview of the dispute, see Juliet Eilperin, *Ozone Rules Weakened at Bush's Behest*, WASH. POST (Mar. 14, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/13/AR2008031304175.html>.

however, disagreed and favored keeping the two standards the same.<sup>110</sup> Unable to reach an agreement, the EPA and OIRA used the conflict-resolution provision of Executive Order 12,866 which provides that “disagreements or conflicts between or among agency heads or between [OIRA] and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President . . . with the relevant agency head.”<sup>111</sup> Ultimately, President Bush favored OIRA’s position.<sup>112</sup>

In its preamble to the final rule, the EPA noted that “the President ‘concluded that, consistent with Administration policy, added protection should be afforded to public welfare by strengthening the secondary ozone standard and setting it to be identical to the new primary standard, the approach adopted when ozone standards were last promulgated.’”<sup>113</sup> Although offering the admission that the President “concluded” to keep the standards the same, the EPA continued by explaining that, “While the Administrator fully considered the President’s views, the Administrator’s decision, and the reasons for it, are based on and supported by the record in this rulemaking.”<sup>114</sup> In subsequent testimony before the House Oversight Committee, EPA Administrator Stephen Johnson provided further elaboration upon the process by which he arrived at the final rule: “Of course, as I believe good government, we went through the process as outlined by President Clinton’s Executive order, and the President provided input. Ultimately, I made the decision . . . .”<sup>115</sup> He further stated:

I know that the chairman and other members of the committee disagree with my decision, and I understand that. These decisions are not easy decisions, but I made the right decision. I made the decision based upon the facts, based upon the law, what the law directs me to, and I stand by that. It was my decision and my decision alone.<sup>116</sup>

How could it be that it was Administrator’s Johnson’s decision alone? After all, the agency had also openly acknowledged the President’s decisive role,

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110. For an account of the ozone proceeding, see Percival, *Who’s in Charge?*, *supra* note 10, at 2520–21.

111. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,743 (Oct. 4, 1993).

112. See Eilperin, *supra* note 109.

113. National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436, 16,497 (Mar. 27, 2008) (to be codified at 40 C.F.R. pts. 50, 58) (quoting Letter from Susan Dudley, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, to Stephen Johnson, Administrator, EPA (Mar. 12, 2008)).

114. National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. at 16,497.

115. *EPA’s New Ozone Standards: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. 109 (2008).

116. *Id.* at 145.

resolving the dispute elevated by the OIRA Administrator by rejecting the position put forward by the agency. Johnson's statement is nevertheless compatible with a signer-as-decider view of decisionmaking. This formalistic view treats an administrative "decision" as the official approval and culmination of an agency action which is effectuated by the administrator or other duly designated agency official affixing a signature on the rule document. As long as only one signature appears on the necessary document—the administrator's—an agency head can always claim that no matter what the President may have concluded, expressed, or even ordered, the decision ultimately was the administrator's alone.

#### IV. A BRIGHT-LINE LIMIT ON PRESIDENTIAL CONTROL

For some readers, a signer-as-decider argument might appear to amount to little more than cramped formalism. But there is something to be said for formalism in this particular context. As an initial matter, let us not forget that a formalistic understanding of signing-as-deciding already comports with widespread practices and norms within administrative agencies.<sup>117</sup> Administrator Johnson's reliance on his signature might look like an attempt to remake history, but his tacit invocation of the signer-as-decider account presumably was not entirely an ad hoc attempt at rationalization—any more than it has been with the actions taken by other administrations. Quite the contrary, a formalist emphasis on an administrator's signature already pervades bureaucratic practice. After all, administrators do not research and draft rules all on their own; they nevertheless still make "the decision" by signing the final documents that their staffs prepare. Until an agency rule or other document is signed by the head of the agency, or other authorized agency official, the agency officially has taken no final action reviewable by the courts and the text of an agency document can still be modified without necessarily needing to restart the administrative process.<sup>118</sup>

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117. It is also well accepted by courts that such formalities as signatures and publication in the *Federal Register* are crucial for determining when administrative action has become final, that is, when a decision has been made. *See, e.g., Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239 (10th Cir. 2012) (even though the Secretary orally announced a decision, the final decision was not made until two days later when the mining claims were actually signed by the Secretary); *cf. Dalton v. Specter*, 511 U.S. 462, 470 (1994) (noting that where a statute confers authority on the President to close military bases upon the recommendation of a commission, they do not close "without the President's approval").

118. The APA authorizes judicial review of "final" actions by agencies. 5 U.S.C. § 704 (2012). *See, e.g., Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (noting that to be

To be sure, it is well understood that formalist, bright-line rules can be over-inclusive or under-inclusive, and thus, at times, dysfunctionally rigid.<sup>119</sup> Scholars have for this reason thoughtfully argued against a uniform reliance on a rigid adherence to a formalist conception of the constitutional separation of powers.<sup>120</sup> Yet even supporters of functionalism, understood more broadly as the legal view that favors standards over bright-line rules, should acknowledge that certain specifications or applications of functionalism can prove dysfunctional too.<sup>121</sup> Such dysfunctional functionalism is what results from a purported decisional limit on presidential control of domestic policymaking and administration. The overseer–decider distinction, viewed in functionalist terms as prohibiting “too much” presidential meddling in the affairs of administrative agencies, simply does not and cannot work to cabin presidential power. It is not only a concept that courts will be unable to enforce or refine, for the reasons discussed in this Article and because the opportunities for judicial review will remain practically nonexistent. But the purported constraints provided by the overseer–decider distinction can also be easily circumvented by honoring it in practice using one or more of the easy legal escapes I have highlighted.<sup>122</sup>

Of course, even the most influential advocate of a decisional limit, Professor Strauss, has fully acknowledged the difficulties of line drawing based on a distinction that depends on the “ineffable” qualities of administrative decisionmaking.<sup>123</sup> However, he has nevertheless suggested that the overseer–decider distinction still helpfully “reinforces the

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considered “final” agency “action must mark the ‘consummation’ of the agency’s decisionmaking process”) (citation omitted); *Murray Energy Corp. v. EPA*, 788 F.3d 330, 334 (D.C. Cir. 2015) (“We may review final agency rules. But we do not have authority to review proposed rules.”) (citation omitted).

119. See, e.g., Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 992–93 (1995).

120. See, e.g., Strauss, *supra* note 9; William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21 (1998).

121. The conception of functionalism I have in mind here is one that stands in opposition to formalism’s preference for bright-line rules. See Eskridge, *supra* note 120, at 21.

122. See *supra* Part III.

123. Strauss, *Overseer or Decider?*, *supra* note 11, at 712–13; see also *id.* at 704 (acknowledging that the overseer–decider distinction is “subtle”). Of course, it is not just administrative decisionmaking that can be ineffable; decisionmaking within the White House can be too. See John F. Kennedy, *Foreword to THEODORE C. SORENSON, DECISION-MAKING IN THE WHITE HOUSE: THE OLIVE BRANCH OR THE ARROWS* xi (1963) (noting that “the essence of ultimate decision remains impenetrable to the observer—often, indeed, to the decider himself”).

psychology of office for the administrator.”<sup>124</sup> No empirical evidence has been put forward to support such a claim. Nevertheless, the belief, or actually faith, seems to be that a decisional limit offers a valuable behavioral reinforcement to administrators, reminding them that ultimately they are “the deciders.” This may well be the best possible defense that can be made of a decisional limit built upon an overseer–decider distinction. Perhaps relying on this distinction will, notwithstanding all of its other weaknesses, help remind political appointees that Presidents can sometimes overreach and that there exists some proper limit on presidential involvement in the work of administrative agencies.

Despite the intuitive appeal of such a belief, I am skeptical of this defense of a decisional limit for several reasons. For one reason, as noted, we have no evidence to support it. For another, given the murkiness and plasticity of the purported overseer–decider distinction, it is hard to imagine how it really could bolster presidential appointees’ sense of their own independence vis-à-vis the President. As I have suggested here and elsewhere, partisans tend to view constitutional claims about presidential control of domestic policymaking using their own ideological lens.<sup>125</sup> Most political appointees will generally share the President’s ideological predispositions, and so the times when White House intrusiveness appears to a presidential appointee to cross the murky line will likely be few, if any. Moreover, one can count on the White House to claim that the President is still well within the permissible side of the overseer–decider line. The murkiness of the asserted legal doctrine inherently limits its ability to come to the political appointee’s aid in resisting a motivated White House bent on using its available incentives to influence an administrator.

If presidential appointees do need something that can help reinforce their proverbial backbone, it would seem more natural to call for something other than a spongy legal distinction. That, of course, is a virtue of a bright-line rule. By defining decisions not by reference to some ineffable qualities but instead by seeing them in purely formal terms, based on the signing of a legal document, the law can and does place some constraint on presidential overreach. Presidents can cajole, shout, and threaten all they want, and they can even direct, command, control, decide, and order. However, at the end of the day, if the statute specifically empowers an

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124. Strauss, *Overseer or Decider?*, *supra* note 11, at 714. Professors Pildes and Sunstein have similarly suggested that “it may be important to acknowledge that, as a technical matter, the decision rests with the agency head” because that view “might bolster agency heads in their conflicts with the White House.” Pildes & Sunstein, *supra* note 9, at 25.

125. See, e.g., Coglianese, *supra* note 26.

administrator and no one else, then presidents must get their administrator to sign off on an administrative order or rule. A signature limit, not a decisional limit, provides a meaningful legal line, clearly determining who must be the one to act in order to make an administrative action final.

It will be true, of course, that political appointees will typically share the views of the Presidents that they serve, and that due to feelings of loyalty or policy affinity they will often accept direction from their presidents even if they might otherwise have been inclined to act differently. But as we have seen, this remains true even if one accepts the existence of a decisional limit based on the overseer–decider distinction.

It is also the case, though, that political appointees have careers, political bases, and ultimately minds of their own, and a formally demarcated separation of authority will offer at least occasional resistance to presidential influence.<sup>126</sup> Presidents must persuade someone else to sign off, and they are not always successful in doing so.<sup>127</sup> During the Bush Administration, the White House chief of staff, Andrew Card, and White House counsel, Alberto Gonzales, paid a widely reported visit to the hospital bed of

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126. For discussions of the challenges that a president faces in keeping agency heads focused on advancing the President's agenda, see Coglianese & Firth, *supra* note 25, at 1906 (explaining why “much in the political science literature . . . could reasonably lead one to question” the assumption that agency heads “would automatically fold were it not for the overseer-decider standard”); Andrew Prokop, *Trump is Setting Up the Government in a Way That Promises Chaos*, VOX (Jan. 20, 2017, 8:43 AM), <http://www.vox.com/2017/1/19/14265392/trump-cabinet-executive-branch> (discussing researchers' conclusions that even after a White House develops “an overall strategy for the administration's success . . . each Cabinet official tends to end up primarily concerned with his or her department's particular concerns,” producing “a recipe for conflict”); cf. Jennifer Steinhauer, *Latest to Disagree With Donald Trump: His Cabinet Nominees*, N.Y. TIMES (Jan. 12, 2017), <https://www.nytimes.com/2017/01/12/us/politics/trump-cabinet-mattis-tillerson.html> (noting that “in their first week of grilling before congressional panels, Mr. Trump's cabinet nominees broke with him on almost every major policy that has put Mr. Trump outside Republican orthodoxy”).

127. See Percival, *Who's in Charge?*, *supra* note 10, at 2534 (noting that “time after time when White House officials tried to persuade agency heads to make decisions for reasons that deviated from statutory commands, agency heads have resisted”). Percival takes agency officials' resistance as evidence of the President's lack of any directive authority, but it is also fully consistent with a view that Presidents possess directive authority even though that authority can only be enforced by the exercise of the President's separate removal authority. For present purposes, the point is simply that, regardless of which view of the directive authority applies, it is the legal requirement that someone other than the President must sign off on agency action that affords agency heads the opportunity to resist presidential entreaties. Recognizing the emptiness of a decisional limit on presidential involvement in the administrative state does not eliminate the opportunity for agency resistance.

Attorney General John Ashcroft to try to get him to reauthorize a domestic surveillance program. The incident offers a telling example of the real limit created by a bright-line signature rule. As described in the *Washington Post*:

In vivid testimony to the Senate Judiciary Committee yesterday, [Deputy Attorney General James] Comey said he alerted FBI Director Robert S. Mueller III and raced, sirens blaring, to join Ashcroft in his hospital room, arriving minutes before Gonzales and Card. Ashcroft, summoning the strength to lift his head and speak, refused to sign the papers they had brought. Gonzales and Card, who had never acknowledged Comey's presence in the room, turned and left.<sup>128</sup>

Such is an example of success “in applying the constraints of law to the world of politics.”<sup>129</sup>

Advocates of a decisional standard should have no real objection to a bright-line signature rule. The requirement for an administrator's signature could even be said to serve as the best way to make a decisional limit operational. Moreover, both types of limits—signature and decisional—are premised on the view that statutory delegations to agency heads vest legal authority to act in those officials, not in the President. Yet a decisional limit purports to sweep more broadly than a signature limit, and therein lies its undoing. A signature limit is clear and circumscribed. It effectively allows for any presidential influence short of the President signing a document purporting to authorize agency action without the administrator's signature.<sup>130</sup> By contrast, adherents of a decisional view hold that a President can become an impermissible decider through other means, even though they really cannot specify a principled account of what those other means might be.

A decisional limit implies that at some point presidents can exert so much influence over agencies that administrators can no longer be said to have made the relevant decisions, even presumably if the administrators are the ones to sign the authorizing documents. That view, as I have shown in this Article, is empty in that it offers no coherent or reliable legal basis for determining what constitutes “too much” presidential influence. With the signature limit, by contrast, the legal difference between permissible and impermissible presidential involvement is not subtle in any way. The signature limit's clarity provides its chief virtue in what is often the heated, highly political environment of administrative governance. The formality

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128. Dan Eggen & Paul Kane, *Gonzales Hospital Episode Detailed*, WASH. POST (May 16, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/15/AR2007051500864.html>.

129. Strauss, *Overseer or Decider?*, *supra* note 11, at 713.

130. Coglianesse & Firth, *supra* note 25, at 1877.

of the administrator's signature protects the law in this context from delegitimizing politicization while still offering undeniable reinforcement of an administrator's legal authority, even for the administrator who may on occasion be confined to a hospital bed.

### CONCLUSION

No matter how well intentioned, advocates of decisional limits on presidential authority over domestic policymaking have offered a doctrinal position that lacks both conceptual clarity and practical import. The fuzzy distinction typically made between oversight and decisionmaking may at a superficial level seem to offer some salve to political commentators and administrative law scholars who seek constraints on presidential authority. But realistically we should not kid ourselves into thinking that trying to embed into separation-of-powers law an ethereal concept such as a "decision" can do much to affect presidential power. Presidents can and do easily find ways to direct agency heads even while respecting a purported decisional limit on presidential involvement in the administrative state. Moreover, there is a real risk, supported with empirical evidence, that continued invocation of a plastic decisional limit unnecessarily drags constitutional law into the middle of polarized political controversy, ultimately weakening the law's legitimacy.<sup>131</sup>

To question the meaningfulness of decisional limits on presidential authority is not to abandon administrative law's aspirations to constrain governmental authority, even at the highest levels. Rather, those aspirations are the precise reason that legal scholars should abandon a distinction that is both too muddled to make a difference and that presents a risk of undermining the legitimacy of law, thus potentially weakening law's impact in other realms where it both can work and needs to work. In contrast to the feebleness of a purported decisional limit, the formality of the requirement that a statutorily authorized official must sign a document for administrative action to take legal effect allows the law to impose a tangible limit on presidential power. When someone else has to sign off, a president must convince that person with signing authority to follow the

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131. See Coglianese & Firth, *supra* note 25, at 1908–09. For a detailed empirical study showing how the legitimacy of the Supreme Court can be tarnished by politics, see JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* (2009). For legal commentary on the dangerousness of contaminating legal institutions with "ordinary politics," see, for example, Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909 (2007).

President's wishes. Sometimes this will be easy, no doubt. But administrators' own egos and the pride they have in their agencies' missions or their own professional integrity will at times bolster their fortitude, and perhaps even imbue them with stubbornness, making it potentially even more difficult for an overbearing president to influence the outcome.

These issues play out even in matters involving the military, with its much stronger culture and norms of obedience to hierarchical command, not to mention the independent constitutional basis for a president's commander-in-chief authority.<sup>132</sup> Indeed, the relationship between presidents and military leaders still can involve a tremendous amount of staff work, appeals to reason and analysis, turf fighting and bargaining, and, undoubtedly less frequently, resort to background threats of budgetary repercussions, personnel removal or reassignment, or other consequences. Presidents and their secretaries of defense know that they cannot easily boss the military brass around, at least not on any matters of great consequence.<sup>133</sup> The brass can and do push back when they think the President is making a mistake. Similar behavior can and does occur with political appointees charged with carrying out domestic responsibilities.

The bare realities implicit in heading any collective enterprise—whether it is running a major corporation or leading the Executive Branch—place practical limits on the leader's ability simply to command compliance, as opposed to inducing it. That is why political scientist Richard Neustadt acknowledged long ago that presidential power ultimately depends on the "power to persuade."<sup>134</sup> Although a presidential directive may seem so powerful that it needs to be cabined by something like a decisional limit, an explicit appeal by a president to a *legal* duty to obey is, practically speaking, not a very powerful move. In addition to all the weaknesses in the decisional limits doctrine that I have explicated in this Article, at the end of the day if a White House must rely on obedience to law to see an agency implement the President's policy agenda, this is actually a sign of presidential weakness, politically and practically speaking, rather than of strength. It is time for legal scholars to recognize more clearly the realities of presidential power and to acknowledge the limits of—and even perils

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132. See CONST. art. II, § 2. See also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (noting "the plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

133. It is telling that former Defense Secretary Robert Gates devotes an entire chapter in his memoir to "Waging War on the Pentagon." ROBERT M. GATES, *DUTY: MEMOIRS OF A SECRETARY AT WAR* 115–48 (2014).

134. NEUSTADT, *supra* note 55, at 42.

of—continuing to interject constitutional law into inherently contested political realms when the proffered doctrinal version of that law is both conceptually and behaviorally empty.